

Citizens' Aide/Ombudsman
January 22, 2012
Page 1 of 5

Carl Olsen
January 22, 2012

Citizens' Aide/Ombudsman
Ola Babcock Miller Building
1112 East Grand Avenue
Des Moines, Iowa 50319-0231
Phone: 515-281-3592
Fax: 515-242-6007

Dear Citizens' Aide/Ombudsman,

This is a formal complaint about the Office of Drug Control Policy (ODCP) which is established by Iowa Code Chapter 80E. <http://www.iowa.gov/odcp/>

On December 27, 2011, ODCP pre-filed a bill with the Iowa legislature, "Marijuana as Scheduled Controlled Substance (5292DP)" which is currently Senate Study Bill 3031 (SSB3031). https://www.legis.iowa.gov/DOCS/LSA/Bills_Prefiled/2012/BPMMT022.PDF and <http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&menu=false&hbill=ssb3031>

The explanation added by the Legislative Service Bureau in both 5292DP and SSB3031, says:

A schedule I controlled substance is a highly addictive substance that has no accepted medical use in the United States and a schedule II controlled substance is a highly addictive substance that has an accepted medical use in the United States.

5292DP, Page 2, Lines 8-12; SSB3031, Page 2, Lines 8-12.

As a condition for placement in Iowa Schedule I, a controlled substance must have no accepted medical use in the United States. See Iowa Code § 124.203(1)(b) (2011).

Because marijuana has accepted medical use in 16 states and the District of Columbia¹, 5292DP and SSB3031 are unconstitutional because they violate the Full Faith and Credit Clause of the U.S. Constitution.

¹ Alaska (Ballot Measure 8) (1998), Alaska Stat. § 17.37.070 (2011) (defines "medical use" including "acquisition, possession, cultivation, use or transportation of marijuana"); Arizona, (Proposition 203) (2010), A.R.S. § 36-2801 (2011) (defines "medical use" including "acquisition, possession, cultivation, manufacture, use, administration, delivery, transfer or transportation of marijuana"); California (Proposition 215) (1996), Cal Health & Saf Code §

130 NE Aurora Ave., Des Moines, IA 50313-3654
515-288-5798 (home) • 515-343-9933 (cell)
carl@carl-olsen.com • www.carl-olsen.com

I have contacted ODCP and explained why this proposed legislation is unconstitutional and ODCP does not agree with me. ODCP says that accepted medical use in the United States is determined by the FDA, despite the fact I've cited to federal court rulings that clearly state FDA approval or lack of FDA approval does not determine accepted medical use in the United States.

Grinspoon v. DEA, 828 F.2d 881, 887 (1st Cir. 1987):

Unlike the CSA scheduling restrictions, the FDCA interstate marketing provisions do not apply to drugs manufactured and marketed wholly intrastate. Compare 21 U.S.C. § 801(5) with 21 U.S.C. § 321 (b), 331, 355(a). Thus, it is possible that a substance may have both an accepted medical use and safety for use under medical supervision, even though no one has deemed it necessary to seek approval for interstate marketing.

11362.5 (2011) (defines "use of marijuana for medical purposes" including possession and cultivation for personal use); Colorado (Ballot Amendment 20) (2000), Colo. Const. Art. XVIII, Section 14 (2011) (defines "medical use" including "acquisition, possession, production, use, or transportation of marijuana"); Delaware (SB17, HB 17-4) (2011), 16 Del. C. § 4902A (2011) (defines "medical use" including "acquisition, administration, delivery, possession, transportation, transfer, transportation, or use of marijuana"); District of Columbia (Amendment Act B18-622) (2010), D.C. Code § 7-1671.01 (2011) (defines "medical marijuana" including "marijuana cultivated, manufactured, possessed, distributed, dispensed, obtained, or administered"); Hawaii (SB 862, HB 13-12) (2000), HRS § 329-121 (2011) (defines "medical use" including "acquisition, possession, cultivation, use, distribution, or transportation of marijuana"); Maine (Ballot Question 2) (1999), 22 M.R.S. § 2422 (2011) (defines "medical use" including "acquisition, possession, cultivation, manufacture, use, delivery, transfer or transportation of marijuana"); Michigan (Proposal 1) (2008), MCLS § 333.26423 (2011) (defines "medical use" including "acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marijuana"); Montana (Initiative 148) (2004), Mont. Code Anno., § 50-46-301 (2011) (defines "use of marijuana" to alleviate symptoms of debilitating medical conditions including "cultivation, manufacture, delivery, and possession of marijuana"); Nevada (Ballot Question 9) (2000), Nev. Rev. Stat. Ann. § 453A.120 (2011) (defines "medical use" including "possession, delivery, production or use of marijuana"); New Jersey (SB 119, HB 25-13) (2010), N.J. Stat. § 24:6I-3 (2011) (defines "medical use" including "acquisition, possession, transport, or use of marijuana"); New Mexico (SB 523, HB 32-3) (2007), N.M. Stat. Ann. § 26-2B-2 (2011) (defines "use of medical cannabis" "for alleviating symptoms caused by debilitating medical conditions and their medical treatments"); Oregon (Ballot Measure 67) (1998), ORS § 475.302 (2009) (defines "medical use" including "production, possession, delivery, or administration of marijuana"); Rhode Island (SB 0710, HB 33-1) (2006), R.I. Gen. Laws § 21-28.6-3 (2011) (defines "medical use" including "acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marijuana"); Vermont (SB 76, HB 645) (2004), 18 V.S.A. § 4472 (2011) (defines "use for symptom relief" including "acquisition, possession, cultivation, use, transfer, or transportation of marijuana"); Washington (Initiative 692) (1998), Rev. Code Wash. (ARCW) § 69.51A.010 (2011) (defines "medical use" including "production, possession, or administration of marijuana").

Gonzales v. Oregon, 546 U.S. 243, 258 (2006):

The Attorney General has rulemaking power to fulfill his duties under the CSA. The specific respects in which he is authorized to make rules, however, instruct us that he is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law.

ODCP has informed me that if I am unhappy with 5292DP and SSB3031 I should file a complaint with the Citizens' Aide/Ombudsman. This is my formal complaint.

GROUND FOR MY COMPLAINT

1. ODCP does not have any formal rulemaking process, so I cannot file an administrative petition for rulemaking or other agency action under the Iowa Administrative Procedures Act, Iowa Code § 17A. ODCP informs me that my only recourse is to file a complaint with the Citizens' Aide/Ombudsman.
2. ODCP did not participate in the public hearings conducted by the Iowa Board of Pharmacy in 2009. The Iowa Board of Pharmacy is specifically authorized by the Iowa legislature to recommend changes in the controlled substances schedules. See generally, Iowa Code § 124.201, and specifically Iowa Code § 124.203. ODCP does not have any authority or qualifications to be making medical decisions on the efficacy of controlled substances for medical use. The Iowa Board of Pharmacy found that marijuana does have medical use and recommended it be removed from schedule I. The Iowa Board of Pharmacy's pre-filed legislation is SSB1016.
3. The Iowa Board of Pharmacy is a branch of the Iowa Department of Public Health. SSB1016 is sponsored by the Iowa Department of Public Health. The Iowa Department of Public Health has over 1000 pages of rules and regulations in the Iowa Administrative Code. ODCP has absolutely zero pages in the Iowa Administrative Code.

Iowa Code Chapter 135 - DEPARTMENT OF PUBLIC HEALTH
Iowa Code Chapter 147 - GENERAL PROVISIONS, HEALTH-RELATED
PROFESSIONS

Iowa Code Chapter 153 - DENTISTRY
Iowa Code Chapter 152 - NURSING
Iowa Code Chapter 155A - PHARMACY

Iowa Administrative Code Chapter 645 - Professional Licensure
537 pages

Iowa Administrative Code Chapter 653 - Medical Examiners
148 pages

Iowa Administrative Code Chapter 655 - Nursing Board
111 pages

Iowa Administrative Code Chapter 657 - Pharmacy Examiners
304 pages

COMPLAINT

1. ODCP is unqualified to determine whether controlled substances have medical efficacy.
2. ODCP did not participate in the public hearings on medical use of marijuana held by the Iowa Board of Pharmacy.
3. ODCP is not authorized by the Iowa legislature to determine whether controlled substances have medical efficacy.
4. ODCP has no administrative procedures and has no accountability to the public as required by the Iowa Administrative Procedures Act.
5. ODCP is proposing legislation that is in violation of the U.S. Constitution, because marijuana has accepted medical use in 16 states and the District of Columbia and ODCP is advising the Iowa legislature that marijuana has no accepted medical use in the United States.

REMEDY

Abolish the ODCP or force the ODCP to answer to the public by making it compliant with the Iowa Administrative Procedures Act. If I'm unhappy with a decision by the Iowa Department of Public Health (IPDH) or the Iowa Department of Public Safety (IDPS), I can file an administrative petition for agency action or declaratory ruling with those two agencies. The functions of ODCP can clearly be performed more effectively and more efficiently by IPDH and IDPS, because those agencies are fully compliant with the Iowa Administrative Procedures Act. ODCP is taking functions that would normally be performed by IPDH and IDPS and removing the due process protections of the Iowa Administrative Procedures Act.

Sincerely,

Carl Olsen

130 NE Aurora Ave., Des Moines, IA 50313-3654
515-288-5798 (home) • 515-343-9933 (cell)
carl@carl-olsen.com • www.carl-olsen.com

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Page 5 of 5

cc:

Office of Drug Control Policy
Interim Director Dale Woolery
Wallace State Office Building
502 E. 9th St, 1st Floor
Des Moines, IA 50319
515-725-0300 Phone
515-725-0304 Fax
dale.woolery@iowa.gov

Legislative Services Agency
Glen Dickinson, Director
Ground Floor, State Capitol Building
Des Moines, Iowa 50319
Telephone: 515-281-3566
Fax: 515-281-8027
glen.dickinson@legis.state.ia.us

Iowa Senate Judiciary Committee
Senator Gene Fraise, Chair
1007 East Grand Avenue
Des Moines, Iowa 50319
eugene.fraise@legis.iowa.gov

Chief Clerk's Office
Charlie Smithson, Chief Clerk
State Capitol Building
Des Moines, Iowa 50319
Phone: 515.281.4280
Cell: 515.681.2354
Fax: 515.281.8758
E-mail: Charlie.Smithson@legis.state.ia.us

130 NE Aurora Ave., Des Moines, IA 50313-3654
515-288-5798 (home) • 515-343-9933 (cell)
carl@carl-olsen.com • www.carl-olsen.com