

**Provisions of Michigan Department of Community Health
Draft Medical Marijuana Rules Needing Revision**

Karen O'Keefe, Esq.
Marijuana Policy Project director of state policies

January 5, 2008

In collaboration with the Lansing law firm Dykema Gossett, I was the principal drafter of Proposal 1. The new law is closely based on Rhode Island's medical marijuana law, which that state's legislature overwhelmingly passed in 2006. Proposal 1 ensures appropriate safeguards without requiring self-incrimination or making life overly difficult for the seriously ill patients whom 63% of Michigan voters chose to allow to use medical marijuana without fearing arrest.

As is the case in the Rhode Island law, Proposal 1 gives the department a very limited role. It allows the department of community health to create rules to set fees for medical marijuana ID cards, procedures for processing applications, and procedures for considering petitions to add additional debilitating conditions. Yet the draft rules have gone much farther, and they instead seek to add onerous and unreasonable restrictions on patients. In several cases they contradict the language of the voter-enacted law.

None of the 12 medical marijuana states require patients and caregivers to produce inventory reports on their medical marijuana, and neither does Proposal 1. Just as patients are allowed to keep far more dangerous medicine like OxyContin in their medicine cabinets instead of safes, none of the medical marijuana states require usable marijuana to be kept in an enclosed, locked location. Similarly, Proposal 1 requires plants, but not usable marijuana itself, to be grown in an enclosed, locked location. The law also does not require inventory reports, which would be self-incriminating because federal law does not yet permit the medical use of marijuana, except by three individuals and short-term trials. Yet the draft rules would require both inventory reports and that usable marijuana be kept in an enclosed, locked facility. These are two of the several rules that need to be changed.

The law also does not charge the department with inspecting or monitoring patients, but the draft rules do. These portions of the draft rules would make very ill patients feel like the state views them as criminal suspects for using a medicine according to their doctors' advice. The law makes it clear that patients' privacy is not to be compromised because they have permission to use medical marijuana. It clearly states that a patient cannot be subject to inspection or search solely for the medical use of marijuana or for having an ID card. This is how our society treats other medicines as well. The department and law enforcement are not allowed to enter the home of the seriously ill and search the premises based on their having a Vicodin prescription.

Voters enacted Proposal 1 as written. They were satisfied with its safeguards, which were carefully considered and are working well in other states, like Rhode Island. The department's role now is to implement that law, not to rewrite it. The rules need to be modified in several areas to avoid overburdening patients and to comply with the spirit and letter of the law voters enacted. Below are 22 specific changes to bring the rules in line with the language and intent of the law, and to avoid making life unnecessarily hard on the seriously ill and dying. I hope you will carefully consider them and make each modification. Please do not hesitate to contact me if I can be of any assistance or if you have any question about the initiative's intent.

1) Redefining Private Property as "Public"

Proposal 1 appropriately does not allow medical marijuana use "in any public place." The draft rules, however, attempt to redefine "any public place" to include any place "visible to the public." This would include being inside one's home by a window or on one's porch. These locations are not "public places" and should not be considered so. This draft rule is both unreasonable and contrary to the language of the law.

Recommended revision: Strike "'Public place' means a place open or visible to the public." [Rule 1 (17).]

2) The Opening Language of Draft Rule 3(1) Should Be Modified

The opening language of Rule 3(1) should be modified so it does not indicate that people with debilitating conditions are *required* to apply for a registry ID cards, since some seriously ill people will not use medical marijuana. In addition, the draft rule should not say that the patient must meet the requirements of the administrative rules. The department does not have the authority to impose additional requirements on patients.

Recommended revision, from: "A qualifying patient shall apply for a registry identification card and, in addition to meeting the requirements of the act and the administrative rules promulgated under the act, shall comply with all of the following: ..."

To: "A qualifying patient may apply for a registry identification card by submitting the following: ..." [Rule 3(1).]

3) Strike Requirement That Physicians Practice Independently of One Another

The draft rules would require that a minor's two physicians who sign their certification practice independently of one another. The law includes no such restriction, which would drive up costs and time for minor patients' parents. Proposal 1 is already stricter than many of the state medical marijuana laws by requiring minors to receive certifications from two physicians. All of the medical marijuana states that track the number of minor patients had had zero or one according to a 2006 survey of the state programs with registries. There is no need for this onerous restriction on seriously or terminally ill minors, and it is counter to the language of Proposal 1.

In addition, Proposal 1 does not require that two physicians provide a certification for adults for who granted someone else a durable power of attorney, so the draft rule should not add that restriction.

Recommended revision, from: "... If the patient is a minor or has a representative as defined in R 333.101(19) of these rules, written certifications from 2 physicians, who practice independently of each other, are required."

To: "... If the patient is a minor, written certifications from 2 physicians are required." [Rule 3 (1)(c).]

4) Patients Should Not Have to Submit the Names of Patients Their Caregivers Serve

The draft rules would require patients who are applying for ID cards to specify what other patients their caregiver serves. This would require the caregiver to disclose that information to the patient. Proposal 1 does not require this information to be submitted, and this requirement would require a caregiver violate the privacy of his or her other patients. The department can check its own database to see how many patients the caregiver serves. There is no need for this invasive rule.

Recommended revision: Strike "The names of any other individuals for whom the patient's primary caregiver also serves as a primary caregiver." [Rule 3 (1)(v).]

5) Requiring the Caregiver to Submit Criminal History Information

Draft Rule 3 (1)(a)(vii) includes a vague requirement that caregivers submit criminal history information via the patient applicant, in addition to authorizing a background check. Only felony drug convictions disqualify caregivers, so the vague phrase should either be stricken or be modified to be clear that they only have to submit information if they have a felony drug conviction.

Recommended revision: Strike "Information related to the criminal history of the qualifying patient's primary caregiver." [Draft Rule 3 (1)(a)(vii).]

6) Specify That Copies of Identification Can Be Submitted

Draft Rule 3 (1)(b) is written as though patients and caregivers have to send the department their *original* drivers licenses or other photo identification. Patients and caregivers will need their identification. This should specify that photocopies may be submitted. In addition, minors may not yet have any photo identification, so it should be clear that they would not need to provide identification.

Recommended revision, from: "Submit photographic identification of both the qualifying patient and the patient's primary caregiver, if applicable. The following shall be considered acceptable forms of identification: ..."

To: "Submit photographic identification of both the qualifying patient and the patient's primary caregiver, if applicable, except that if the qualifying patient is a minor who does not have photographic identification, no photographic identification is required. Photocopies of the following shall be considered acceptable forms of identification: ..." [Rule 3 (1)(b).]

7) Inventory Reports

The draft rules would require patients and caregivers to create and submit inventory reports about their marijuana cultivation each year. The draft rule says that the patient would not be issued a renewed card if they did not submit reports. The department does not have the authority to require these records, nor should it. The law clearly enumerates the only reasons that a patient may be denied a card, and failing to submit an inventory report is not one of them, because the law 63% of voters approved does not require inventory reports. These reports would be self-incriminating statements, documenting a violation of federal law. Proposal 1 already protects against diversion,

penalizing diversion with increased penalties and the revocation of one's medical marijuana card. All references to inventory reports need to be stricken.

Recommended revisions: Strike all of the following:

"The applicant or primary caregiver authorized to grow plants for the renewal applicant shall submit an inventory log regarding the plants grown during the previous year." [Rule 7 (4).]

"A registered primary caregiver shall make and maintain a complete and accurate inventory of all usable marijuana produced and plants in the primary caregiver's possession that is authorized for a registered qualifying patient's medical use. The registered primary caregiver shall make and maintain a separate inventory for each qualifying patient that the primary caregiver assists with the medical use of marijuana." [Rule 15 (3).]

"An inventory of the plants shall be maintained for the full registration year and the inventory form shall be submitted with the renewal documentation." [Rule 29 (3).]

"The plant inventory shall be returned with the patient registration and shall indicate the manner in which the plants were destroyed or transferred to another qualifying patient." [Rule 29 (4).]

Also, needed changes to Rule 15 (7) are discussed below. The problematic inventory requirement is also included in it.

8) Face-to-Face Meetings Are Unreasonable

The draft rules say that, if proof of identity is uncertain, the department may require a face-to-face meeting. It can take more than nine hours to drive from the furthest point in Michigan to Lansing. It would be unreasonable to require a very ill patient to travel several hours. Some people with debilitating illnesses cannot tolerate any long trips. In addition, the draft rule does not create a clear standard for when the department might require this burdensome trip. It is already clear from Rule 3 (1)(b) that the ID card will only be issued with a valid form of identification.

Recommended revision: Strike "If proof of identity is uncertain, the department may require a face-to-face meeting with an applicant and may require the production of additional identification materials." [Rule 9 (a).]

9) The Department Needn't Contact Federal Programs

The draft rules helpfully provided for a discounted rate of \$25 for beneficiaries of Medicaid or Social Security Income. But because marijuana is not yet legal under federal law, patients have legitimate privacy concerns about the department contacting a federal agency to verify their eligibility. Some may reasonably fear their benefits could be cut off as a result. The MDCH should instead rely on information submitted by the patient to confirm eligibility, as Rhode Island's administrators do. If the department had a reasonable basis to doubt the documents, it could ask the patient whether the patient preferred to pay a higher fee or for the department to verify that he or she is a beneficiary.

Recommended revision: Strike "Contacting the department of human services or the social security administration to verify a qualifying patient's eligibility for the Medicaid health plan or Social Security Income benefits." [Rule 9 (f).]

10) Certification Language Should Track the Statute

The draft rule that discusses what the applicant patient must submit does not track the statutory language and suggests the department may require something other than what the law requires, which is a physician's written certification.

Recommended revision, from: "The applicant did not provide the information required under R 333.103 and R 333.105 to establish the qualifying patient's debilitating medical condition and to document the qualifying patient's consultation with 1 or more physicians regarding the therapeutic or palliative benefits from the medical use of marihuana."

To: "The applicant did not provide a document signed by a physician, stating the patient's debilitating medical condition and stating that, in the physician's professional opinion, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating medical condition." [Rule 13 (5)(a).]

11) The Language About Denying Applications Should Be Modified

The draft rules provide that an applicant can be denied a card if an applicant has willfully violated the act or rules. However, the draft rules impose unreasonable requirements that the law does not, such as the inventory requirement. The draft rule would allow the department too much discretion to deny an application. Instead, an application should be denied only if the patient's card has been revoked for a proven violation of the law.

Recommended revision, from: "An applicant has willfully violated the provisions of the act or these rules."

To: "An applicant has had his or her previous registry identification card revoked for willfully violating the provisions of the act." [Rule 13 (5)(c).]

12) The Reference to Inspections Must Be Stricken

One of the draft rules seems to envision the MDCH conducting inspections. This is in direct and flagrant contradiction to the law voters passed. The law specifies, "Possession of, or application for, a registry identification card shall not constitute probable cause or reasonable suspicion, nor shall it be used to support the search of the person or property of the person possessing or applying for the registry identification card, or *otherwise subject the person or property of the person to inspection by any local, county or state governmental agency.*" The draft rules' inspection language needs to be stricken. This law makes the limited cultivation of marijuana lawful under state law, and it is not a basis for treating the very ill like criminal suspects.

Recommended revision, from: "Authorized employees of the department as necessary to perform official duties of the department, including the production of any reports of non-identifying aggregate data or statistics, investigations or inspections of enclosed, locked facilities."

To: "Authorized employees of the department as necessary to perform official duties of the

department, including the production of any reports of non-identifying aggregate data or statistics." [Rule 21 (a).]

13) Changing the Rule About Leftover Marijuana

The MDCH's draft rules suggest that a caregiver give any marijuana left over after one patient is no longer qualified or dies to other patients he or she assists, which is reasonable. However, other aspects of this draft rule are not. It would require the caregiver to provide an inventory to the department, which is problematic for reasons discussed above, and, if the caregiver did not assist any other patients, he or she would be required to hand over the marijuana to law enforcement. Proposal 1 does not have any such provision. Sadly, state and local law enforcement in some cases have collaborated with federal authorities to raid patients or caregivers. It is unreasonable to require a cardholder to turn over marijuana, which is possessed in violation of federal law, to police. These provisions should be stricken or modified to simply say that the caregiver or patient may provide the marijuana to another registered patient, may destroy it, or *may* hand it over to law enforcement for destruction. It should also give a set and reasonable timeframe that allows for time to give the marijuana to the caregiver's other patients who may live some distance away or to get back in town if the caregiver is traveling.

Recommended revision: Strike Rule 15 (6) and (7).

Replace with: "(6) If a registered qualifying patient dies or is no longer deemed a qualified patient, a registered primary caregiver may transfer all marihuana produced for the former patient to other patients who are currently registered to that primary caregiver, as long as the total amount of marihuana per patient is within the requirements established in R 333.127 of these rules.

(7) Except as provided in subrule (6) of this rule, if a registered qualifying patient dies or is no longer deemed a qualified patient, a registered primary caregiver must, within 14 days of learning that the patient has died or is no longer deemed a qualified patient either destroy all marihuana produced for that patient or turn it over to law enforcement for destruction." [Rule 15 (6) and (7)]"

14) Remove Requirement to Notify the Department of a Changed Telephone Number

Neither Proposal 1 nor the part of the draft rule listing what application materials a patient must submit include the patient's telephone number. Since there is no requirement that they submit a telephone number, it is not reasonable to require cardholders to notify the department of a changed number.

Recommended revision: Strike "The registered qualifying patient's telephone number." [Rule 19 (1)(c).]

15) Make Enclosed, Locked Facility Language Conform With the Law

Some of the draft rules say patients must keep their marijuana – not just plants – in an enclosed, locked facility. This contradicts the plain language and intent of the law. Proposal 1 requires patients to keep their marijuana *plants* in enclosed, locked facilities that only a patient and caregiver can access. However, the law allows people other than designated caregivers to assist

patients with administering marijuana. This is necessary because many terminal patients and severely disabled individuals need round-the-clock care, which necessitates more than one aide or the assistance of more than one loved one. Many patients will be physically incapable of administering marijuana on their own. Naturally, the aides would not be able to administer the marijuana if it was in an enclosed, locked facility that the aides were not allowed to access. This language should revert to the language in the law.

Recommended revision, from: "... The patient shall ensure that the marihuana in his or her possession is kept in an enclosed, locked facility."

To: "... The patient shall ensure that the marihuana plants in his or her possession are kept in an enclosed, locked facility." [Rule 27(1).]

Rule 23 (2)(g) should be stricken for other reasons. It would also wrongly require marijuana to be in an enclosed, locked facility.

16) The Certification Language Should Track the Law

Proposal 1 says the department "shall issue" an identification card to patients who submit their application with their address, a written certification, and a fee, and that an application can only be denied if the information is falsified or incomplete. To qualify, a physician must be a DO or MD who is licensed to prescribe drugs. Yet, the draft rules do not track the law, and instead of requiring a physician only to be licensed, require he or she be "in good standing with the department." Also, the draft rule says that the department may examine an original patient record if the doctor does not meet the definition of a physician. But the definition of a physician is a licensed MD or DO. So the patient record would presumably be irrelevant to determining the licensure status. Under the draft rules, the department would also deny patients' applications if the patient does not allow his or her medical records to be examined if the physician "does not meet the definition" of physician. The draft rule would allow the department to take things into consideration when granting or denying the application that the law does not, such as complaints by health care providers about the doctor. If the physician is unfit to practice medicine, the proper venue where that would be addressed is physician licensing, not reviewing the validity of a written certification.

Recommended revisions: Strike all of the following:

Rule 23 (3) and (4)

Rule 1 (24): "in good standing with the department"

Rule 3 (1) (c): "in good standing with the department"

Rule 7 (2): "is in good standing with the department"

Rule 9 (d): "and is in good standing with the department"

17) The Language on Law Enforcement and Confidentiality Must Track the Statue

The draft rules' language on verifying cardholders' status to law enforcement indicates that the department might be planning to violate the confidentiality requirements of the act by stating that a person is a registered patient in response to an inquiry about that person, rather than only verifying an ID card after law enforcement has called in the random number on the ID card to verify it. The distinction is important. Allowing a police officer to ask if a person is registered based on the vague standard of a "bona fide reason" would allow fishing expeditions, which the

act does not allow. In addition, the draft rule says the department can confirm to law enforcement that a caregiver only serves five people. There is no need for the department to verify that a caregiver serves no more than five patients because the department would not issue a card for the caregiver to assist a sixth patient.

Recommended revision, from: "Authorized employees of state or local law enforcement agencies when they provide a specific name or address and a bona fide reason for the inquiry. Information will be supplied only as necessary to verify any of the following:

"(i) That a person is or was a lawful possessor of a registry identification card.

"(ii) That a registered primary caregiver is not assisting more than 5 qualifying patients."

To: "(b) Authorized employees of state or local law enforcement agencies only to verify the validity of a registry identification card that the law enforcement agency has been presented with, as demonstrated by the reading of the card's registry identification number." [Rule 21 (b).]

18) A Person Can Only Authorize the Release of Information About Himself or Herself

The draft rules prudently specify that information about cardholders can only be released pursuant to a signed release. However, as it is written, a person could authorize the release of information about someone who does not want that information released. For example, a patient could authorize the release of information about his or her caregiver. This needs to be modified.

Recommended revision, from: "Other persons upon receipt of a properly executed release of information signed by a registered qualifying patient, a qualifying patient's parent or legal guardian, a qualifying patient's registered primary caregiver, or a registered qualifying patient's representative. The release of information shall specify what information the department is authorized to release and to whom."

To: "Other persons upon receipt of a properly executed release of information signed by a registered qualifying patient, a qualifying patient's parent or legal guardian, a qualifying patient's registered primary caregiver, or a registered qualifying patient's representative. The release of information shall specify what information the department is authorized to release and to whom. No release of information may allow the disclosure of information about any person except the person signing the release, except that a legal guardian may authorize the release of information about a minor patient." [Rule 21 (2 (c)).]

19) Remove Monitoring and Inspection Role

Proposal 1 does not create an investigatory role for the MDCH. Nor does it permit inspections. Yet the draft rules envision monitoring by the MDCH that is not provided for in the act. This draft rule would also have the MDCH notify law enforcement of things like a failure of a patient to return registry ID cards within 14 days. The law doesn't say that cardholders need to return ID cards, though, and there's no reason to require this since the department can just have the database note that the number is no longer associated with a valid card. The draft rule would also have the department notify law enforcement of a failure to keep marijuana in an enclosed, locked facility. The department would have no reason to know if marijuana is kept in an enclosed facility, and only plants are even required to be kept in enclosed, locked facilities. The department is not responsible for law enforcement functions, and the only aspect that should remain is notifying the

department of falsified applications, which the law specifies the department may do, and which is information that the MDCH would have reason to encounter.

Suggested revision: Strike current text for Rule 23 (1-5).

Insert: "(1) Pursuant to the act, the department may contact a qualifying patient, primary caregiver, or a qualifying patient's certifying physician to verify an application.

"(2) Subject to subrule (1) of this rule, the department shall, when it has reason to believe a false information has been submitted during the registration or registration renewal process, conduct an investigation, and, if the information was falsified, refer the matter to law enforcement." [Rule 23 (1-5).]

20) The Language About Drug Convictions Must Track the Statute

The draft rules conflict with Proposal 1 by disqualifying patients and caregivers for convictions that do not disqualify them under the act. The draft rule would disqualify patients and caregivers for any drug conviction, which would even include a federal marijuana conviction for acts allowed under state law! Proposal 1 does not disqualify patients for any unrelated drug conviction, and caregivers are only disqualified for drug felonies. A violation of the medical marijuana law, such as selling marijuana to a non-patient, could also result in a revocation, but the department does not have the authority to rewrite the law to exclude bona fide seriously ill patients based on unrelated convictions.

Recommended revision, from: "Conviction of a misdemeanor or felony offense involving the manufacture, illegal delivery, or possession of a controlled substance."

To: "If the cardholder is a caregiver, conviction of a felony offense involving the manufacture, illegal delivery, or possession of a controlled substance." [Rule 25 (1)(c).]

Recommended revision: Strike Rule 25 (1)(d).

Rule 23 (2)(e) also includes this problematic language. Additional problems with that rule are discussed further down in this memo.

21) The Revocation Portion Needs to Be Revised

Rule 25 provides that a card may be revoked for violations of Proposal 1. But most of the grounds for revocation don't say who will determine if the act was violated or based on what evidence. The grounds for revocation should only be grounds if a court of law has determined the act was violated in those ways.

Recommended revision, from: "Undertaking any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice."

To: "Loss of a civil lawsuit for undertaking any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice." [Rule 25 (1)(e).]

Recommended revision, from: "Smoking marihuana on public transportation or in a public place."

To: "A criminal conviction for smoking marihuana on public transportation or in a public place."
[Rule 25 (1)(g).]

22) Caregivers and Patients Must Not Be Required to Disclose Their Grow Location

Proposal 1, like most medical marijuana laws, did not require patients to register a grow site, nor did it provide cards for grow sites. It is not reasonable for rules to require a patient or caregiver to disclose the location where they would cultivate. It is not entirely clear from the draft rules that the location would have to be disclosed, but it suggests it would. References to a grow site and card must be stricken. Instead, patients wishing to have documentation by their plants can photocopy their ID card and keep it with their marijuana plants.

Recommended revision: Strike all references to grow locations, in Rule 29, Rule 11 (3), and Rule 13 (4).