

“HIGH” LEVELS OF CARE: MEDICINAL MARIJUANA IN RCFES

By Joel Goldman, Partner
Hanson Bridgett, LLP

In recent months, a number of RCFEs have inquired about residents who have prescriptions for medicinal marijuana. Nothing in the RCFE law or regulations deals specifically with this issue. Nor has DSS issued any formal pronouncements on the subject. Although this issue involves navigating uncharted waters, there are guidelines that can be followed.

How an RCFE responds to a prescription for marijuana will depend in part on its attitude toward medicinal marijuana. A provider that is opposed to medicinal marijuana (whether on philosophical, medical or other grounds), can simply refuse to permit its use on its premises. Marijuana remains illegal under Federal law and that should be a sufficient justification for an RCFE to ban its use even where a resident uses marijuana to treat a condition that is recognized as a disability. In a case that appears to have applicability, the California Supreme Court ruled that an employer could terminate an employee who tested positive for marijuana use even though the employee had a prescription for the drug in order to treat a bona fide disability. Under the rationale of this case, an RCFE apparently would not have to accommodate a resident's disability by allowing him or her to possess and utilize marijuana on its premises.

However, an RCFE that wishes to evict a resident with a prescription for and utilized marijuana on its premises cannot base the eviction on violation of federal drug laws. The RCFE law states that providers can only evict for the specific reasons set forth in the RCFE regulations. Regulation Section 87224(a)(2) permits eviction based on "Failure of the resident to comply with state or local law after receiving written notice of the alleged violation." Note that this section does NOT include federal law, and since the use of medicinal marijuana is permitted under state law, an RCFE cannot rely on 87224(a)(2) to evict a resident. Rather, it would need to rely on subsection (a)(3), failure of the resident to comply with the written policies of the community. Thus, if the RCFE had a written rule against (a) smoking, (b) using marijuana or (c) violating federal laws generally, it could evict a medicinal marijuana user for violation of its policies.

RCFEs that wish to accommodate a resident's use of medicinal marijuana must address a number of issues. Marijuana is a prescription drug. Regardless of its unusual status, an RCFE that allows its use must treat marijuana as a prescription medication and cannot ignore any of the basic rules that apply to prescription drugs in RCFEs. Initially, one must determine whether the resident is capable of handling his or her own medications. If not, the community would need to treat the resident's marijuana prescription as it would any other prescription, in accordance with regulation Section 87465. This would include centrally storing the

drug. There are legal risks involved in handling a resident's prescription marijuana. During the Bush Administration, federal drug laws were fully enforced without regard to state laws allowing medicinal use of marijuana. As a result, there were numerous prosecutions of individuals for growing and distributing medicinal marijuana, and RCFE providers were thus cautioned against centrally storing marijuana and potentially facing felony charges for possession and distribution. While the political winds may have shifted under President Obama, there currently is considerable ambiguity about this subject. On the one hand, Attorney General Holder has stated that the Justice Department will prosecute medicinal marijuana use only in cases in which both federal and state law are violated. On the other hand, in moving forward with a recent prosecution, the Justice Department stated that it, not the state, would decide when both federal and state laws were violated.

Until there is clarification as to what the Justice Department is going to do in this regard, providers are cautioned against centrally storing and disseminating marijuana to their residents.

If a resident is not capable of handling his or her own medications, the options available to an RCFE are:

1. Not allow the use of marijuana.
2. Require the resident to use Marinol, an FDA approved synthetic drug. (Note, the criticism of Marinol is that it does not produce all the medicinal benefits of marijuana and that because it takes an hour or more to take effect, a user cannot control the dosage as he or she could by smoking marijuana. Thus, critics state that Marinol users often either under- or over-medicate.)
3. Have an outside caregiver come in to assist the resident with the medicinal marijuana. The caregiver would either need to bring the drug to the community each time or store the drug in the resident's apartment in a manner where the resident could not access it.
4. Depending on where the RCFE is located, allow the resident to obtain marijuana at a local outpatient establishment.

Under option number 4, the RCFE still has to deal with a number of issues. How is the resident going to travel to and from the establishment? It is probably not a good idea to have a frail resident (who is incapable of handling his or her own medications) riding public transportation while intoxicated. In all likelihood, the provider would need to assist the resident by arranging for appropriate transportation and perhaps an escort as it would for any resident who goes off campus to obtain medical treatment.

For residents who are capable of handling their own medications, other issues arise. First, where will the resident store the marijuana? In accordance with DSS's interpretation of the regulations, it must be inaccessible to other residents. In accordance with common sense, it would need to be inaccessible to staff. Thus, a locked storage area would be required. Second, where will the resident smoke? Most RCFEs ban smoking indoors. Should an exception be made for marijuana use? If so, precautions would need to be taken to eliminate second hand smoke, such as installation of a smoke filter. If smoking is only permitted outdoors, second hand smoke issues still must be addressed. This might entail designating an outdoor smoking area to be used exclusively for medicinal marijuana users.

Finally, for any resident who uses marijuana (or Marinol for that matter), precautions must be taken to deal with the risk of falls or other injuries that may result from an intoxicated resident wandering around your community.

As medicinal marijuana use becomes more prevalent among the elderly, we will no doubt gain greater insight into the myriad of issues that may arise. For example, once RCFEs begin to centrally store marijuana, the rules pertaining to PRN medications will apply. So too, presumably, would the rules pertaining to medication records, labeling, etc. although it is unclear as to how some of these would be applied. As use becomes more prevalent, we can expect to see DSS develop policies and perhaps even regulations to deal with these emerging issues.