HIGH Levels of Care

medicinal marijuana in RCFEs

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With ever-increasing frequency, Assisted Living communities are encountering residents who have prescriptions for medicinal marijuana. Nothing in RCFE law or regulations deals specifically with this issue, nor has the Department of Social Services (DSS) issued any formal pronouncements on the subject, though they did respond to an attendee inquiry during the Spring 2011 CALA Conference & Trade Show.

Department representatives stated that, although there is no specific policy regarding medical marijuana in RCFEs, marijuana is considered to be like any other prescription medication. DSS did note that, because marijuana is illegal under federal law, any community that does not want to allow medical marijuana is free to make that decision. As use becomes more prevalent, we can expect to see DSS develop policies and perhaps even regulations to deal with this emerging issue. In the meantime, this issue involves navigating uncharted waters, yet there are guidelines that can be followed.

How a community 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 the premises. Marijuana remains illegal under federal law; that should be a sufficient justification for a community to ban its use even in instances where marijuana is used to treat a condition that is recognized as a disability. According to a California Supreme Court ruling, an employer could terminate an employee who tested positive for marijuana use even if the employee had a prescription to treat a diagnosed disability. Under the rationale of this case, an Assisted Living community apparently would not have to accommodate a resident's disability by allowing him or her to possess and utilize marijuana on its premises. As noted in the Spring 2011 conference session, DSS has indicated that it agrees with the foregoing.

However, a community that wishes to evict a resident for using medicinal 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 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), which refers to failure of the resident to comply with the written policies of the community. Thus, if the community 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.

Communities that wish to accommodate a resident's use of medicinal marijuana must address a number of issues. Regardless of its unusual status, marijuana is still a prescription drug. A community that allows its use must treat marijuana as such and cannot ignore any of the basic rules that apply to prescription drugs in RCFEs. First, 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, which 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. RCFE providers were thus cautioned against centrally storing marijuana and potentially facing felony charges for possession and distribution. While the political winds have shifted under President Obama, there is still a degree of ambiguity about this subject. Nevertheless, despite recent raids on pot clubs by the U.S. Department of Justice, it currently seems unlikely that an Assisted Living community would be prosecuted for assisting residents with medicinal marijuana.

If a resident is not capable of handling his or her own medications and the community does not wish to centrally store and disseminate medicinal marijuana, the options are:

1) Don't allow the use of marijuana.
2) Require the resident to use Marinol, an FDA-approved synthetic drug. *Note: Marinol has been criticized for not producing all the medicinal benefits of marijuana. In addition, critics say 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, Marinol users often either under- or overmedicate.*
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. *Note: Given DSS's position that the licensee must itself provide all basic services to residents, an exception would presumably be needed to allow a third party to assist.*
4) Depending on where the community is located, allow the resident to obtain marijuana at a local outpatient establishment.

Under option number 4, the community still has to deal with a number of issues. For instance, how is the resident going to travel to and from the establishment? As it would for any resident who goes off campus to obtain medical treatment, the provider would need to assist the resident by arranging for appropriate transportation and perhaps an escort.

If a community does agree to assist a resident with medical marijuana, it is necessary to deal with the regulations pertaining to PRN medications. In almost every case, a physician will indicate that marijuana is to be taken on a PRN basis. Title 22, Section 87465(e) PRN medication requirements state that medications must contain a label specifying the exact dosage. Because medicinal marijuana doesn't come in traditional dosages like pills or drops, it may be impossible to comply with these requirements. Thus, providers would need to request an exception or waiver from DSS.

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. And 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 communities ban smoking indoors. Should an exception be made for marijuana use? If so, precautions would need to be taken to eliminate secondhand smoke, such as installation of a smoke filter. Even if smoking is only permitted outdoors, secondhand smoke issues must still be addressed. This might entail designating an outdoor smoking area to be used exclusively for medicinal marijuana users.

The secondhand smoke issue has led some communities to limit marijuana use to edible forms, such as brownies, or FDA-approved pill forms like Marinol. More recently, vapor systems akin to e-cigarettes have come into use to deliver THC, the active ingredient in marijuana. This allows for rapid relief without fire risk and eliminates the secondhand smoke problem.

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. As medicinal marijuana use becomes more prevalent among older adults, we will no doubt gain greater insight into the myriad issues that may arise. ■

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