Nevada System of Higher Education

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MEMORANDUM

TO: Members of the Board of Regents
Chancellor
Presidents
cc: General Counsels

FROM: Brooke A. Nielsen
Vice Chancellor for Legal Affairs

DATE: May 27, 2014

RE: Use or Possession of Marijuana at NSHE Campuses and Facilities is Prohibited

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Many questions have arisen recently about the possession or use of marijuana at NSHE campuses and facilities in light of the amendments to the medical marijuana laws passed by the 2013 Nevada Legislature. As you know, the state and local governments have begun the process of licensing medical marijuana dispensaries, cultivation facilities and testing laboratories pursuant to the 2013 statutory amendments. This memorandum provides a brief overview regarding current law and policy on the possession and use of marijuana at NSHE campuses and facilities. The memorandum also outlines a proposed policy on medical marijuana that will come to the Board for consideration at its September 2014 meeting. Please note that the General Counsels are copied on this non-confidential memorandum so that they may provide appropriate guidance and education to their specific campus communities, including employees, students and visitors.

Summary of Conclusions

The use or possession of marijuana by employees or students at NSHE campuses and facilities is illegal under federal law and is prohibited under Board of Regents' policies. There is no exception for use or possession of medical marijuana under federal law or Board policy. Violation of the federal laws which prohibit use or possession of marijuana by NSHE employees or students could result in the loss of federal funds and financial aid, and possible criminal prosecution. Users of illegal substances are not entitled to the protections of federal disability or rehabilitation laws. State law does not require accommodation of medical marijuana use in the workplace, but employers must consider modifying job or working conditions under certain circumstances. An amendment to the Board of Regents' Handbook, Title 4 will be proposed to clarify NSHE policy with regard to the possession, use and cultivation of medical marijuana.

Federal Law and Enforcement

The cultivation and use of marijuana is prohibited under the Controlled Substances Act (except for Federal Drug Administration approved research). *See* 21 U.S.C. 812(c)(c). Furthermore, under provisions of the Drug Free Workplace Act (DFWA) of 1988 (41 U.S.C. 701-07) and the Drug-Free Schools and Communities Act Amendments (DFSCA) of 1989 (20 U.S.C. 1011i, 7101, 34 CFR 86.1 *et seq.*), the use and possession of illegal controlled substances (including marijuana) by employees and students at institutions which receive federal funding or federal financial aid, is prohibited. There are no exceptions in these federal laws for use or possession of medical marijuana. The sanctions which may be imposed for violation of the DFWA and the DFSCA include loss of federal funds and financial aid by the institution and student.

Although the United States Department of Justice announced in 2009[1] that it will not "focus federal resources" on prosecutions of individuals whose actions comply with state authorized medical marijuana use, it retains complete authority to prosecute not only individuals who violate the Controlled Substances Act, but also those who aid, abet or assist in such violations. *See, e.g,.* 21 U.S.C. 846. In 2011, the Justice Department issued additional guidelines to federal prosecutors directing enforcement efforts to "large scale, privately operated industrial marijuana cultivation centers," *even if* they purport to operate in compliance with state law.[2] More recently, in 2013, the Justice Department announced additional marijuana enforcement priorities and reiterated its authority to investigate and prosecute any activities which are contrary to federal interests and priorities.[3]

Board of Regents' Policy

While Board of Regents' policy does not specifically refer to "medical marijuana," the use or possession of marijuana by employees and students is prohibited. Board of Regents' Code in Title 2, Chapter 6, Sections 6.2.1(h) and (bb), respectively, prohibit employees from being under the influence of a controlled substance, and prohibit any conduct which would violate local, state or federal law. The possession of marijuana by students is specifically prohibited under the Code, Title 2, Chapter 10, Section 10.2.1(t), and any violations of local, state or federal law are also prohibited under Section 10.2.1(ee). Campuses with their own student conduct codes have similar prohibitions. The Desert Research Institute employee disciplinary procedures, set forth in the Code, Title 2, Chapter 8, Section 8.3.1(h), specifically reference the Drug Free Workplace Act and prohibit use or possession of controlled substances prohibited in the work place. Section 8.3.2(m) also prohibits any violations of local, state or federal law. The Board of Regents adopted an "NSHE Anti-Drug Policy Statement" in Title 4, Chapter 3, Section 44.1, which states:

> ***The NSHE prohibits the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in the workplace. Any employee who violates this policy is subject to disciplinary action, which may include termination of employment.***

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[1] See Memorandum from David W. Ogden, Dep. Atty. Gen., DOJ for Selected U.S. Atty's re Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009).

[2] See Memorandum from James M. Cole, Dep. Att'y Gen., DOJ, for Selected U. S. Atty's re Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011).

[3] See Memorandum from James M. Cole, Dep Att'y Gen, DOJ, Guidance Regarding Marijuana Enforcement (August 29, 2013).

The definition of the term "controlled substance" in Title 4, Chapter 3, Section 44.4 includes marijuana. In accordance with these policies, institutions currently do and should continue to take appropriate disciplinary action for violations of the prohibitions on possession and use of marijuana.

Accommodation of Disabilities

Under the federal Americans with Disabilities Act (42 U.S.C. 12114(a)) and the Rehabilitation Act (29 U.S.C. 701(a)), individuals using illegal drugs (which includes medical marijuana) are excluded from the protections of those laws. Nevada law, in NRS 453A.800 (2) does not "[r]equire any employer to allow the medical use of marijuana in the workplace." However, state law under NRS 453A.800(3), does require employers to "attempt to make reasonable accommodations" for employees holding valid registry identification cards. Nevertheless, the federal laws noted above would still prohibit the use or possession of medical marijuana as a "reasonable accommodation" for employees or students.

Proposed Policy on Medical Marijuana

As noted above, current Board policy does not address medical marijuana use or possession at NSHE campuses and facilities. A proposed policy has been drafted and will be circulated for review and input from all campuses. It is anticipated that following this review process, the proposed policy will be presented to the Board for its consideration at the September 2014 Board of Regents' meeting. Highlights of the current draft proposal include:

- Prohibits the use, possession or cultivation of medical marijuana on NSHE property or at NSHE sponsored events.
- Recognition of the healthcare purpose of Nevada's medical marijuana laws.
- Recognition of the federal prohibition on the use or possession of medical marijuana on university and college campuses.
- Recognition of the Nevada's statutory commitment to a program for the evaluation of medical use and distribution of medical marijuana at the University of Nevada School of Medicine.
- Authorization for any NSHE institution to engage in medical marijuana research if legal authorization from appropriate federal authorities in obtained, and with the permission of the institution president.
- Requires each institution to publish the policy on its website and in its course catalog.
- Requires each institution to waive the requirements to live on campus for students who have complied with state law, *i.e.*, who have obtained valid medical marijuana registration cards, and who request such waiver.
- Students who are in compliance with state law should be released from housing contracts without financial penalty and allowed to move off campus.

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OFFICE OF THE VICE CHANCELLOR FOR LEGAL AFFAIRS

POSSESSION OR USE OF MEDICAL MARIJUANA AT NSHE INSTITUTIONS

- ***Use or Possession of Marijuana Prohibited at NSHE Campuses and Facilities.*** The use or possession of marijuana by employees or students at NSHE campuses and facilities is illegal under federal law and is prohibited under Board of Regents' policies.

- There is no exception for use or possession of medical marijuana under federal law or in Board of Regents' policy.

- ***Compliance with Federal Law Required.*** The federal government does not recognize medical marijuana use and treats it as a controlled substance. It is a federal crime to possess or use medical marijuana. This law can only be changed by the United States Congress.

- Universities are still subject to the Drug-Free Workplace Act of 1988 and the Drug-Free Schools and Communities Act Amendment of 1989. These federal acts have not carved out exceptions for medical marijuana.

- Institutions receiving federal funding must comply with federal mandates. The failure to do so could potentially lead to the loss of federal funding for all NSHE institutions. No NSHE institution can authorize the use or possession of medical marijuana on its campus or all NSHE institutions could face the risk of losing federal funding. NSHE receives over $500 million annually in federal funding. Based on Fiscal-Year 13 data, NSHE federal financial aid expenditures totaled more than $360 million, and federal grants and contracts were over $170 million.

- Individual students may also lose federal funding. Federal law provides that a student who has been convicted of an offense under any federal or state law, involving possession or sale of a controlled substance, during a period of enrollment for which the student was receiving financial aid, shall not be eligible to receive any federal or institutional grant, loan, or work assistance during certain specified time periods.

- Although the Nevada Legislature has passed laws that allow for the potential use of medical marijuana, and the Nevada Constitution provides for the use and possession of medical marijuana, under the Supremacy Clause of the United States Constitution, federal laws supersede state laws when conflicts exist.

- Public universities and colleges in other states that receive federal funding also prohibit the possession and/or use of any type of marijuana on their campuses. This is true even in states that have legalized the recreational use of marijuana.

- Only the United States Congress can change federal law to decriminalize medical marijuana.

- The use and cultivation of marijuana is prohibited under the Controlled Substances Act (except for Federal Drug Administration approved research). See 21 U.S.C. 812(c)(c).

- The Drug Free Workplace Act (DFWA) of 1988 (41 U.S.C. 701-07) and the Drug-Free Schools and Communities Act Amendments (DFSCA) of 1989 (20 U.S.C. 1011i, 7101, 34 CFR 86.1, *et seq.*), prohibit the use and possession of illegal controlled substances (including marijuana) at institutions which receive federal funding or federal financial aid.

- ***Board of Regents' Policies.***
  While Board of Regents' policy does not specifically refer to "medical marijuana," the use or possession of marijuana by employees and students is prohibited.

- Board of Regents' policies which prohibit the possession or use of marijuana by students and employees include the following:
  - Code, Title 2, Chapter 6, Sections 6.2.1(h) and (bb) (employee prohibitions)
  - Code, Title 2, Chapter 10, Section 10.2.1(t) and Section 10.2.1(ee) (student prohibitions).
  - Code, Title 2, Chapter 8, Section 8.3.1(h) and Section 8.3.2 (m) (DRI employee prohibitions).
  - Board of Regents Handbook, Title 4, Chapter 3, Section 44.1, NSHE Anti-Drug Policy Statement, provides:

    The NSHE prohibits the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in the workplace. Any employee who violates this policy is subject to disciplinary action, which may include termination of employment.

  - The definition of "controlled substance" in Title 4, Chapter 3, Section 44.4, includes marijuana.

- ***Accommodation.***
  Under the federal Americans with Disabilities Act (42 U.S.C. 12114(a)) and the Rehabilitation Act (29 U.S.C. 701(a)), individuals using illegal drugs (which includes medical marijuana) are excluded from the protections of those laws. Nevada law, in NRS 453A.800(2) does not "[r]equire any employer to allow the medical use of marijuana in the workplace." However, state law under NRS 453A.800(3), does require employers to "attempt to make reasonable accommodations" for employees holding valid registry identification cards. Nevertheless, the federal laws noted above would still prohibit the use

or possession of medical marijuana as a "reasonable accommodation" for employees or students.

- ***Research.***
  Under strict regulations, federal law does allow for marijuana research. Very few institutions across the country have been authorized for such purposes. In addition to federal authorization, the proposed NSHE policy would require prior written approval of marijuana research by the institution's President and consultation with legal counsel prior to conducting any such research.

- ***NSHE Policy Proposal on Medical Marijuana.*** A proposed policy on medical marijuana is under review and will be presented to the Board of Regents for its consideration at its September 2014 meeting.

- Highlights of the current draft proposal inlcude:
  - Prohibits the use, possession or cultivation of medical marijuana on NSHE property or at NSHE sponsored events.
  - Recognition of the healthcare purpose of Nevada's medical marijuana laws.
  - Recognition of the federal prohibition on the use or possession of medical marijuana on university and college campuses.
  - Recognition of the Nevada's statutory commitment to a program for the evaluation of medical use and distribution of medical marijuana at the University Of Nevada School Of Medicine.
  - Authorization for any NSHE institution to engage in medical marijuana research if legal authorization from appropriate federal authorities in obtained, and with the permission of the institution president.
  - Requires each institution to publish the policy on its website and in its course catalog.
  - Requires each institution to waive the requirements to live on campus for students who have complied with state law, *i.e.,* who have obtained valid medical marijuana registration cards and who request such waiver.
  - Students with who are in compliance with state law should be released from housing contracts without financial penalty and allowed to move off campus.

POLICY PROPOSAL
TITLE 4, CHAPTER 1, *new* SECTION 32
Possession and Use of Medical Marijuana

Additions appear in ***boldface italics***; deletions are [~~stricken~~ and bracketed]

Section 32. Possession and Use of Medical Marijuana

The Nevada System of Higher Education is sympathetic to the medical needs of our students, employees and visitors. A growing number of states, including Nevada, are enacting laws decriminalizing or legalizing the use, possession, delivering, manufacturing, growing, distribution, production, and/or cultivation (hereinafter "use") of medical marijuana. Federal law prohibits the use of medical marijuana on college and university campuses that receive federal funding. The following provisions shall govern the possession and use of medical marijuana on NSHE property.

1. ***The use, possession, or cultivation of marijuana for medical purposes is not allowed in any NSHE institution housing or any other NSHE or institution property.***

2. ***The use of medical marijuana is not allowed at any NSHE or institution sponsored, conducted, or authorized event or activity off campus. Students, employees, faculty, guests, and/or visitors who violate this policy are subject to disciplinary, legal and/or administrative action as permitted by law.***

3. ***Each institution shall permit students who are required to live on-campus to petition ("request") for a waiver thereof if they assert legal compliance with Nevada State Law to use medical marijuana. Such students who prove their compliance with state law should be released from their housing contracts without financial penalty and permitted to move off campus.***

4. ***Each institution shall publish on its website and in its course catalog notice of the prohibited use of medical marijuana on NSHE or institution property in accordance with the provisions of this Section and as prohibited student conduct defined in Title 2, Chapter 10.***

5. ***The Board of Regents recognizes the Nevada Legislature's stated commitment to a program evaluating the medical use and distribution of medical marijuana to be conducted by the University of Nevada School of Medicine. However, any NSHE institution may engage in medical marijuana research, provided that the following are obtained: (a) the prior written consent of the President of the institution , after consultation with the institution's General Counsel; and (b) legal authorization from the proper federal authorities for approved research purposes.***

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POLICY PROPOSAL
TITLE 2, CHAPTER 10, SECTION 10.2
Prohibited Student Conduct – Marijuana Use

Additions appear in ***boldface italics***; deletions are [~~stricken~~ and bracketed]

10.2.1 Prohibited Conduct.

The following conduct is prohibited:

. . .

(t) Use, possession, manufacturing or distribution ***(hereinafter "use")*** of marijuana, heroin, narcotics, or other controlled substances, use or possession of any illegal and/or unauthorized drugs, prescription drugs, and drug paraphernalia or being under the influence of illegal drugs except as expressly permitted by law. ***Use of medical marijuana is expressly prohibited pursuant to Title 4, Chapter 1.***

. . .

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