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Cannabis Education, Research and Advocacy

September 10, 2014

To: Colorado Board of Health
Email: cdphe.bohrequests@state.co.us

Dear Board of Health Members:

Pursuant to CRS 24-4-103, please accept this letter and all attachments as part of the official rulemaking record concerning proposed Amendments to 5 CCR 1006-2, Medical Use of Marijuana, with a rulemaking hearing set for September 16, 2014 at 8:30am at the State Capitol.

The Cannabis Therapy Institute is a patient advocacy and education organization. We speak on behalf of thousands of Colorado patients who are too sick to participate in the political process. Many of the CDPHE's proposed regulations will be harmful to patients, are unconstitutional, and subvert the will of the voters who enacted Colorado's medical marijuana law (Article XVIII Section 14 of the state Constitution, commonly known as Amendment 20) in 2000.

As you know, Article XVIII Section 14 gives the CDPHE **very limited powers and duties** with regards to the medical marijuana program. Article XVIII Section 14 (3) (a) requires the Colorado Department of Public Health and Environment to maintain a **confidential** registry of patients, to be accessed only by the state health agency and only when law enforcement has detained someone that they believe is in possession of a fake registry ID card.

The CDPHE is tasked with maintaining a confidential registry of medical marijuana patients in order that their legitimate status can be confirmed, when necessary and appropriate, to protect such patients from being wrongfully raided, arrested, or harassed by law enforcement. CDPHE's job is **merely to record** the information provided by the medical marijuana patient and to make confirmation of that registration available to specific individuals for particular reasons in extremely limited circumstances.

According to the Office of the State Auditor's report in 2013, the CDPHE has utterly failed to perform this simple task. Yet time and time again, the CDPHE over-steps its Constitutional mandate. The proposed rules to be discussed on Sept. 16 are yet another example.

1) Patients who shop at MMCs will be tracked in the Department of Revenue's non-confidential database, which is open to all law enforcement.
In a stunning reversal of policy, the CDPHE wants to stop tracking a patient's MMCs and plant counts in the confidential Medical Marijuana Registry, which they have done since 2010. The proposed rules eliminate the CDPHE's long-standing practice of tracking of patients' Medical Marijuana Center (MMC) designations on the Registry application. Instead, the CDPHE says that patients should use the Department of Revenue's non-confidential database and tracking system to track MMC designation and patient plant counts.

Proposed Regulation 2 (A) (2) (b) states that specific MMC information would no longer be stored by the CDPHE in the confidential Registry. Proposed Regulation 2 (D) states that the **CDPHE will no longer** "process patient requests to change his or her designated medical marijuana center."

The CDPHE proposed rules state that "a patient wishing to change his or her designated medical marijuana center **should reference the requirements established by the department of revenue's marijuana enforcement division**." Proposed Regulation 2 (D).

The Department of Revenue's Medical Marijuana Rule M 402 requires Medical Marijuana Centers "maintain a written record" of:

- The patient's current MMC
- The patient's plant count (how many plants the patient's doctor has recommended).
- The patient's "written authorization" regarding "any relative plant count waivers to support the number of plants designated for that patient."

"Written authorizations" and "plant counts waivers" would mean a patient's physician recommendation and justification for increased plant counts would be tracked by the DOR. This is protected, confidential medical information.

There are NO CONFIDENTIALITY REQUIREMENTS for this information.

The CDPHE claims that this change is just a way to make the Registry more efficient, but it really is a plan to allow confidential patient information to be tracked by the Department of Revenue in a new non-confidential patient registry, that can be shared with all law enforcement at any time. This is an unprecedented attack on a patient's constitutional right to confidentiality.

Patient confidentiality is protected by the Constitution, giving it the highest legal standard.

The DOR requires MMCs to use the online **MITS (Marijuana Inventory Tracking Solution)**, which keeps track of every transaction from "seed-to-sale" with Radio Frequency ID (RFID) tracking and facial recognition technology. **The MITS is open and accessible to all law enforcement, at any time, for any reason.**

The new rule change would **force patients** who purchase medicine at Medical Marijuana Centers **to become part of the MITS system**, with no provisions whatsoever for confidentiality.

Patient privacy is paramount. If it becomes known that a person uses marijuana, that person faces discrimination and potential harm in employment, housing, child custody, health insurance, veteran's benefits, organ transplants, automobile insurance, firearm ownership, occupational licensing (including real estate, medical professionals, construction trades, and teachers), student loans, loss of right to due process, interactions with law enforcement (loss of freedom), and incrimination in federal crimes.

In addition, since marijuana is a violation of federal law, these non-confidential DOR registration requirements violate the U.S. Constitution Fifth Amendment and the Colorado Constitution Article II, Section18, which both protect citizens from self-incrimination.

Read more on the CDPHE's history of breaching patient confidentiality here:
http://www.cannabistherapyinstitute.com/patients/privacy/

2) New caregiver 10-patient limit is unconstitutional.
The proposed rule that limits caregivers to serving no more than 10 patients is unconstitutional. Any patient limit on caregivers is unconstitutional. Amendment 20 (Article XVIII, Section 14 of the Colorado Constitution) contains no limit on the number of patients a caregiver can serve.

Amendment 20 contemplated medical marijuana distribution by qualified caregivers, not by Medical Marijuana Centers. MMCs were not mentioned in A20, and were instead created by statute in House Bill 10-1284 in 2010.

3) No proof of widespread problem: Proposed rules written to target 4 people.
According to the CDPHE rulemaking packet, only **4 out of 2,896** caregivers that have voluntarily registered with the CDPHE have more than ten patients. That means these proposed caregiver rules are targeted at **0.001% of the caregivers** that have voluntarily registered. Since registration of both patients and caregivers is voluntary under the Constitution, the fraction of caregivers who are the target of these rules probably becomes even smaller.

Enactment of these new rules will negatively affect thousands of patients, yet the CDPHE has not presented any evidence of any actual harm that has been caused by any caregivers anywhere. Frequently, members of the Marijuana Industry Group or similar greed-based trade organizations complain to state legislators that caregivers are a competition to their businesses and hurt their profit margin.

However, caregivers have been serving multiple patients for over 14 years, protected by the Constitution, with no documentation of any long-standing or systemic complaints against the practice. There is no problem to address.

4) The caregiver system is essential to the medical marijuana program.
Caregivers provide medicines and therapies that are not provided by Medical Marijuana Centers (MMCs). The MMCs were created by statute, but the caregiver system was voted into the Constitution by the people of the state of Colorado in 2000. These proposed rules eliminating caregivers would subvert the will of the voters.

5) Eliminating caregivers will harm patients by forcing them to purchase medicine at Medical Marijuana Centers.
The caregiver model has worked well without problems for over 14 years in Colorado. If these new rules are enacted, patients will be harmed when their caregivers are eliminated. MMCs are generally more expensive, have lower quality medicine, and have fewer varieties and forms of medicines than those provided by caregivers. Also, MMCs are banned in many locations, including almost all of eastern Colorado and a good portion of the Western Slope. These proposed rules will put undue hardships on patients, forcing many to travel hundreds of miles to obtain lower quality medicine at a higher price.

6) Caregiver registry is unconstitutional.
Proposed new Regulation 2 (2) (a) requires patients to register their caregivers with the CDPHE. There is no Constitutional requirement for caregiver registration under Amendment 20. Once again, the CDPHE seeks to over-step its Constitutional authority.

7) Caregiver registry is non-confidential.
In addition, the proposed rules to register caregivers through the CDPHE contain no provisions for confidentiality, effectively creating a list of cannabis cultivators that is open to law enforcement. Since marijuana is a violation of federal law, this registration requirement violates the U.S. Constitution Fifth Amendment and the Colorado Constitution Article II, Section18, which both protect citizens from self-incrimination.

8) Using over-collected patient fees to pay for grant programs is unconstitutional.
The money used to fund the Colorado Medical Marijuana Research Grant Program was collected illegally from patients and should be returned to them. Article XVIII, Section 14 of the state Constitution (commonly called Amendment 20, approved by state voters in 2000) requires that patient fees can only be used to pay for "administrative costs" of maintaining the confidential Medical Marijuana Registry (MMR). According to the state Auditor's report in 2013, the CDPHE had a $12 million surplus from over-collected patient fees and was failing to keep the Registry confidential.

The proposed Colorado Medical Marijuana Research Grant Program is clearly not an "administrative cost" of maintaining the Registry, therefore the proposed rules creating it should be rejected. If patients want to donate their money to state-sponsored cannabis research, then patients should be given the choice to do so. However, the money currently held by CDPHE was over-collected from patients for over 13 years. Patients were paying for a service from the CDPHE: to maintain a confidential Registry and to notify patients of any changes to the Registry rules. Since patients got neither confidentiality nor notification from the CDPHE (according to the state Auditor), patients should certainly be refunded the money they overpaid for all those years. To spend it on a research grant program is a blatant violation of the Constitution.

9) Patients have not been adequately notified of the proposed rulemaking hearing.
The CDPHE has consistently failed to adequately inform stakeholders about the changes in medical marijuana Registry rules.

The fact that surveys about these issues only 129 responses proves that patients do not know about these proposed changes. According to Attachment B, page 6 of the rulemaking packet (Stakeholder Survey Responses & Comments), the survey the CDPHE posted on their website for 7 weeks **only had 129 respondents**. There is no breakdown of how many of the respondents were actually patients or caregivers on the Registry, but even if they all were, it would only represent **0.0005%** of the 250,000+ current and former patients and caregivers on the Registry.

On page 18 of the rulemaking packet, CDPHE admits that emails were only sent to **580 "contacts"**. Information gathered from Colorado Open Records Act requests have shown that most of these "contacts" are not patients. Many are government officials and law enforcement.

In 2007, patients withdrew a lawsuit against the CDPHE on the stipulation that the CDPHE agreed to inform patients of all future rulemaking hearings. In LaGoy v Colorado, Denver District Court Judge Larry Naves ruled that the CDPHE had not provided adequate notice of a rulemaking hearing.

On November 15, 2007, the Court signed a joint stipulated Order that settled all claims in this case. The Court's Order/settlement of November 15, 2007 provided in relevant part that:

> (3) The Colorado Department of Public Health and Environment **shall provide notice** to all state-registered medical marijuana patients, caregivers, and the parties to this action of any meeting to discuss possible policy changes or regulatory changes to the Colorado medical marijuana law when such notice is required by the Colorado Open Meetings Act, C.R.S. 24-6-401 et seq. and/or the Administrative Procedures Act, C.R.S 24-4-101, et seq.

The Court Order of November 15, 2007 was the result of a stipulated settlement, drafted and negotiated by respective counsel, which supposedly ended this litigation and was supported by adequate consideration.

Despite repeated requests by patient advocates, and despite Judge Naves' court order, CDPHE has consistently refused to notify patients by mail or email of any rulemaking hearings, surveys or requests for input.

Patients have paid a fee to the CDPHE to maintain a confidential Registry and notify them of any changes to the Registry. The CDPHE is required to contact all current and former patients and caregivers directly every time there is a rulemaking hearing or substantial change to the Registry. These stakeholders are paying members of the Registry, and the CDPHE is supposed to be providing a service to them.

Part of the $12 million in over-collected patient money should be used for to purchase $0.52 stamps to send letters to all current and former patients and caregivers on the Registry that these rulemaking proceedings are occurring. Why does the CDPHE continuously refuse to do so?

10) The caregiver system will be essential if HB 10-1284 is repealed.
House Bill 10-1284, which created the Medical Marijuana Center (MMC) model, is scheduled to be repealed (sunset) in July 2015.

If HB10-1284 is allowed to sunset, **MMCs will be eliminated** and forced to convert to A64 Retail Marijuana Stores. **This will make the right of caregivers to serve multiple patients even more important than it is now.**

The state purposefully began the destruction of the caregiver model in 2010 with House Bill 10-1284. Since HB1284 passed, more and more patients have been forced to become reliant on MMCs to get their medicine.

If HB 10-1284 is allowed to sunset, patients will be forced to purchase their medicine from Retail Marijuana Stores under Amendment 64. A64 stores charge high taxes and do not provide the same varieties and forms of cannabis that patients need as medicine. This is another undue burden on patients, and is contrary to the spirit of the Constitution.

You don't need a Registry ID card to obtain medicine from a caregiver. Under the Constitution, the Registry is and always has been voluntary. However, you do need a red card to purchase cannabis at an MMC. If MMCs start sending private patient information to the DOR, that will defeat the very purpose of Amendment 20, thwarting the will of the voters to create a compassionate system of cannabis distribution through caregivers.

11) The proposed rules violate Equal Protection rights.
The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution prohibits states from denying any person the equal protection of the laws. The proposed rules, which are designed to eliminate patients' caregivers, discriminate against patients who use cannabis as medicine. Other medical patients can use whatever medicine they need from any provider, but medical cannabis patients are treated like second-class citizens.

These proposed rules are also in violation of health equity and environmental justice (HEEJ) standards. Achieving health equity requires valuing everyone equally, and this is clearly not the case here. The proposed rules treat medical cannabis patients as second-class citizens, at best, causing huge disparities in this area of health care.

Conclusion

In an interview earlier this year, Dr. Larry Wolk, executive director of the CDPHE, accused patients of using the CDPHE as their "crutch."

“They (patients) can no longer use the Department of Public Health as their defense for medical necessity….The patient then will be put in this position of trying to make sure that they can establish medical necessity with police or with the legal system **without using the Department of Public Health as their crutch**.”
– Dr. Larry Wolk, executive director of the CDPHE, to Denver 7 News

Dr. Wolk's attitude that the patients are trying to use the CDPHE as a "crutch" is telling. The CDPHE has no respect for patients or their confidentiality, and has not even the smallest amount of compassion. What kind of cruel health care professional would deny a patient a crutch, anyway?

We sincerely ask you to reject the proposed rules we have discussed above. If you pass the proposed rules, it will be a violation of the Constitution, and Colorado medical cannabis patients will suffer.

Sincerely,

Laura Kriho
Cannabis Therapy Institute

Kathleen Chippi
Patient and Caregiver Rights Litigation Project

Attachments regarding Fifth Amendment Violations

- California NORML: Federal Medical Marijuana Prisoners and Cases: Shows the real and immediate harm patients face if it becomes known that they use cannabis.