

**COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS  
SPECIAL EDUCATION APPEALS**

**Student v. Sandwich Public Schools &  
The Amego School**

**BSEA # 2109444**

This decision is issued pursuant to the Individuals with Disabilities Education Act (20 USC § 1400 *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 USC § 794), the state special education law (MGL ch. 71B), the state Administrative Procedure Act (MGL ch. 30A), and the regulations promulgated under these statutes.

By agreement of the parties and pursuant to BSEA Hearing Rule XII, this matter is decided solely on the basis of documents that have been filed. The Parents, (hereinafter, “Parents”) filed their Request for Hearing with the BSEA on April 26, 2021. During a May 17, 2021 conference call, the Parties stipulated that the facts underlying Parents’ Request for Hearing were not in dispute, and stated that they wished to submit written argument and evidence to support their respective legal positions. On July 26, 2021, Parents filed their argument and supporting exhibits marked A-E. Also on said date, a Stipulation of the Parties was submitted. On July 27, 2021, Sandwich filed its arguments and Amego filed its arguments and exhibit A. On August 4, 2021, Parents filed a reply memorandum and exhibits A-D and the record closed at that time.

**ISSUES**

1. Whether Student requires the administration of medical marijuana in order to receive a free appropriate public education pursuant to IDEA, M.G.L. c. 71B and Section 504.
2. Whether the administration of medical marijuana by a private residential special education school such as Amego is a reasonable accommodation to address the symptoms of Student’s disability.

**UNDISPUTED FACTS<sup>1</sup>**

1. [Student] is a 15-year-old, 110 pound boy affected by Severe/Non-Conversational Autism, Crohn’s Disease, intellectual disability, anxiety, apparent migraine issues (possibly cluster migraines/based on cyclical data) and recurring PANDAS that has flared after exposure to illness. These conditions resulted in significant periods of being unable to attend a traditional school placement prior to his placement at Amego in 2019.

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<sup>1</sup> The undisputed facts are copied verbatim from the Stipulation of the Parties submitted on July 26, 2021, along with their initial submissions. Therefore, they do not contain citations to the record.

2. [Student] has struggled with chronic pain but has not been able to communicate anything meaningful or specific about when or where he experiences pain. This has made it difficult to find effective treatments. [Student] has a history of bleeding in the stool, scar tissue and ulcers in his intestines and mouth, restricted diets, hospitalization for lack of motility in GI/Chronic constipation and bleeding that lead to dangerously low hematocrit levels resulting in a week long hospital stay and blood transfusions to stabilize him.
3. For 7 years, [Student] received monthly intravenous immunoglobulin (IVIG) treatment to build up his immune system. At the direction of his medical team, [Student] also has received 80 full body Hyperbaric Oxygen Treatment Dives at 100% oxygen to address the inflammation/internal wound healing. He has been treated with intense diet intervention, help from a GI specialist, sleep neurologist, allergist, pediatric neurologist, pain doctors, functional medicine doctors, a PANDAS specialist, oral surgeons, dermatologist, and Otolaryngology and Neurotology (ENT) specialists (many of whom have coordinated care) in efforts to address autoimmune issues to mediate/control/alleviate his ongoing struggle with chronic pain.
4. [Student] has had a dozen colonoscopy/endoscopy procedures related to his Crohn's disease.
5. Despite years of intensive medical treatment and coordinated care by countless medical providers, [Student] continued to struggle with pain that caused him to act out.
6. In 2017, at the recommendation of Dr. Melissa Walker, a pediatric neurologist at MGH, to address apparent debilitating migraine symptoms, [Student] began to take 900 mg of Gabapentin daily. This was a repeat of a treatment he had at age 9 to address ongoing sleep issues that had worked for a while and then stopped being effective. While there were some improvements in sleep and appetite, pain-related aggression remained unpredictable and [Student] had major issues with diarrhea.
7. Following this trial of Gabapentin in 2017, a prescription of Marinol (a synthetic THC medication typically prescribed for AIDS patients or patients with eating disorders or cancer in order to stimulate appetite/help pain) was tried. During this trial [Student] was completely out of it and slept all day when on this medication.
8. The family and doctors ruled out treatment with antipsychotic medication due to gastrointestinal side-effects.
9. Following the experience with Marinol and Gabapentin, in June 2017, after receiving suggestions from many sources to try medical marijuana, including Dr. John Gaitanis, Chief of Pediatric Neurology at Tufts Medical Center, Student received a formal recommendation from Dr. Eric Ruby a Massachusetts Board Certified pediatrician and licensed Cannabis consultant, and internal medicine/medical marijuana pediatric prescriber Hong Truong, D.O. allowing [Student]'s parents, as his caretakers, to enroll in the Massachusetts medical marijuana program now administered by the Massachusetts Cannabis Control Commission. This allowed his parents to legally purchase controlled

doses of medical marijuana in a capsule form and administer the specific strains that have been grown and developed to treat GI issues while not greatly altering mental clarity. The family began a process of trial and error to arrive at the proper dosage/strain that reduced [Student]'s symptoms and made him available for learning.

10. The family initially tried to treat [Student] with CBD, but this treatment alone did not provide significant relief from his many symptoms. Eventually, the family determined that a particular strain and method of preparation of cannabis was successful in addressing [Student]'s symptoms. Currently on school days, [Student] is treated with a capsule of processed cannabis oil three times daily – before leaving for school, upon arriving home from school and then before he goes to sleep.
11. Treatment with medical marijuana has proven to be effective in addressing many of [Student]'s symptoms. [His] GI symptoms have gradually improved. Prior to using medical marijuana, [Student]'s colonoscopies revealed substantial scar tissue, bleeding, and conditions consistent with a leaky gut. These conditions indicated that [Student] had been experiencing intense pain which most likely was an underlying cause of behavioral issues, including self-injurious and aggressive behaviors. After using medical marijuana for a year, Dr. Timothy Buie conducted another colonoscopy. Dr. Buie is a leading pediatric gastroenterologist with Boston Children's Hospital and the Lurie Center, who has been treating [Student] since he was an infant. Following the colonoscopy Dr. Buie reported that, for the first time in [Student]'s history, [Student]'s intestine and bowel looked healthy and healed. The only additional treatment modality that had been tried during this time was the medical marijuana.
12. [Student]'s behaviors also substantially improved with the medical marijuana treatment. His incidents of behavioral dysregulation, including self-injurious behaviors, declined significantly. His parents report that a semblance of peace had returned to their home after years of conflict. [Student] showed consistent improvement in all areas, including sleep, interest in food, willingness to participate in lessons, and increased language use, flexibility, and general well-being. His parents report that [Student] became very present and clear headed.
13. [Student]'s medical marijuana can be administered in a tincture form but is mainly administered in capsules for him as it is easier to control dosage. When [Student] is at home on non-school days, he receives his medications with each meal and then again at bedtime. On school days, [Student] currently receives his medication in the morning before leaving for school and receives his next dose when he returns home from school. However, in a June 6, 2021, Dr. Buie recommends that [Student]'s treatment mirror his treatment at home and, as such, a dose at noon while at school is recommended to maintain the stability of [his] behaviors. Amego, however, is not comfortable administering the medication given concern about running afoul of federal law.
14. [Student]'s continued use of medical marijuana has been endorsed by Dr. Eric Ruby (P-A), Dr. John Gaitanis (P-B), and Dr. Timothy Buie (P-E). All have endorsed the use of

medical marijuana as a reasonable accommodation and/or necessary for [Student] to receive an appropriate education.

15. [Student] has been receiving special education and related services provided and/or funded by the Sandwich Public Schools since [he] was three years old. From approximately 2015-2019, [Student] received educational services at home since no school program was able to support him, given the complexity of his medical conditions and behavioral difficulties.
16. By December 2018, the District noted in an N-1 form that [Student]'s behavior had greatly improved over the past few months, following trials with medical marijuana. Screaming, chin pushing, and aggressions were at a greatly reduced level.
17. By the summer of 2019, [Student]'s behaviors had improved such that consideration was being given to placement in a special education day school. Several referrals were made and a decision was reached by the parents and the District to place [Student] at the Amego School in Franklin.
18. [Student] began attending Amego on November 15, 2019. An IEP was developed for Amego in January 2020. Unfortunately, however, by March 2020 [Student] was no longer able to attend at Amego due to the restrictions imposed by the COVID-19 pandemic. [Student]'s home program was reinstated to the extent possible.
19. In late June 2020, [Parents] rejected [Student]'s IEP in part for its failure to include as an accommodation the administration of medical marijuana while at Amego. A Team meeting was then held on July 15, 2020 to discuss the partial rejection. Following that meeting, the District issued a revised IEP. The N-1 form accompanying the IEP reflected that while the school-based Team members understood that a physician had prescribed the use of medical marijuana for [Student], because federal law criminalizes the distribution, possession, or use of marijuana for any purpose, Amego was not willing to have its staff administer the medical marijuana to [Student] during the school day. On November 16, 2020, the revised IEP for January 2020 to January 2021 was again partially rejected for failure to include the medical marijuana accommodation. (P-C) The revised IEP did indicate that [Student] required a residential special education program but that the parties had agreed to defer such a placement until Amego had an opening for residential placement.
20. A Team meeting was held on March 17, 2021 to develop an annual IEP. The District subsequently issued an IEP for the period March 17, 2021 to March 16, 2022. This IEP again noted the need for a residential placement but the agreement to defer until Amego could accept [Student]. Parents rejected the IEP in part on April 14, 2021 noting again the failure to include the medical marijuana accommodation. (P-D)
21. [Student] is now attending Amego School as a day student on a daily basis, Monday through Friday. Amego is developing more residential placements and has told the family that it may have a residential placement available soon. However, Amego continues to tell

the family that it cannot administer medical marijuana to [Student] unless it has a court order to do so. The family, the District and Amego would like to have [Student] attend Amego residentially. However, the family is unwilling to stop the only treatment that has proven to be effective for [Student].

22. Amego is a MA DESE approved special education school that serves approximately 45 students in grades 4 through post-12<sup>th</sup> grade. Amego has provided services to students with autism and other developmental disabilities since 1971. Amego is open 245 days a year, with teaching based on the principles of Applied Behavior Analysis and supervised by licensed and Board-Certified Behavior Analysts. It is fully licensed by the Department of Early Education and Care (DEEC) and the Department of Elementary and Secondary Education (DESE). Residential services are provided in private homes, located in residential settings throughout central and southeastern Massachusetts for children, adolescents and young adults ages 8 to 21. Amego has a high staff-to-student ratio [that] affords each child the engagement and attention necessary to participate and ensure their individual needs are met.

## **FINDINGS AND CONCLUSION:**

Student is an individual with a disability, falling within the purview of the Individuals with Disabilities Education Act (IDEA)<sup>2</sup> and the state special education statute.<sup>3</sup> As such, he is entitled to a free appropriate public education (FAPE). Neither his status nor his entitlement is in dispute.

The IDEA was enacted “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education, employment and independent living.”<sup>4</sup> FAPE must be provided in the least restrictive environment. Least restrictive environment means that, “to the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and special classes, separate schooling or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”<sup>5</sup>

Student’s right to a FAPE is assured through the development and implementation of an individualized education program (“IEP”).<sup>6</sup> An IEP must be custom-tailored to address a student’s “unique” educational needs in a way reasonably calculated to enable him to receive educational benefits.<sup>7</sup> For an IEP to provide a FAPE, it must be “reasonably calculated to enable

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<sup>2</sup> 20 USC 1400 *et seq.*

<sup>3</sup> MGL c. 71B.

<sup>4</sup> 20 USC 1400(d)(1)(A). See also 20 USC 1412(a)(1)(A); *Mr. I ex. Rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007)

<sup>5</sup> 20 USC 1412(a)(5). See also 20 USC 1400(d)(1)(A); 20 USC 1412(a)(1)(A); MGL c. 71B; 34 CFR 300.114(a)(2)(i); 603 CMR 28.06(2)(c)

<sup>6</sup> 20 USC 1414(d)(1)(A)(i)(I)-(III); *Honig v. Doe*, 484 U.S. 305 (1988); *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982)

<sup>7</sup> *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083 (1st Cir.1993)

a child to make progress appropriate in light of the child's circumstances."<sup>8</sup> A student is not entitled to the maximum educational benefit possible.<sup>9</sup> Similarly, the educational services need not be, "the only appropriate choice, or the choice of certain selected experts, or the child's parents' first choice, or even the best choice."<sup>10</sup> The IDEA further requires that special education and related services be designed to result in progress that is "effective."<sup>11</sup> Further, a student's level of progress must be judged with respect to the educational potential of the child.<sup>12</sup>

The burden of persuasion in an administrative hearing challenging an IEP is placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 534, 537 (2005) In this case, Parents are the party seeking relief, and as such have the burden of persuading the Hearing Officer of their position.

This case presents a significant conundrum. The Parties agree that Student presents with "severe/non-conversational autism, Chron's Disease, intellectual disability, anxiety, apparent migraine issues, and reoccurring PANDAS. They further agree that since Student began taking medical marijuana there has been a substantial improvement in his severe gastrointestinal symptoms, which has led to a marked improvement in his behavioral regulation. All Parties have indicated that Student's current placement at Amego is an appropriate one, that he has made progress, and that his most recently proposed IEP calling for a residential placement at Amego is an appropriate proposal.

Student's current presentation, as a student able to progress in a private school program, is in stark contrast to his prior presentation, which, due to the complexity of his medical and behavioral needs, required that he receive all services at home for a period of approximately four years. Since Student has been treated with medical marijuana, he has benefitted from educational services provided, and is now ready to receive more intense services as a residential student. Nobody disputes the remarkable difference that the administration of medical marijuana has made for Student. Parents, through their Request for Hearing, are seeking an Order affirming their position that Student requires the administration of medical marijuana to receive a FAPE under the IDEA and § 504. Further, they seek a declaration that administration of medical marijuana by a private residential school, such as Amego, is a reasonable accommodation of Student's disability. The conundrum arises because Parents' requested accommodation involves the possession and distribution of medical marijuana on school grounds, by school employees. Sandwich and Amego have raised concerns about their ability to lawfully implement such a request.

There is no dispute that Student is a qualified individual with a handicap, as defined under Section 504. Regulations promulgated under Section 504 of the Rehabilitation Act of 1973 require that school districts "provide a free appropriate public education to each qualified handicapped person who is in [its] jurisdiction, regardless of the nature or severity of the person's

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<sup>8</sup> *Endrew F. v. Douglas County. Sch. Dist.*, 580 U.S. \_\_\_ (2017)

<sup>9</sup> *Rowley*, 458 U.S. at 197

<sup>10</sup> *G.D. Westmoreland Sch. Dist.*, 930 F.2d 942 (1st Cir. 1991)

<sup>11</sup> 20 USC 1400(d)(4); *North Reading School Committee v. Bureau of Special Education Appeals*, 480 F. Supp.2d 479 (D. Mass. 2007)(the educational program must be reasonably calculated to provide effective results and demonstrable improvement in the various educational and personal skills identified as "special needs")

<sup>12</sup> *Lessard v. Wilton Lyndeborough Cooperative School District*, 518 F.3d 18 (1st Cir. 2008)

handicap.” 34 C.F.R. § 104.33(a). The Act defines an appropriate education as “the provision of regular or special education and related aids and services that ... are designed to meet the individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met...” 34 C.F.R. § 104.33(b)(1).

Parents argue that as a qualified individual with a handicap, Student has requested a reasonable accommodation from Sandwich Public Schools and the Amego School, specifically, that he be administered medical marijuana at Amego. Parents requested the specific accommodation of administration of medical marijuana in responding to the January 2020 IEP in June 2020. (¶19) The Sandwich Public Schools specifically rejected the requested accommodation, as documented by a N-1 form following the June 15, 2020 Team meeting. (¶ 19) Parents again rejected the failure to include the requested accommodation on November 16, 2020. A third request for the accommodation was made in response to a new IEP on April 14, 2020. The record amply supports a finding that a reasonable accommodation request was specifically made by Student’s Parents.

Section 504 has been interpreted to require federal grantees to modify or excuse non-essential requirements which impede a disabled person from participating in the grantee's federally funded program. It has been held that a grantee's refusal to make "reasonable accommodations" for the disabled person can only be explained as "unreasonable or discriminatory." *Southeastern Community College v. Davis*, 442 U.S. 9 397, 413, 99 S.Ct. 2361, 2370, 60 L.Ed.2d 980 (1979). The Supreme Court has held that Section 504 imposes on federally funded programs a duty to accommodate handicapped persons, to the extent possible, to ensure that non-essential requirements and practices do not "arbitrarily deprive genuinely qualified persons of the opportunity to participate in a covered program." *Davis*, 442 U.S. at 412. A program may not be defined in a way that effectively denies meaningful access to an otherwise qualified handicapped person. *Alexander v. Choate*, 469 U.S. at 301. To ensure this principle is respected, where it appears that a person with a disability satisfies a federally funded program's basic requirements, Section 504 requires the court to determine whether any "reasonable accommodations" can be made by the grantee to facilitate the handicapped person's participation. *School Board of Nassau County, Fla. v. Arline*, 480 U.S. 273, at 288 n. 17 (1987). A school district’s refusal to modify an existing program to eliminate nonessential requirements that would prevent a handicapped person from participation must be condemned as "unreasonable and discriminatory." *Davis*, 422 U.S. at 413.

An accommodation is generally any change in the school environment or in the way things are customarily done that enables an individual with a disability to enjoy equal opportunities. *Thomas v. Davidson Academy*, 846 F.Supp. 611, 618 (M.D.Tenn.1994) (citing 29 C.F.R. § 1630.2(o)); accord *Burch v. Coca-Cola Co.*, 119 F.3d 305, 314-315 (5th Cir.1997) ("In all cases a reasonable accommodation will involve a change in the status quo, for it is the status quo that presents the very obstacle that the ADA's reasonable accommodation provision attempts to address.")

While Section 504 imposes an obligation to provide a free and appropriate public education, it also requires that policies and procedures be modified when necessary to afford equal educational opportunity. See: *In re Mystic Valley Regional Charter School*, BSEA No. 03-3629 requiring Mystic Valley Regional Charter School to implement a number of accommodations,

and holding that Section 504 mandates equality of access to education and equality of treatment of the handicapped individual vis a vis the non-handicap individual by an institution receiving federal funds. See also: *In re: Worcester Public Schools*, 6 MSER 194 (2000) (requiring a school district to modify policies to provide student with instruction outside of the normal school day); *In re: Gabriel C.*, 3 MSER 29 (1997); 34 C.F.R. 104.34(b).

Thus, at first blush, it would seem to be apparent that the provision of medical marijuana in Student's school setting would be a reasonable accommodation, given his inability to attend school prior to beginning his course of medical marijuana, and his ability to attend school thereafter. However, in the instant case, the determination as to whether the requested accommodation is reasonable must be filtered through the lens of laws surrounding the use of medical marijuana.

As stipulated by the Parties, Student is a registered patient in the Massachusetts Medical Use of Marijuana Program. The medical use of marijuana in Massachusetts was authorized by referendum in November 2012. See: An Act For the Humanitarian Use of Marijuana, Session Law, Chapter 369, 2012. The stated purpose of the act is that "there should be no punishment under state law for qualifying patients, physicians and health care professionals, personal caregivers for patients, or medical marijuana treatment center agents for the medical use of marijuana, as defined herein." See St. 2012, c. 369, § 1.

The act first sets out "the parameters of protection from State prosecution and penalties that the act respectively gives to physicians and health care professionals, qualifying patients and their personal caregivers, and licensed dispensary agents." *Commonwealth v. Canning*, 471 Mass. 341, 345 (2015). Pursuant to the act, "[a]ny person meeting the requirements under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions." St. 2012, c. 369, § 4. See G. L. c. 94I, § 2. See also G. L. c. 94G, § 7. Further, "[a] qualifying patient or a personal caregiver shall not be subject to arrest or prosecution, or civil penalty, for the medical use of marijuana," provided he or she meets the requirements of the law. St. 2012, c.369, § 4. See G. L. c. 94I, § 2. See also G. L. c. 94G, § 7. Additionally, "[t]he lawful possession, cultivation, transfer, transport, distribution, or manufacture of medical marijuana as authorized by [the act] shall not result in the forfeiture or seizure of any property." St. 2012, c. 369, § 6 (A). See G. L. c. 94I, § 2(b)(4).

The Act "establishes a medical marijuana registration or licensing regime . . . that covers nonprofit medical marijuana treatment centers, medical marijuana center dispensary agents, and qualifying patients and personal caregivers." *Canning, supra*. In 2018 the legislature enacted St. 2017, c. 55: An Act to Ensure Safe Access to Marijuana; M.G.L. c. 94G and M.G.L. c. 94I, codifying the provisions of St. 2021 c. 369. These provisions are now referred to as the Massachusetts Medical Marijuana Act. This act also required that administration and oversight of the Massachusetts Medical Use of Marijuana Program transfer from the Department of Public Health (DPH) to the Cannabis Control Commission (CCC). The Cannabis Control Commission has been the principal regulatory body concerned with both the Medical Marijuana program and the subsequent legalization of marijuana for adult use. The Medical Use of Marijuana Program specifically authorizes the use of medical marijuana by a minor when (s)he has been diagnosed

by two certifying healthcare providers, one of whom must be a board-certified pediatrician, pediatric subspecialist, oncologist, neurologist, or family physician as having a Debilitating Medical Condition that is also a Life-limiting Illness. 935 CMR 501.002.

Amego and Sandwich not dispute that Student appears to have benefitted significantly from the administration of medical marijuana, and Amego is not philosophically opposed to the medical use of marijuana in legally designated circumstances and settings. However, as noted by Sandwich, the federal Controlled Substances Act still lists marijuana as a Schedule I controlled substance and criminalizes the possession, use, cultivation and distribution of marijuana regardless of whether or not it is prescribed by a physician. 21 U.S.C. §§812(c), 844(a).

Although Massachusetts has legalized the use of medical marijuana, it does not “authorize the possession or consumption of marijuana or marijuana accessories on the grounds of or within a public or private school where children attend classes in preschool programs, kindergarten programs or grades 1 to 12, inclusive, on a school bus, ...” M.G.L. c. 95G, § 2(d)(3). Further, Amego cites to section 501.450 of the regulations, entitled “Nonconflict with Other Laws” which states, “Nothing in 935 CMR 501.000: ... (d) requires any accommodation of any on-site medical use of Marijuana in any place of employment, school bus or on school grounds....”

The above provisions distinguish this case from the California case cited by Parents in their brief. See *Rincon Valley Union Elementary School District*, OAH Case #2018050651 (CA Office of Administrative Hearings, 2018). In that case it was undisputed that Student required the administration of THC oil as an emergency medication to control her seizures. In fact, during the two years prior to the school year at issue, the student had successfully attended a pre-school program with a nurse contracted by the school who was able to administer her THC oil as needed on the bus or at school. During the school year at issue, the school took the position that but for the possible illegality of possessing THC oil on the campus and the bus, a public school campus would be the student’s least restrictive environment. The district stated that, “[A]llowing Student on campus with her medication ‘could potentially jeopardize’ funding for the entire district because the ‘federal guideline is that I have to be able to declare that it’s a drug-free campus.’” Due to the necessity of Student having access to THC oil throughout her day, the district proposed an at home placement for Student. The ALJ dismissed the district’s arguments around concerns about violating the Controlled Substance Act and the Drug Free Work Place Act finding that, “The force of that law, if any, is greatly outweighed by the competing federal law command, in the IDEA, that Student be given a FAPE in the least restrictive environment.” Further the ALJ referred to a section of California’s Health and Safety Code which does not permit any person to possess cannabis in or upon the grounds of a school where children are present. (Health and Saf. Code 11362.3 subds. (a), (a)(5).) However, the ALJ relied upon subsection (c) of that statute which provides: “Nothing in this section shall be construed or Use Act of 1996.”

Massachusetts law does not currently provide for the administration of medical marijuana on public or private school campuses nor on a school bus. Where the California ALJ found a blanket statute bolstering the Compassionate Use Act as noted above, Massachusetts law specifically states that there is no requirement to accommodate any on-site medical use of marijuana in any school bus or on school grounds. Thus, even if I were to agree with the California ALJ that the requirements of the IDEA supersede other federal laws regarding the

legality of marijuana use, I could not legally Order that Amego staff provide Student with medical marijuana on campus or a school bus under Massachusetts law.

The Massachusetts Supreme Judicial Court has recently addressed the issue of medical marijuana. In *Barbuto v. Advantage Sales and Marketing LLC*, 477 Mass. 456 (2017), an employee who used medical marijuana to treat Crohn's disease was fired for testing positive for marijuana in violation of the employer's drug policy. She brought an action against her former employer alleging handicap discrimination and unlawful termination. The *Barbuto* court found that under Massachusetts law... "the use and possession of medically prescribed marijuana by a qualifying patient is as lawful as the use and possession of any other prescribed medication." It further noted that when the employee's physician determined that medical marijuana was the most effective medication for the employee's condition and where any alternative medication whose use would be permitted by the employer's drug policy would be less effective, an exception to an employer's drug policy to permit its use is a facially reasonable accommodation. However, the court further found that the Medical Marijuana Act makes clear that it does not require "any accommodation of any on-site medical use of marijuana in any place of employment." St. 2012, c. 369, §4. The court found that "The fact that the employee's possession of medical marijuana is in violation of Federal law does not make it per se unreasonable as an accommodation." Under the facts of that case, the court reasoned, the only person at risk for Federal criminal prosecution for her possession of medical marijuana was the employee. An employer would not be in joint possession of medical marijuana or aid and abet its possession simply by allowing an employee to continue her off-site use. *Barbuto*, pgs. 464-465 (2017)

The *Barbuto* case is distinguishable from the facts of the case before me in some significant respects. First, the employee's use and possession of the medical marijuana took place off site. The Medical Marijuana Act has an exception which specifically excludes the use of medical marijuana at any place of employment, much like it expressly does not authorize its use on the grounds of or within a public or private school or on a school bus. The court noted that in that case the employer would not be in joint possession of the marijuana, thus limiting the employer's culpability in aiding or abetting possession of marijuana under federal law. Amego, however, would be required to be in possession of the medical marijuana if it were ordered to store and administer it to Student, if Parent's requested accommodation were to be Ordered here.

At least one federal district court has held that it would be unreasonable, and, in fact, would lead to an "absurd" result, to interpret a federal statute such as the Individuals with Disabilities Education Act as requiring a school to commit or accommodate a federal crime in order to satisfy the obligation to provide a student with a free, appropriate public education. *Albuquerque Public Schools v. Sledge*, 2019 WL 3755954, 74 IDELR 291 (D.N.M. 2019). As support for its holding, the court noted that the IDEA does not unambiguously require schools to offer services that violate federal criminal law. *Id.* The court continued that if such a requirement were read into the IDEA, the IDEA's constitutionality would be in serious doubt, citing to the U.S. Supreme Court for the proposition supporting that court first looking to determine if a statute could be construed to avoid the question of the constitutionality of a Congressional act. *Id.* In addition, in *Albuquerque*, the court reasoned that:

if the Court were to interpret the IDEA to include the administration of cannabis to students as a medically necessary related service, such interpretation would

conflict with Congress' legislative determination in the CSA [Controlled Substances Act] that cannabis has no accepted medical use at all.

Ultimately the court in *Albuquerque* concluded that there was no "clear and manifest" congressional intent

for the IDEA to displace the CSA by including the administration of cannabis to students as a medically necessary related service. As such, the Court must construe the IDEA and the CSA harmoniously and give effect to both, by holding that the CSA operates to exclude the administration of cannabis from being a related service under the IDEA. That the CSA's cannabis prohibition is more specific and the IDEA's provisions regarding related services are more general reinforces the Court's conclusions on this point.

Within the context of another recent case, the Massachusetts Supreme Judicial Court stated

We recognize that the current legal landscape of medical marijuana law may, at best, be described as a hazy thicket. Marijuana is illegal at the Federal level and has been deemed under Federal law to have no medicinal purposes, but Massachusetts, as well as the majority of States, have legalized medical marijuana and created regulatory schemes for its administration and usage. Complicating and confusing matters further, Congress has placed budgetary restrictions on the ability of the United States Department of Justice to prosecute individuals for marijuana usage in compliance with a State medical marijuana scheme, and the Department of Justice has issued, revised, and revoked memoranda explaining its marijuana enforcement practices and priorities, leaving in place no clear guidance. *Wright's Case*, 486 Mass. 98 at 98 (2020)

It is beyond the BSEA's jurisdiction to rule on the parties' arguments with respect to the likelihood that Amego or its staff would be subject to any criminal prosecution or loss of federal funding under federal law if it were to comply with Parents' requests. Thus, while appreciative of Parents' thoughtful arguments in this regard, I decline to make any conclusion on the likelihood of either. Further, as discussed above, neither Massachusetts law, as written, nor federal law allows for me to order Sandwich or Amego to require its staff to provide Student with medical marijuana on Amego's campus. Although Massachusetts law allows for the provision of medical marijuana, it does not allow for Student to receive that medical marijuana at school or on a school bus.

Based upon the foregoing, I am unable to make a determination that providing Student with medical marijuana at a private school is a reasonable accommodation within the context of Section 504. An accommodation that requires circumvention of current Massachusetts law cannot be construed as reasonable. Similarly, I am unable to order Sandwich to include the use of medical marijuana in Student's IEP, as neither Sandwich nor Amego could legally implement the IEP. BSEA does not have the authority to order a district to write an IEP which requires the administration of medical marijuana on school premises when M.G.L. C. 94G, § 2(d)(3) states that possession or consumption of

marijuana on the grounds of or within a public or private school is not authorized by the Medical Marijuana law.

This result does not fulfill the intent of the IDEA, M.G.L. ch. 71B or Section 504. It leaves Parents with an impossible choice between sending their son to a school that can provide all of the services he requires to receive a FAPE, and being able to continue his treatment with the only medication that has been effective in managing his significant health issue. Many other states have recognized the needs of students such as Student and have made provision in their state laws for allowing the administration of medical marijuana to students on school grounds and/or by school staff. For example, in New York facilities can be designated as caregivers for the purpose of providing patients with necessary medical marijuana. Facilities that can be designated are listed in Title 10 NYCRR § 1004.3(k) of the regulations, and include “a private or public school.” In this vein, Parents have suggested that the Cannabis Control Commission can grant waivers to its existing regulations such as expanding the scope of “Institutional Caregivers” to include private and public schools. There was no evidence presented as to how a waiver is granted, nor does the BSEA have any authority over the Cannabis Control Commission which would enable it to issue any order regarding a waiver.

It should be noted that the current Massachusetts law allows for the provision of medical marijuana by a Personal Caregiver.

A Personal Caregiver means a person, registered by the Commission, who is 21 years of age or older, who has agreed to assist with a Registered Qualifying Patient’s medical use of Marijuana, and is not the Registered Qualifying Patient’s Certifying Healthcare Provider. *A visiting nurse, personal care attendant, or home health aide* (emphasis added) providing care to a Registered Qualifying Patient may serve as a Personal Caregiver, including to patients younger than 18 years old as a second caregiver. 935 CMR 501.002

The Parties are advised to continue to collaborate and attempt to come up with any lawful “out of the box” solution to this conundrum. They may wish to consider whether it would be feasible to contract with a visiting nurse, personal care attendant or home health aide, as allowed by regulation, to administer medical marijuana to Student. Although the administration would have to occur off Amego’s campus, the Parties may be able to determine a means for said personal caregiver to administer the medication.<sup>13</sup>

In conclusion, as previously stated, this Decision does not result in allowing Student access to the medication which he is lawfully permitted to utilize under state law, while attending the school that all parties agree would provide him appropriate services to

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<sup>13</sup> The Parties’ filings expressed differing views as to the regulations Amego is required to follow with respect to medication administration by its employees. Amego takes the position that it is bound by the provisions of the Medication Administration Program (“MAP”) while Parents contend that Amego is not bound by said provisions. Since current Massachusetts law does not allow for the administration of medical marijuana on a school campus using any medical model, it is not necessary to address their arguments in this regard.

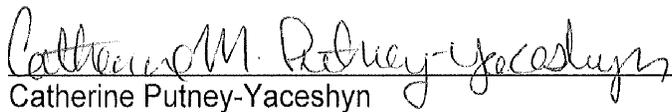
achieve his educational goals. In addition to arcane federal laws regarding the use and storage of marijuana, the current state law precludes the BSEA from ordering Student to receive the medication he requires to benefit from his proposed educational program. And, as discussed above, other states have addressed this issue in a manner similar to the New York regulations cited above.

I am respectfully referring this case to legal counsel at the Cannabis Control Commission and the Department of Elementary and Secondary Education and requesting that they review this case and determine whether it would be appropriate to consider any policy guidance or regulatory changes in light of this student's situation.

### **ORDER**

For the reasons stated above, Parents' request that Sandwich be ordered to draft an IEP which includes the administration of medical marijuana by a private school, such as Amego is DENIED.

So ordered by the Hearing Officer,

  
Catherine Putney-Yaceshyn

Dated: September 13, 2021