Impact of the Legalization of Marijuana on New Jersey Schools

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Porzio Education Law Update

After months of anticipation, Governor Murphy signed into law three bills making New Jersey the 14th state to legalize the recreational use of marijuana. While the impact of these new laws is widespread, the actual sale of legal marijuana remains months away as the yet-to-be created Cannabis Regulatory Commission still must issue regulations that govern the sale and distribution of a legalized cannabis product. However, effective immediately, it no longer is a crime for adults 21 years of age or older to possess or use up to 6 ounces of marijuana. Similar to alcohol, marijuana usage remains unlawful for minors. However, to further the Governor's goal to reduce the number of minors involved in the criminal justice system, the law narrows the guidelines to arrest a minor who uses marijuana and only provides for minimal penalties for minors who are convicted.

The new law will make marijuana usage far more commonplace in New Jersey. This impacts schools both as an employer and as an educational institution responsible for the health and safety of minors. School districts should review their policies from an employment and educational perspective to account for the new law. Districts should further contact their local police departments to discuss the best course of action when addressing underage use and how to best navigate any changes in the way law enforcement may respond to these incidents when reported by school officials or observed by police on school grounds.

STUDENTS

Background

Governor Murphy was clear in signing the bill that he wanted to prevent juveniles from being "tangled up in our criminal justice system" for using marijuana. While it remains illegal for an individual under the age of 21 to use marijuana, the new law intentionally makes enforcement difficult. In particular, the law prohibits police officers from engaging in certain actions when investigating a minor suspected of violating the revised laws. For example, law enforcement may not ask a minor for consent to search on suspicion that the minor possessed or consumed a "regulated product" such as marijuana, because the revised language states minors are not capable of giving consent to that search. Further, the "plain smell" or "plain view" of marijuana no longer provides an officer with probable cause to search a minor suspected of possessing or consuming marijuana (this includes searches of their property, locker, or vehicle). Officers who violate these provisions can be charged criminally with depriving the individual of his or her civil rights, regardless of the officer's intent.

The penalties for minors who possess or use marijuana (or alcohol) in any public place, including schools, also have been reduced. Instead, the law puts into place an extensive warning system officers must follow:

- *First Offense:* the officer only may issue a written warning. For the first offense, the officer may not notify the minor's parents of the warning.
- *Second Offense:* the officer only is allowed to issue a written warning and provide informational materials on community drug treatment services. For individuals under the age of 18, the officer can provide the minor's parent/guardian with copies of the warnings issued for both the first and second offenses.
- *Third Offense:* the officer only is allowed to issue a written warning and again provide the individual with information on community drug treatment services. If the individual is between 18 and 21, then the officer can provide notice of the written warning to the community drug treatment program, and for individuals under 18, the officer can again provide the juvenile's parents or guardian with a copy of the written warning.

In response to the Governor signing the law, the New Jersey State Policemen's Benevolent Association (PBA) -- the State's largest police union representing over 33,000 officers -- issued a statement claiming that the law "criminalizes any response or investigation by a police officer for illegal use by juveniles by detaining someone for a longer period beyond the extent required to issue a warning or write-up." As a result, the PBA advised its members to take no law enforcement action regarding marijuana or alcohol use.

Notwithstanding, as the United States Supreme Court noted, there is a strong public interest in preventing drug use by school children. "School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. … And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662 (1995). Thus, similar to alcohol, school districts continue to have an interest in preventing the underage use of marijuana.

This important public interest must be balanced against the protections found in the United States Constitution, which ensures the right to be secure against unreasonable searches and seizures. The Supreme Court has held that this protection applies to searches conducted by public school officials. The touchstone in any assessment of the constitutionality of a search or seizure is whether the government intrusion was "reasonable." Usually, reasonableness demands a warrant (or an exception to this requirement) and a showing of probable cause. However, this is not necessarily the case in the public school setting, based on the "unique responsibilities public schools bear."

The new law does not alter a school's ability to perform searches of its students, nor impact a school district's ability to enforce its zero tolerance policies. In support of the important public policy to prevent the unlawful use of drugs or alcohol in schools, the New Jersey Department of Education passed a regulation that outlines what is required for school districts to conduct a search or seizure of students, their property, and their personal effects. *N.J.A.C.* 6A:16–6.2. These include:

- All searches and seizures conducted by school staff shall comply with the standards prescribed by the United States Supreme Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (i.e. the school staff member had reasonable suspicion before performing a search).
- Questions about searches conducted by school officials shall be directed to the appropriate county prosecutor.
- School officials may request that law enforcement authorities assume responsibility for conducting a search or seizure.
- No school staff member shall impede a law enforcement officer engaged in a lawful search, seizure, or arrest whether under a warrant or otherwise.

- School staff shall permit law enforcement authorities, upon their arrival, to assume responsibility for conducting a search or seizure.
- All inspections of lockers, desks, or other objects or personal property on school grounds involving the use of law enforcement drug-detection canines may be undertaken with only the express permission of the county prosecutor or the Director of the Division of Criminal Justice or his or her designee in the New Jersey Department of Law and Public Safety.
- Questions about the legality of a contemplated or ongoing search, seizure, or arrest conducted by a law enforcement officer on school grounds shall be directed to the county prosecutor or in the case of a search, seizure or arrest undertaken by the Division of Criminal Justice's designee in the New Jersey Department of Law and Public Safety, to the assigned assistant attorney general.

Issues Districts Will Face

School administrators must occasionally address incidents of substance use or possession on school grounds. These incidents may require searches of students or their possessions based upon *reasonable suspicion*. While the new legislation does not impact the way schools conduct searches, it will undoubtedly affect the way law enforcement agencies respond to these incidents and what actions they take.

The PBA has advised its members to take no law enforcement action regarding marijuana or alcohol use with regard to minors. How officers will respond to this guidance from their union is unclear at this point. As a result, Districts should schedule a meeting with their local police department to discuss how they plan to address students suspected of being under the influence or students found to be in possession of marijuana or alcohol.

It also is likely that school officials will see an increase in the number of marijuana related incidents in schools due to the increase in the availability of these now legal substances. While students will not be able to purchase marijuana legally, parents and adults in their household will. This will make marijuana, when not properly secured at home, available to minors in the same way that alcohol has been.

This issue becomes further complicated by the various forms in which cannabis is available and the ways it can be ingested. The odor of burnt marijuana is likely to be easily detected in a school setting. The use of concentrates in electronic smoking devices or vaporizers or ingested through edible products is far more difficult. Vapes easily are concealable and do not generate the same odor or smoke that makes traditional marijuana smoking easier to detect. Even more difficult and potentially dangerous are the concentrates that contain THC (Tetrahydrocannabinol), the main psychoactive compound in cannabis that produces the high sensation. These concentrates can be infused into edible products such as candy and baked goods that otherwise resemble similar store bought products that are common in school cafeterias. These concentrates pose a significant risk when ingested in amounts that exceed the recommended dosages or worse, when students attempt to make their own edibles by adding THC oil to their own baked goods or other foods.

"Unfortunately I witnessed students becoming ill after consuming homemade edible products containing THC at school, as well as the difficulty detecting and enforcing school rules related to electronic smoking devices which have become a pervasive issue due to the ease of concealment" notes Kevin Craig, who serves as an Assistant Vice President of Safety, Security, and Investigations at Porzio Compliance Services, and formerly served as Director of Safety and Security at High Point Regional High School and Chief of Police of Jefferson Township. "While there is no way to prevent or detect all potential incidents of the use of these substances on school grounds, familiarizing staff with the various forms of cannabis products and concentrates available, the types of devices and methods used to ingest these substances, and the symptoms of marijuana intoxication will better prepare the school community to identify and respond to underage use. Robust educational programs for students to discuss the impact of underage use should also be part of an overarching strategy."

Recommendations

Districts should continue to treat students suspected of being under the influence in the same manner as they have in the past. Students found to be under the influence can be disciplined under the District's code of conduct. While law enforcement is less likely to get involved, Districts may still notify law enforcement whenever they deem it necessary. Any search will need to be conducted by a school staff member, rather than a law enforcement officer or SRO. While law enforcement may not notify parents after a first offense, there is no such similar prohibition as it relates to school district administration or staff (other than your SRO or Class III officers). As a result, school districts may notify parents anytime a student is suspected of being under the influence or found to be in possession of marijuana or alcohol.

Districts also still possess the ability to send students suspected of being under the influence out for a drug test. The yet-to-be created Cannabis Regulatory Commission will be providing a certification process for employees to become "Workplace Impairment Recognition Experts." These individuals will be responsible for conducting a physical evaluation to determine whether an individual is under the influence. While the intent is that employers can utilize this position to evaluate employees suspected of being under the influence, there appears no reason why this position could not similarly evaluate students. Depending on the certification process, Districts should consider having one or more administrators or school nurses become certified so these individuals can evaluate students suspected of being under the influence.<

Action Steps

We recommend Districts take the following steps:

- Schedule a meeting with their local police department to discuss how they plan to address students suspected of being under the influence or students found to be in possession of marijuana or alcohol.
- Review and revise District policies to ensure the policies comply with the law's new requirements.
- Provide training to administrators and staff on the various forms of cannabis products, identify students who are under the influence, and the District's policies in responding to students believed to be under the influence.
- Consider having one or more employees become certified "Workplace Impairment Recognition Experts."

EMPLOYEES

Employment Protections

The new law also contains employment protections that prohibit an employer from taking adverse action or otherwise discriminating against an employee or potential employee for the legal, personal use of marijuana during non-working hours. This includes during both the hiring process and once the employee is hired. The law applies to public and private employers, including school districts. However, these employment protections only extend to individuals using legalized marijuana.

As a result, these provisions will not become effective until the yet-to-be created Cannabis Regulatory Commission creates regulations that govern the sale and distribution of a legalized cannabis product. The law requires the Commission create the regulations within 180 days of the Governor signing the bill. However, should the Commission take months to be fully operational, the bill does allow this deadline to be extended to 45 days after the Commission is fully appointed. As a result, finalization of the regulations is not anticipated until late 2021. At that point, the distribution and sale process will need to be fully operational for individuals to lawfully purchase cannabis. Based on the present circumstances, it remains unclear when this process will be up and running. For comparison, it took Massachusetts approximately two years after legalizing recreational marijuana before a legal product was available for purchase. It only is at that point -- when individuals in New Jersey can legally purchase cannabis -- that the employment protections will apply

Recommendations

Once legalized cannabis products are made available, school districts will be required to comply with the employment protections. However, districts will continue to retain the right to maintain a drug-free workplace and can prevent employees from engaging in personal use cannabis activities on school grounds, during working hours, or during extracurricular activities. Districts also may conduct random drug tests upon reasonable suspicion of cannabis usage while the employee is engaged in the performance of work responsibilities and may conduct pre-employment drug screenings (although the law prohibits candidates from being denied employment based solely on a positive test).

When an employee is suspected of being under the influence while at work, the law provides a process that must be used before the district can discipline the employee. Unlike alcohol, there is no affordable, reliable scientific method to determine whether an employee is currently under the influence of marijuana. In order to discipline an employee suspected of being under the influence, the district will have to perform a physical evaluation completed by a certified "Workplace Impairment Recognition Expert," to be followed by a drug test (e.g., blood, urine, or saliva test) to confirm that marijuana was in the employee's system. At the present time, it is unclear what will be required to become a certified "Workplace Impairment Recognition Expert" beyond that this individual will need to be certified by the Commission.

Action Steps

We recommend Districts take the following steps:

- Review and revise District policies to ensure the policies comply with the law's new requirements.
- Set clear expectations to all employees that the District maintains a drug-free workplace and that all employees are prohibited from: (1) using marijuana on school grounds, during working hours, or during extracurricular activities (this would include while working virtually, even if doing so in their own home); and (2) being under the influence of marijuana during working hours and during extracurricular activities.
- Consider having one or more administrators or school nurses become a certified "Workplace Impairment Recognition Experts."

CONCLUSION

While additional guidance will be provided upon completion of the regulations, districts should anticipate treating the use of cannabis the same way they treat the use of alcohol. For students, this means working with local law enforcement, taking disciplinary consequences where necessary, maintaining policies to address incidents where students are suspected to be under the influence of substances, and working with parents to get students help when needed. For employees, districts should review their drug and alcohol policies to determine whether the present policies need to be revised.