

Testimony in Support (with Amendments) of Senate Bill 604 (2020)

Public and Nonpublic Schools – Medical Cannabis – Policy for Administration During School Hours and Events

*Before the Education, Health, and Environmental Affairs Committee and Finance Committee:
February 18, 2020*

Senate Bill 604 will improve a child’s access to important medication and help uphold the right to education in Maryland. This bill permits students to receive medical cannabis at school or on the school bus. To ensure the safety of this process, the State Department of Education and the Natalie M. LaPrade Cannabis Commission will develop guidelines for public schools on the administration of medical cannabis to qualified patients during school hours, school-sponsored after school events, and on school buses.

A qualifying patient under the age of 18 must have an adult caregiver to administer medical cannabis. Currently, only a parent or legal guardian can serve as the patient’s caregiver. This bill would allow the parent or legal guardian to designate additional caregivers for their child. This change facilitates the administration of medical cannabis in schools by allowing school nurses or other school staff to serve as the caregiver. To accommodate these additional caregivers, the bill allows qualifying patients to have up to four caregivers.

Currently, 12 jurisdictions have adopted policies allowing the administration of medical cannabis at school and several others are considering similar legislation this session. This reinforces the importance of ensuring access to critical medication and protecting a child’s right to education. We recommend amendments, explained below that will address unintended consequences. It is for these reasons that University of Maryland, Public Health Law Clinic supports Senate Bill 604.

**SAFEGUARDING A MARYLAND STUDENT’S RIGHT TO EQUAL EDUCATION
AND ENSURING A QUALIFIED PATIENT’S ACCESS TO CRITICAL MEDICATION**

Children in Maryland, regardless of their health challenges, have a right to education that is shaped by both federal and state law. At the federal level, the Individuals with Disabilities Education Act (“IDEA”),¹ was enacted by Congress in response to the failure to meet the educational needs of children with disabilities. Many of the qualifying conditions for which students can receive medical marijuana are covered by IDEA, e.g., seizure disorder.² IDEA

¹ Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (1975).

² Under IDEA, a child with a disability means a child evaluated as having an intellectual disability, a hearing impairment, a speech or language impairment, a visual impairment, a serious emotional disturbance, an orthopedic impairment, autism, a traumatic brain injury, another health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. Other health impairment includes having limited strength, vitality or alertness due to chronic or acute health problems and

requires that school systems ensure that all disabled children have access to a free appropriate public education (FAPE) that is designed to meet their needs and to protect their rights.³ FAPE emphasizes a “public education” and this should be in the least restrictive environment possible. The right to equal education for disabled students finds further support through the Rehabilitation Act of 1973⁴ which seeks to empower disabled individuals by declaring that disability in no way diminishes the individual’s right to live independently and integrate into the economic, political, social, cultural, and educational mainstream of society. Allowing the school system to administer medical marijuana ensures that they meet their obligations under IDEA and the Rehabilitation Act.

The Maryland Constitution has a provision establishing the public school system⁵ and a provision in the Education Code that mandates all children ages 5 to 20 shall have access to the public education system.⁶ The Education Code further requires the State Board of Education to provide guidance and coordinate the development and implementation of educational programs based on the needs of disabled students in the public schools.⁷ Many of the qualifying conditions for which students can receive medical marijuana are covered by this requirement, e.g., epilepsy.⁸ Passing Senate Bill 604 enables schools to comply with existing state law.

Senate Bill 604 not only protects this right to education but ensures its effectiveness by allowing children with qualifying health conditions to access medication that enables them to attend school. Maryland recognizes that cannabis is medicine and allows pediatric patients to access it under certain conditions. Medical marijuana is critical in treating qualifying conditions such as severe or chronic pain, wasting syndrome, severe nausea, seizures, and severe or persistent muscle spasms. Pediatric patients spend a lot of time at school, so it is necessary that they receive their medication during school hours or after-school activities to adequately access their

adversely affects a child’s education performance. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (1975).

³ Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400(d), 1407 (1975).

⁴ Rehabilitation Act, 29 U.S.C. §§ 701-796 (1973).

⁵ MD. CONST. art. VIII, § 1.

⁶ MD. CODE ANN., EDUC. § 7-101 (West 2019).

⁷ MD. CODE ANN., EDUC. § 7-201(b) (West 2019).

⁸ Maryland defines “student with a disability” as a student who meets the definition of “handicapped person” provided in 45 C.F.R. § 84.3(j). MD. CODE ANN., EDUC. § 7-4B-01(f) (West 2019). Under this provision, “handicapped person” means any person who has physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Physical or mental impairment includes physiological disorders or conditions, cosmetic disfigurement, anatomical loss affecting certain body systems, or mental or psychological disorders. Major life activities relates to functioning-caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 45 C.F.R. § 84.3(j)..

right to education. Senate Bill 604 may prevent litigation against the State, as exemplified by the story of Ashley Surin.

Ashley Surin was diagnosed with childhood acute lymphoblastic leukemia. She now suffers from a seizure disorder and epilepsy as a result of the chemotherapy used to treat her cancer. Since the age of 2 years old, Ashley has been plagued with debilitating seizures. The medications she was prescribed caused serious side effects, deteriorated her health, and did not keep the seizures at bay. Prior to her use of medical marijuana, Ashley suffered one to three seizures per day while at school. One full body seizure was so violent she had to go to the hospital and have blood drained from her brain. Her parents felt hopeless until a doctor recommended medical marijuana, which has been a “golden cure” according to her mother.⁹ Ashley Surin wears a medical marijuana patch and also uses cannabis oil and lotion to manage her seizures, however state of Illinois did not allow medical marijuana in schools. Without access to her medication Ashley could not attend school. The Surin’s brought a lawsuit against the school in federal district court. As a result of this suit, Illinois passed Ashley’s Law which permits children who suffer from debilitating illness to take medical marijuana at school to relieve their symptoms.¹⁰ Senate Bill 604 is also a proactive measure that could help avoid litigation like the case the Surin’s were forced to bring in Illinois.

Ashley’s Law reflects a successful policy that multiple states have replicated, and Maryland should as well. The implementation of Senate Bill 604, like Ashley’s Law, will allow vulnerable children with debilitating conditions to use their medication, medical marijuana, at school. All Maryland children, regardless of their health condition, deserve access to a quality education. Access to education is vital because it is one of the most important social determinants of health. Social determinants of health are economic and social conditions that influence health status in individuals and groups. Education correlates strongly with both life expectancy and health status. Length and quality of education predict employment and income which influence where someone can live and whether or not they can afford health care. Further, statistics show that individuals who finish high school are likely to live longer- approximately 5.3 years. These realities emphasize the critical need for Senate Bill 604.

MARYLAND SCHOOLS ARE UNLIKELY TO FACE CRIMINAL SANCTIONS OR LOSE FEDERAL FUNDING

Some schools may fear federal criminal sanctions or loss of federal funding if they allow the administration of medical marijuana at school, however these fears are unfounded.

⁹ Jen Christensen, *Groundbreaking medical marijuana case lets little girl go back to school*, CNN (April 27, 2018, 10:36 AM), <https://www.cnn.com/2018/01/22/health/medical-marijuana-school-illinois/index.html>.

¹⁰ Thanks To ‘Ashley’s Law,’ *Sick Illinois Students Now Can Take Medical Marijuana At School*, CBS CHICAGO (Aug. 29, 2017, 9:57 AM), <https://chicago.cbslocal.com/2018/08/29/ashleys-law-ashley-surin-medical-marijuana-at-school-illinois-law/>.

Under federal law, marijuana is still classified as a Schedule I substance under the Controlled Substances Act and is subject to criminal sanctions. However, the federal government is unlikely to come after schools that permit the administration of medical marijuana. Due to finite resources, federal memoranda have been issued outlining enforcement priorities for the Department of Justice (DOJ). The Ogden Memo issued in 2009 instructed U.S. Attorney's to deprioritize individuals in clear and unambiguous compliance with existing state medical marijuana laws.¹¹ In 2013, the Cole Memo was released in response to state legalization of recreational marijuana and the DOJ identified eight activities as significant threats that their limited resources would address. This indicated that states with strong regulatory schemes were not as likely to threaten the identified enforcement priorities.¹² The current Attorney General, William Barr has indicated the DOJ will continue with these enforcement policies. The federal government is further limited through the marijuana spending rider attached to the appropriations act. Since 2014, Congress has passed an appropriations rider preventing the DOJ from using any of their funding to prevent states from "implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."¹³ This rider has been interpreted to protect individuals who strictly comply with the medical marijuana laws of their state.¹⁴ Maryland has a strong regulatory program for its medical cannabis program which will help protect its citizens from federal enforcement. So as long as schools and their staff comply with the parameters of Senate Bill 604 and the regulations enacted pursuant to it, they do not risk criminal sanctions.

The Drug Free Workplace Act requires federal contractors and federal grantees to maintain a drug free workplace. The Act specifically prohibits employees from engaging in the unlawful,

¹¹ Memorandum for Selected U.S. Attorneys from David W. Ogden, Deputy Attorney General, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, October 19, 2009 *available at* <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.

¹² Memorandum for All United States Attorneys from James M. Cole, Deputy Attorney General, Guidance Regarding Marijuana Enforcement, 1, August 29, 2013 *available at* <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>

¹³ Consolidated and Further Continuing Appropriations Act, 2015, Public Law No 113-235, §538 (providing first marijuana appropriations rider, which became law on December 12, 2014) *available at* <https://www.congress.gov/bill/113th-congress/house-bill/83> ; Consolidated Appropriations Act, 2016, Public Law No 114-113, §542 (renewing marijuana appropriations rider for 2016) *available at* <https://www.congress.gov/114/plaws/publ113/PLAW-114publ113.pdf>; Consolidated Appropriations Act, 2017, Public Law No 115-31, §537 (renewing marijuana appropriations rider for 2017) *available at* <https://www.congress.gov/bill/115th-congress/house-bill/244/text>; Consolidated Appropriations Act, 2018, Public Law No 115-141, §538 (renewing marijuana appropriations rider) *available at* <https://www.congress.gov/115/plaws/publ141/PLAW-115publ141.pdf>; Consolidated Appropriations Act, 2019, Public Law No 116-9, §537 (renewing marijuana appropriations rider) *available at* <https://www.congress.gov/bill/116th-congress/house-joint-resolution/31>; Consolidated Appropriations Act, 2020, Public Law No: 116-93 § 531(renewing marijuana appropriations rider) *available at* <https://www.congress.gov/bill/116th-congress/house-bill/1158/text>.

¹⁴ *See e.g.* United States v. McIntosh, 833 F.3d 1163, 1176-77 (9th Cir. 2016)(explaining the reach of the appropriations rider).

distribution, dispensation, possession, or use of a controlled substance at a site where the performance of work is done in connection with a contract or grant. Violations of these prohibitions can result in the loss of federal funding and being disbarred from receiving federal grants in the future. Schools may fear that allowing the administration of medical marijuana to qualified patients at schools would violate this act and result in the loss of federal funding. Schools, however, are unlikely to lose federal grants. While not involved in the enforcement of the Drug Free Workplace Act, the DOJ's enforcement policies reflect the federal government's general policy of allowing medical marijuana programs to function at the state level. There are currently medical marijuana programs in 33 states and the District of Columbia, and the federal government has not shut down any of these programs. More specifically, the federal government has not denied any school funding for a violation of the Drug Free Workplace Act. Instead they have permitted these policies to exist and continue to be implemented, and it is highly unlikely that they will change their position now. Finally, if the federal government changes its enforcement policies, it is unlikely to target a single school or individual school administrator, but rather go after the entire state law that permits the administration of medical marijuana in schools.

THE CAREGIVER LIMITATION SHOULD BE KEPT IN PLACE WITH AN EXEMPTION FOR SCHOOL EMPLOYEES DESIGNATED AS CAREGIVERS

While this bill will afford patients better access to medication and educational opportunities, it unnecessarily expands the number of patients a caregiver may serve. While this would enable a school nurse to serve more than five students, the current limit, it has unintended consequences. This would facilitate the development of unauthorized medical marijuana delivery services. Currently, some caregivers cycle through patients, constantly adding and dropping patients, so that they can offer a delivery service to a broad client base. Lifting the patient cap would only facilitate this problem. To avoid this unintended complication, we propose that the patient limit should remain, but an exemption should be granted for caregivers who are school employees providing services to qualifying students during school hours and school-sponsored-after-school activities and while on a school bus.

CONCLUSION

The passage of Senate Bill 604 enables qualified patients who are students to receive access to necessary medication while protecting their right to equal education. For the aforementioned reasons, I encourage you to vote favorably on this bill with the proposed amendment.

This testimony is submitted on behalf of the Public Health Law Clinic at the University of Maryland Carey School of Law and not by the School of Law, the University of Maryland, Baltimore, or the University of Maryland System.

PROPOSED AMENDMENTS TO SENATE BILL 604

(From the Public Health Law Clinic)

(First Reading File Bill)

AMENDMENT NO. 1

On page 1, strike beginning with “repealing” in line 7 down through “purpose;” in line 9.

AMENDMENT NO. 2

On page 2, in lines 23 and 25, strike the bracket.

On page 2, in line 23, after “(i)” insert “Except as provided in subsection (ii) below.”; in the same line strike “A” and substitute “a”.

On page 2, after line 24, insert “(ii) Caregivers who are school employees providing services during school hours and school-sponsored activities or on a school bus may serve an unlimited number of qualifying patients who are students enrolled in the public or non-public school for which the employee works”.

On page 2, line 25, strike “(ii)” and substitute “(iii)”.