



Cannabis Education, Research and Advocacy

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January 28, 2011

Roxy Huber, Executive Director
Colorado Department of Revenue
Medical Marijuana State Licensing Authority
Email: MMEDRulecomments@dor.state.co.us

Re: Rulemaking comments and Petitions for Emergency Rules

Dear Ms. Huber:

Pursuant to CRS 24-4-103, Please accept this letter as part of the official rulemaking record for regulations proposed by the Medical Marijuana Enforcement Division concerning implementation of HB 10-1284.

This letter also contains a Petition for Emergency Rules pursuant to the state Administrative Procedures Act, CRS 24-4-103 (6).

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.

Through HB 10-1284, the state legislature took safe access to cannabis medicine by patients out of the hands of their loving caregivers and put it into the hands of a heavily-regulated, for-profit business model controlled by Department of Revenue. The authors of HB 10-1284 designed the bill to put 80% of existing medical marijuana providers out of business, so it is no wonder that it has resulted in a regulatory nightmare. HB 10-1284 was not created to make a working model for medical marijuana distribution, it was designed to shut down an industry deemed undesirable by many legislators.

It was an unusual decision for the legislature to take regulation of a medical program out of the hands of the Colorado Department of Public Health and Environment and put it into the hands of the Department of Revenue. The Department of Revenue does not normally deal in health care policy, so the legislature put the Department in a difficult position of regulating a product with which it was quite unfamiliar. We appreciate that you may have had a chance to become educated on the historical and medical uses of cannabis. We would like to help.

Many people don't know that this country was founded on hemp. Thomas Jefferson and George Washington both cultivated medicinal cannabis. The first Levis and the covered wagons were made out of hemp. "Canvas" comes from the word cannabis. Cannabis has been illegal in this country only since 1937. Cannabis has been used as a medicine safely by humans for over 10,000 years without one death from an overdose. In 1988, the DEA's chief administrative law judge Francis L. Young called it "safest therapeutically active substance known to man." The new MMED rules are historic in that they treat cannabis as the most scrutinized substance on the planet, tracked more stringently even than plutonium or firearms. We think is the wrong direction.

PROPOSED EMERGENCY RULE #1

Statutory Authority: Sections 12-43.3-201 and 12-43.3-202, C.R.S.

Basis and Purpose:

The privacy of patients is protected by Article XVIII, Section 14 of the Colorado Constitution. The MMED's new rules threaten those privacy rights by creating a database system where patient identifying information will be stored and accessible by other agencies. For these reasons, these emergency rules are necessary for the immediate preservation of the public peace, health, and safety.

Proposed Emergency Rule #1

Because the rights of patient privacy is guaranteed by Article XVIII, Section 14 of the Colorado Constitution, be it hereby declared that the Medical Marijuana Enforcement Division (MMED) of the Department of Revenue's rules regarding the "sales, manufacturing and dispensing of medical marijuana" (1 CCR 212) be amended by the inclusion of the following new section:

43.3-xxx Patient Privacy Regulations

(1) The MMED shall not require Medical Marijuana Centers to photograph, videotape, duplicate or in any other way record any patient identifying information, including but not limited to their faces, their CDPHE Registry ID cards or their photo IDs.

(2) The MMED shall not require Medical Marijuana Centers to keep patient identifying information. MMC's will be required only to check a patient's CDPHE Registry ID card for validity on its face and they shall not be required to photograph, videotape, duplicate or in any other way record any patient identifying information.

Justification for Emergency Nature of Rules

CRS 24-4-103 (6) (a) provides that an "emergency rule may be adopted ... if the agency finds that immediate adoption of the rule is imperatively necessary to comply with a state or federal law or federal regulation or for the preservation of public health, safety, or welfare..." and if compliance with the requirements of the non-emergency rulemaking procedures "would be contrary to the public interest."

The protection of patient privacy is of the utmost concern. Often, by the time confidential information is leaked or shared, the damage may already have been done. For these reasons, these emergency rules are necessary for the immediate preservation of the public peace, health, and safety. Delaying in the enactment of these rules would be "contrary to the public interest."

In addition, these emergency rules allow the State of Colorado to comply with the Fifth Amendment of the U.S. Constitution's protection against self-incrimination. Marijuana possession and cultivation are still illegal under federal law.

Request for Formal Rulemaking Hearing

If the state licensing authority denies this emergency petition, we request that you set a formal rulemaking hearing on the petition as soon as possible.

PROPOSED EMERGENCY RULE #2

Statutory Authority: Sections 12-43.3-201 and 12-43.3-202, C.R.S.

Basis and Purpose:

The current proposed regulations regarding medical marijuana were written in violation of Colorado's Open Meetings Law. These regulations should not be promulgated because of their failure to comply with CRS 24-6-402 (2) (a) which requires that "all meetings of two or more members of any state public body at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times."

In July 2010, the Medical Marijuana Enforcement Division formed the "Medical Marijuana Workgroup", a 25 person advisory committee composed of industry and government members, to give input on the new rules needed to implement HB 10-1284. The "Workgroup" members became the "stakeholders" referred to in the proposed rules. They were chosen without any public input.

The MMED originally planned to hold their "stakeholder" meetings in private, but after pressure from patient advocates and the press, they agreed to hold the meetings in public with proper notice. From August to December 2010, the "stakeholders" had a handful of public meetings. At their second public meeting, the MMED created several sub-committees of the workgroup. From September through December 2010, these sub-committees met repeatedly outside of the public meetings in private to discuss public business. At each of these private sub-committee meetings, the "stakeholders" developed medical marijuana policy advice that was incorporated into the MMED's new proposed rules. The public was not allowed to attend these private sub-committee meetings, in violation of CRS 24-6-402 (2) (a).

The MMED will argue that the workgroup stakeholders did not formally give advice on the rules. However, the "stakeholders" were referred to 12 times in the 99 pages of proposed rules as having had an effect on the final version of the rules.

Proposed Emergency Rule #2

Because the patients of Colorado, as well as the press, deserve openness in the process of government that is guaranteed by the Open Meetings Act, be it hereby declared that the Medical Marijuana Enforcement Division (MMED) of the Department of Revenue's rules regarding the "sales, manufacturing and dispensing of medical marijuana" (1 CCR 212) be amended by the inclusion of the following new section:

43.3-xxx MMED Medical Marijuana Advisory Committee

(1) Instead of adopting the proposed rules which were developed illegally, the MMED shall form the Medical Marijuana Advisory Committee (hereinafter "Committee") to advise on all rules to be adopted by the Medical Marijuana Enforcement Division regarding medical cannabis in the state. The Committee will be composed of nine members. Each is to be appointed by the Director of the MMED to serve a term of office of two years, except as provided in subsection (2) of this section. Potential appointees must be residents of Colorado and must meet the following qualifications:

- (a) One appointee shall be a person who has benefited from the use of therapeutic cannabis.
- (b) One appointee shall have had experience acting as a primary caregiver for a seriously ill person.
- (c) Two appointees shall be physicians licensed to practice medicine in Colorado.
- (d) One appointee shall have at least five years' experience in a field related to public health.
- (e) One appointee shall have at least five years' experience in a field related to electronic security.
- (f) Two appointees shall have at least five years' experience in the public advocacy of therapeutic cannabis.
- (g) One appointee shall be chosen at large at the discretion of the Director of the MMED whom he/she believes will best represent patient interests.

- (2) The term of office for appointees pursuant to Section(1) (d), (e), and (f) shall be one year for the first set of appointments only. Thereafter all appointments shall serve a term of two years pursuant to Section (1).
- (3) The Director of the MMED will make notice to the public and take applications for the positions for at least 30 days.
- (4) The Director of the MMED shall make the first set of appointments no later than March 15, 2011.
- (5) The Director of the MMED shall appoint only members who shall protect the rights of patients to safe and confidential access to quality medicine.
- (6) The Committee members shall serve as volunteers, unless otherwise provided for by law.
- (7) The first task of the Committee shall be to hold a public meeting where they will review the draft rules that were rejected by the MMED at their hearing on Jan. 27.
- (8) For purposes of Colorado’s Sunshine Laws, the Committee and any of its subcommittees will be considered a “state public body” as defined in C.R.S. 24-6-402(1) (d) and all meetings will be open to the public to observe, but not to participate in.

Justification for Emergency Nature of Rules

CRS 24-4-103 (6) (a) provides that an emergency rule may be adopted if they are necessary for the “for the preservation of public health, safety or welfare” and if compliance with the requirements of the non-emergency rulemaking procedures “would be contrary to the public interest.”

The formation of the Committee in a legal way is mandatory to avoid expensive lawsuits and to allow public participation as required by law. The rule needs to be enacted as an emergency because the failure to follow the law has held up the rulemaking process to the point where both patients and businesses will be harmed by any further delays. It is in the imperative public interest that these rules not be promulgated and that the Advisory Committee be formed immediately.

Request for Formal Rulemaking Hearing

If the state licensing authority denies this emergency petition, we request that you set a formal rulemaking hearing on the petition as soon as possible.

COMMENTS ON MMED PROPOSED RULES

PATIENT PRIVACY CONCERNS

Patients and their caregivers in Colorado saw HB 10-1284 as a direct attack on Constitutional rights and safe access to medicine that patients had enjoyed for over 9 years in Colorado. The passage of HB 10-1284 harmed patient safe access to their constitutionally-protected medicine by restricting their choice of caregivers and physicians and by destroying their right of confidentiality and their ability to use an affirmative defense in court.

Rules as well as statutes must abide by the Constitution. Even though the state legislature through HB 10-1284 violated the Constitution in many ways, we hope that you as the Medical Marijuana State Licensing Authority will have more respect for the Constitution than the legislature did.

The new Department of Revenue rules related to video surveillance and tracking of patient purchases certainly violate the patients' right to confidentiality guaranteed in the Constitution.

Article XVIII Section 14 (3) (a) of the Colorado Constitution 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 claiming to be in possession of a valid registry ID card. The Constitution does not authorize any other collecting of patient information for any other purposes by any other agency. Confidentiality is the backbone of patients' Constitutional right to cannabis medicine. Patients stand to lose their jobs, their homes, their health insurance, their children and other harms if it becomes known that they are on the medical marijuana registry. There is no point in a patient signing up for the medical marijuana program if they have no guarantee that their identity and medical information will be kept confidential.

See attached Original Action Petition to the Colorado Supreme Court filed Jan. 5, 2011 (Filing #2011SA4 – See attached PDF) on behalf of caregiver and dispensary owner Kathleen Chippi and the Patient and Caregiver Rights Litigation Project.

The MMEDs proposed rules include tracking every purchase from “seed to sale.” However, under the Constitution, there can be no tracking and monitoring of patient medical information outside of the CDPHE confidential registry. The following proposed rules are all unconstitutional.

Proposed rule 43.3-xxx B. "Specifications for Video Surveillance and Recording of Medical Marijuana Licensed Premises" is un-Constitutional and will violate the patients' right to confidentiality in several ways.

Under this section, Proposed Rule 5 (c) requires that Medical Marijuana Centers record each transaction with a patient on video surveillance or by capturing "fixed images of the transaction and the individual making the purchase." The rules require patients to be videotaped or photographed with their Registry card, another photo ID card, and the amount of medicine being purchased. According to the Department of Revenue's consultant Fern Epstein of Rebound Solutions, the Department of Revenue's goal is to log all of this information into an enormous electronic database, accessible to law enforcement and other state agencies on demand. Even if patient's names aren't used in the database, photographic evidence of their names on their ID cards exists and pictures of their faces will also be used. One need only to say "WikiLeaks" to prove that even the federal government cannot securely store its most important electronic secrets. Patients' lives stand to be destroyed by the creation and inevitable leaks in this new database. Criminal penalties for those responsible for leaking the information are of no consequence, as by the time the information is leaked, the harm has been done.

Proposed rule 43.3-xxx B. 6 (c) states "a chronological POS transaction log must be made available to be used in conjunction with recorded video of those transactions." This requirement will also violate patient confidentiality rights.

Proposed rule 43.3-xxx B. 6 (h). requires that "surveillance recordings and clear still photos must be made available to the MMED and law enforcement personnel upon request." This opens up all patient information, including identifying information like photographs of their faces, to law enforcement on demand. This requirement will also violate patient confidentiality rights.

Proposed rule 43.3-xxx B. 11. requires a Point of Sale Integration and Data Overlay for "systems not utilizing Point of Sale (POS) photo capture". The requirement will be to overlay "the video with data from on premise point of sale systems." The rules states that "The overlay data shall allow for manual verification of the transaction with the associated video." This collection of patient data will also violate patient confidentiality rights in violate Article XVIII, Section 14 of the Colorado Constitution.

Proposed rule 43.3-xxx B. 12 (b)? states that "the MMED must have full control capability over camera operation over all other remote access service equipment located outside of the surveillance room." This seems to indicate the MMED will be allowed access to these surveillance cameras on demand. This is also a violation of patient confidentiality rights and there is no authority for patient surveillance of any kind in the Constitution, let alone for surveillance of this magnitude.

Proposed rule 43.3-xxx Transportation – Authorization and licenses required.

"A. No person shall transport Medical Marijuana or Medical Marijuana Infused Products pursuant to section 12-43.3-310(5), C.R.S. and these rules without first being licensed by the State Licensing Authority." This would seem to apply to patients and caregivers transporting medicine. Is this the intention?

We respectfully ask that you do not promulgate these rules, as they violate patient confidentiality rights guaranteed in the Constitution. If these rules are implemented, no patient will want to be part of this new NON-confidential database system. Please have compassion for Colorado patients.

Sincerely,

Laura Kriho, Director
Cannabis Therapy Institute

Kathleen Chippi
Patient and Caregiver Rights Litigation Project

Attachments: Original Action Petition to the Colorado Supreme Court filed Jan. 5, 2011. (Filing #2011SA4 – See attached PDF) filed on behalf of Kathleen Chippi and the Patient and Caregiver Rights Litigation Project.

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