

## DRUG POLICY ALLIANCE

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Alfredo Vigil, M.D., Secretary  
New Mexico Department of Health  
1190 St. Francis Drive, N-4100  
Santa Fe, NM 87502-6110

Re: Proposed Registry Identification Card Regulations

Dear Secretary Vigil:

We have reviewed the Department of Health's draft regulations regarding the establishment of the state's medical marijuana identification card program. We believe it goes far to implement the Lynn and Erin Compassionate Use Act (Act). However, set forth below are some concerns about the regulations, identified by the specific section number.

- **7.34.3.7 (B):** “**adequate supply**’ means an amount of marijuana... that is determined by the department to be no more than reasonably necessary to ensure the uninterrupted availability of marijuana for a period of three (3) months... An adequate supply shall not exceed six (6) ounces of useable marijuana four (4) mature plants and three (4) seedlings.”
- **7.34.3.7(Z):** “**uninterrupted availability of marijuana**’ means an adequate supply of useable marijuana... which is possessed by a qualified patient or collectively possessed by each qualified patient and the patients’ designated caregiver that includes but shall not exceed six ounces of useable marijuana.”
- **7.34.3.7 (DD) –** “**reasonably necessary**’ means the amount of marijuana in any form approved by the department used by a qualified patient for the purpose of alleviating symptoms caused by a debilitating medical condition or associated medical treatments.”
- **Our concerns with the above provisions are:**
  - The definitions of “adequate supply” and “uninterrupted availability of marijuana” appear to restrict the amount of medical marijuana allowed a qualified patient or primary caregiver to no more than 6 ounces, 4 plants, and 3 seedlings over the course of the three month period rather than at one point in time. The regulations need to clearly state that the limits (6 ounces, 4 mature plants and 4 seedlings) grant people the right to possess that amount at any one time, not just “over 3 months.”
  - Six ounces of useable marijuana over a 3-month period is insufficient for some patients, and the regulations should provide for exceptions to the 6 ounce limit upon a special showing, such as a letter from the physician explaining why additional amounts are needed.

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- The definition of “uninterrupted availability of marijuana” includes a separately defined “adequate supply” of useable marijuana “which is possessed by a qualified patient or collectively possessed by each qualified patient and the patients’ designated caregiver that shall not exceed six ounces of useable marijuana.” Note that “adequate supply” is defined as including 6 ounces of useable marijuana, 4 mature plants and 4 seedlings for a period of 3 months, whereas “uninterrupted availability” includes only 6 ounces of useable marijuana. These two definitions are inconsistent and the definition of “uninterrupted availability of marijuana” should include 6 ounces of useable marijuana, 4 mature plants and 4 seedlings.
  - There are no definitions of “mature plants” or “seedlings” and patients and caregivers are not provided with guidance about what these terms mean. We urge the department to review how other states with medical marijuana laws have defined these terms, and we would be happy to work with the department to come up with a sample definition.
  - The draft is missing a comma before the word “four” in the definition. Also, it spells out three seedlings, but has the numeral 4 in parentheses.
  - It is unclear how the term “reasonably necessary” relates to “adequate supply” or “uninterrupted availability.”
  
- **7.34.3.7 (G) Definition of “Cannabis” and 7.34.3.7 (O) Definition of “Marijuana”**
  - These definitions are limited to the plant sativa. However, the cannabis genus has various species and strains. Different genetic strains of marijuana produce different therapeutic effects and the department is unnecessarily limiting the definition to the plant sativa.
  
- **7.34.3.7 (H) “Consent to release of medical information form.”**
  - The medical release consent form seeks more information than may be needed for participation in the program. Specifically, it allows the department to obtain information relating to an applicant’s “Sexually Transmitted Diseases (STD)... [and] may also include information about behavioral or mental health services, and treatment for alcohol and drug abuse and information obtained by the New Mexico Department of Health from other providers.” It is not clear why this information is necessary to determine whether a person qualifies for the program.
  - There are other forms that both the patient and practitioner must complete where the necessary medical information is already provided, so it is not necessary for the department to have access to the patient’s medical records. The written certification and the opportunity to contact the practitioner should provide the Department with adequate means to verify the application. Therefore the Department should have no need to view patient’s medical files.
  - We recommend deleting the signed release of information requirement. In the alternative, the release should specify that only medical information relevant to the patient’s qualifying condition should be accessible by the department.
  
- **7.34.3.7 (K) “Designated caregiver”** is a resident “who has been designated by the patient’s practitioner or qualified patient.....” However, in the “**Designated caregiver**

**application form**” section (7.34.3.8 (C)), it states that the person requires written approval from the qualified patient and the qualified patient’s practitioner.

- We recommend that the requirements in the application form should be consistent with the definition of designated caregivers, i.e. the written approval should be from the qualified patient or the caregiver.
- **7.34.3.7(V) – Definition of “Possession”** “means the full accounting of medical use marijuana under the qualified patient’s, or designated caregiver’s, control.”
  - It’s unclear what this means. The regulations should provide additional guidance to patients about what “possession” means.
- **7.34.3.7(X) – Definition of “Premises”** “all buildings or grounds for which the...” has a typo and the word “for” should be deleted.
- **7.34.3.8 (A) – Qualified patient enrollment form** states that the “department *may* issue a registry identification card...” and requires information in subsection (7) regarding the “length of time the applicant has been under the care of the practitioner providing the medical provider certification for patient eligibility.”
- **7.34.3.9(A)(d): “Registry Identification Cards. Department Inquiry.”** The department may verify application information including “contacting the attending practitioner to request further documentation to support a finding that the practitioner is the applicant’s *attending practitioner...*”
  - Our concerns with these provisions are:
    - If the regulations use the word “may” instead of “shall” this means that the department has the discretion to deny a registry card even if the person meets all the requirements for a “qualified patient.” We recommend that the regulations should state: “the department *shall* issue a registry identification card...”
    - The phrase “attending practitioner” is a new term of art not previously used in the statute. Use of this phrase inappropriately opens up the regulations to future confusion and unnecessary litigation.
    - The applicant’s “attending practitioner” (if this phrase is synonymous with “primary care physician”) may not feel comfortable recommending marijuana, not on the basis of any doubts about the medical appropriateness of the recommendation, but rather based upon the fear of federal government retaliation. Therefore, the patient may have received the recommendation from another qualified practitioner.
    - The Act itself does not specify that the practitioner must be the applicant’s attending physician; accordingly, the regulations are improperly and unnecessarily narrowing the scope of the Act.
  - We recommend amending **7.34.3.9(A)(d)** to read “contacting the attending practitioner to obtain further documentation that the applicant’s medical diagnosis and medical condition qualify the applicant for enrollment in the medical use cannabis program.”
- **7.34.3.8 (D) – “Designated Caregiver application requirements and prohibitions”** states that “no other cost associated with the possession of medical use marijuana...including the cost of labor, may be reimbursed or paid. All marijuana possessed by a designated caregiver

for a qualified patient is the property of the qualified patient and *must* be provided to the qualified patient by the designated caregiver upon request.”

- The first statement regarding reimbursement is overly restrictive and not required by the Act. Further, a consequence of the statement would be to discourage caregivers from growing/maintaining marijuana for a qualified patient.
- The last sentence in this section may in theory create a federal law preemption problem because it requires the caregiver to do an act which violates federal law, i.e. distribute marijuana. This sentence should be reworded to avoid possible preemption problems. One suggestion is to end the sentence after the words “qualified patient” and to delete the words “and *must* be provided to the qualified patient by the designated caregiver upon request.”
- **7.34.3.9 (C) – “Supplemental information requirement”** requires that any changes in address, practitioner, or caregivers must be reported to the department within 10 calendar days. Further, failure to do so will result in *immediate* revocation of the identification card.
  - This is an unduly harsh consequence for a patient’s failure to promptly notify the department of any changes.
  - We recommend increasing the number of days (to make it business days rather than calendar days); or instead of automatic revocation, allow the department to consider information about why the patient failed to notify the department of the change within the time required (e.g. incapacitation, illness, hospitalization.)
  - In the alternative, the regulations should state that failure to notify the department of changes *may* result in revocation of the identification card.
- **7.34.3.9 (E) Registry identification card renewal application.** “...A qualified patient or designated caregiver shall apply for a registry identification card renewal no less than thirty (30) calendar days prior to the expiration date of the existing registry identification card ...”
  - It is unclear what consequences there are if the person fails to apply for a renewal no less than thirty calendar days prior to the expiration date.
  - We recommend amending 7.34.39(E) to read “... thirty calendar days prior to the expiration date of the existing registry identification card *in order to prevent interruption of possession of a valid (unexpired) registry identification card.*”
- **7.34.3.9 (H) – “Automatic Expiration of registry identification card by administrative withdrawal”**
  - As written, it’s unclear what this section means and who the “licensing authority” is. The regulations should clarify what these provisions mean.
- **7.34.3.9 (I) – “Lost or stolen registry identification cards.”** “The qualified patient or primary caregiver shall report a lost or stolen registry identification card to the division within twenty-four (24) hours after discovery...”
  - The 24 hour-requirement is an unreasonably short period of time to notify the department of a lost or stolen ID card, particularly if the loss occurred over a weekend. Additionally there are no specified consequences for failure to notify, so patients may believe themselves to be vulnerable to revocation of their identification cards.

- We recommend increasing the time period (to at least 48 hours) in which a patient/primary caregiver has to notify the Department of a loss.
- **7.34.3.9 (J)(1) – “Survey, monitoring and investigations”** – “the department may contact a... cardholder...in person to verify the current accuracy of information...”
  - Our concern is that the “in person” language this seems invasive.
  - We recommend that the “in person” language be stricken, or in the alternative that patients be given reasonable notice before the department shows up to monitor a patient in person.
- **7.34.3.9 (J)(2)** – “The department shall refer criminal complaints... to the appropriate authorities”
  - This provision imposes an additional burden on the department to be an arm of law enforcement. We recommend deleting this provision.
- **7.34.3.10 (B)(1)(c) – “Procedure for requesting informal administrative review.”** This section requires that the request be made “within twenty (20) calendar days, as determined by the postmark, from the date of the denial notice issued by the department.”
  - Twenty calendar days to appeal as postmarked from the date of the denial notice is a short period of time and may create problems for patients because of delays in mail delivery. Even without any delays in mail delivery, a letter could easily take 2-4 days to reach the patient, at which point the patient would need time to gather materials for an effective appeal. Given their medical condition, this may be especially difficult, if not impossible, to do in such a short time span.
  - We recommend that the appeal period be expanded to at least 30 days – the window established by other states with similar programs.
  - This section also requires that the applicant provide his/her work address. It’s unclear why this information is needed or even relevant in the administrative review process. We recommend deleting the request for a work address.
- **7.34.3.10 (D) – “final determination.”** “Content. The administrative review committee shall render, sign and enter a written decision setting forth the reasons for the decision and the evidence upon which the decision is based....”
  - There is no time limit in which the department shall notify the applicant of its decision.
  - We recommend specifying a deadline for the department to issue a decision, for example 30 days.
- **7.34.3.12 “Exemptions from Criminal and Civil Penalties...”**
  - The regulations should add “or political subdivisions thereof” to “by the state of New Mexico” to also cover local and county governments and law enforcement officials.
- **7.34.3.11 (A) “Prohibitions....”**
  - We recommend adding an explicit statement that participation in the program does not relieve anyone from the reach of federal prosecution by federal authorities for violations of federal law.

- There is a problem with saying there is no exemption from “possession” in any other “public place,” since highways and roads are “public places.” Qualified patients (and designated caregivers) should be able to possess the medicine as they transport it on highways or roads to their homes. This would mean they are possessing it in a “public place.” We recommend deleting the words “or other public place” in subsection (3)(d).
- **7.34.3.12 (B) – “Exemption from criminal penalties....”** This section exempts patients and caregivers from arrest and prosecution for possession related to the medical use of marijuana.
  - It is unclear if this includes transportation as well. See comments on § 7.34.3.7(A)
- **7.34.3.12 (C) - “Exemptions From Criminal And Civil Penalties For the Medical Use of Marijuana”** “shall not apply to a qualified patient under the age of eighteen (18) years, unless...”
  - This subsection is unnecessary and confusing because a person under 18 years of age is already required to comply with the specified requirements in order to be a qualified patient. This section implies that there are additional requirements on qualified patients under 18 years of age, and the superfluous language can lead to future legal problems.
- Overall there are time period inconsistency problems. The time periods for deadlines are different and may be problematic to implement and for patients to remember.
  - We recommend that whenever possible, time periods should be standardized to thirty (30) days. This is consistent with other states’ regulations and will allow for a more manageable system for the department.

For the reasons stated, we urge the department to fully consider all of our concerns and recommendations. We would welcome the opportunity to provide additional information or answer any questions.

Sincerely,



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