DHHS/CDC Proposed Changes to Maine’s Medical Use of Marijuana Rules
Impact on Patients

The Department of Health and Human Services/Center for Disease Control are proposing a number of changes to the rules governing Maine’s Medical Use of Marijuana Program. This will be the first revision of rules for the program in four years.

The new rules are supposed to be limited to minor technical changes needed to implement law changes that have gone into effect since 2013. However, some of the proposed rules would create major changes to the law, and go beyond the scope of “minor technical” changes. These changes are coming from within the Department itself.

Unlike legislation, rule making is handled by unelected department officials, and the final decision is left to the Commissioner. However, the Department is taking Public Comments through June 26th and proposed rules are subject to change based on input.

Rule changes that could negatively impact patients include new inspections requirements, expanded registration requirements, and prohibitions on mobile and teleconferencing doctor’s visits.

**There will be a Public Hearing on the proposed rules Wednesday, June 14, from 9 a.m.-noon at the Augusta Civic Center, 76 Community Drive, Augusta.**

Comments will likely be limited to 3-5 minutes per person, depending on the turnout. Department staff members at the hearing are unable to answer questions about the intent of the rules, or address people’s concerns about the rules directly. This hearing will be for gathering information that will then be brought to the Department attorney and Commissioner for consideration.

If you cannot attend the hearing in person, you can still get your concerns on the record by sending written comments, sending letters to the editor, and encouraging others concerned about patient’s rights and safe access to participate and comment.

The department could issue final rules any time between early August and the end of the year. Major changes that could have negative impacts on patients should go to the legislature for full vetting. If rules are implemented that go against the intent of the law, legal challenges could take place at that time.

In order for your comments to be effective, it’s best to identify what section(s) of rule changes would affect you as a patient, family member or caregiver for a patient, then explain, as concisely as possible, your personal situation as it directly impacted by these rule changes.

Written comments are being taken up until 5 p.m. on Monday, June 26.
Comments on the proposed rule changes can be emailed to: Bridget.Bagley@Maine.gov
Inspections of Patients

Rule changes to Section 10 would set guidelines for Department inspections of medical cannabis caregivers and patients.

Legislation was passed in 2014 authorizing the Department to take action necessary to ensure compliance of registered caregivers, doing onsite assessments and complaint-based investigations. The legislation directed the Department to develop rules on how inspections to ensure compliance would be conducted. These rules were intended to specify the process for inspections and compliance actions toward registered caregivers.

The proposed rules go beyond the scope of any laws passed by elected officials, by adding patients to those who are subject to inspection and search without a warrant, and resulting enforcement action.

The following new language would be added to the Rules:
“Submission of an application for a registry identification card constitutes permission for a criminal history record check and on-site assessments which may include inspections.”

It appears that even patients who are not registered with the Department could be subject to inspections, with Section 10-A going on to specify:
“Any patient, primary caregiver or cardholder must comply with the Department’s request for evidence of authorized conduct and to inspect the premises and records, as appropriate, to assess compliance with this rule and the statute.

Failure to comply with provisions of statute and rule may result in remedial action up to, and including, suspension, revocation and denial of a registry identification card or registration certificate; civil penalties; and referral to law enforcement.”

The proposed rules would require the Department to give 24 hour notice prior to inspection of a patient’s residence. However the rules state that entry may not be denied when the department takes steps to safeguard privacy and preserve status of operations. The Department would be authorized to take samples, photos, or electronic copies of materials during an inspection in order to obtain evidence of non-compliance.

If a person is found to be out of compliance, the Department could revoke the violator’s registry identification card. It is unclear what impact this would have on a person’s ability to continue to cultivate and access their medicine as a patient. Grounds for revocation would include if the cardholder is convicted of a disqualifying drug offense, if the patient commits, permits, aids or abets any illegal practices or unauthorized conduct related to the cultivation, processing, acquisition, dispensing, delivering or transfer of marijuana, if the patient has repeat forfeiture of excess marijuana, or if the patient fails to pay state or local taxes.
Patient Registration Card

Maine is one of the few states where patient privacy is protected and there is no medical marijuana patient registration database.

In 2011 legislators went against the intent of the 2009 medical marijuana citizen’s initiative, and passed a law requiring registration of all patients. However, this was rapidly overturned in 2012 when the legislature passed LD1296, An Act to Protect Patient Privacy. This bill restored the intent of the 2009 and 1999 citizen’s initiatives. The bill removed the patient registration requirement, and made clear that a patient’s certification for medical use of marijuana from their doctor would continue to be the only required proof necessary to use or cultivate cannabis for personal medical use.

In 2015, the DHHS created a new certification form and card for patients, and eliminated what had become a voluntary patient registration card.

In August 2016, LD 726, An Act To Increase Patient Safety in Maine's Medical Marijuana Program, became law, removing any reference to a “registered” patient in the definition of a “Cardholder”.

In spite of these changes, the new rules continue to include provisions for a patient registration card, and require additional information from a patient seeking a card, including the location of the patient’s cultivation area.

It is unclear why the Department would go against its prior stance of supporting removal of a patient registration card that generates no revenue, and serves no purpose now that the new certification includes a card, unless there is a desire to expand patient registration requirements and inspections in the future.

Washington state regulators made similar changes to patient registration requirements following the passage of the referendum to legalize recreational use of marijuana.

As lawmakers and regulators restructured the medical marijuana program, changes were made to specify that if a patient wanted to maintain protections against arrest, search and seizure, and if more than one patient was to be cultivating in the same residence, registration would be necessary.

Registration in Washington remains technically voluntary, however in reality is has become required in order for a patient to continue to cultivate their medicine and maintain legal protections.

Many patients would either access their medicine illegally or switch to opiate-based pharmaceuticals and risk addiction and negative side effects, if they were required to register. This includes patients who currently work for the government, are veterans, parents, and others concerned about the impacts of being on a state registry for people using what is still a federally-illegal substance.

It will be important to make sure similar loss of patient privacy doesn’t take place in Maine.
Section 11 would update Department rules governing inpatient hospice and nursing facilities. In 2014 Maine legislators passed LD 1779, An Act Relating to Nursing Facility and Inpatient Hospice Patients and Medical Marijuana.

This bill was put forth in response to rules developed by the Department in 2012 that created major barriers to patient access in hospice facilities and nursing homes.

Patients in Maine hospice and facilities have been using medical marijuana as recommended by their physician since the first Medical Marijuana Citizen's Initiative was implemented in 1999. Since that time, the decision to allow access to marijuana for qualifying patients in hospice and nursing facilities has been left up to the individual facilities.

The facilities’ choice to allow patients access to medical marijuana has been in line with facility policies allowing access to other doctor-recommended herbal therapies. Some facilities have allowed a designated medical marijuana caregiver to provide doctor-recommended medical marijuana to a patient in the facility - either through use of tincture, topical salve, medicated food, or in some cases, a vaporizer which allows a person to inhale.

Very few, if any facilities have chosen the option, created by law in 2010, to have the facility register with the Department as a patient's caregiver, due to concerns that going on record as providing a federally-prohibited medicine to patients could jeopardize their federal funding.

In 2012 the Department made rule changes, independent of any legislation, that made it nearly impossible for a patient to access medical marijuana in a hospice or nursing facility. The 2012 rules created a structure that would only allow a patient to access their doctor-recommended medical marijuana only if the patient registered with the state, AND the facility registered with the state, AND the facility had staffing and funding to fulfill the record-keeping and access requirements, AND if those registered staff members administered the marijuana directly to the patient. The rules prohibited a patient from keeping marijuana in their room or on their person, as it was classified as “a danger to other residents.”

Maine's medical marijuana law and rules clearly state that, “The primary caregivers for a patient are determined solely by the patient's preference...” A patient’s preference is effectively removed if they are required to designate a nursing facility as their caregiver.

Changes made by lawmakers in 2014 as part of LD 1779 directed the Department to update its rules to ensure hospice and nursing home patients could have access to their medicine without creating an unnecessarily complicated structure.

The 2014 law specified that a patient may store the prepared marijuana in the qualifying patient's room and is not required to obtain a registry identification card or to designate the hospice provider or nursing facility as a caregiver.
The 2017 proposed rule changes to Section 11 would incorporate many of the changes required by LD 1779.

However the new rules lacks clarity on whether a patient could legally store and access their medicine while in a hospice facility or nursing home, without the facility being registered as their caregiver.

Section 11 of the new rules state:

1. If a qualifying patient is storing marijuana for medical use, the patient must disclose this to the facility.

2. Prior to assisting a patient residing in the facility, inpatient hospice providers and nursing facilities must submit a Department-approved Primary Caregiver Application form to become a registered primary caregiver in the Maine Medical Use of Marijuana Program.

3. It is the inpatient hospice provider or the nursing facility, not their staff, that is designated a registered primary caregiver and must comply with applicable provisions of these rule and statute.

4. A facility may not assist the patient with the medical use of marijuana, including storage or acquisition, unless designated by the qualifying patient.

5. Storage of marijuana for medical use. Special storage consideration is required for marijuana and foods containing marijuana such that access is limited to only the patient and those authorized to assist the patient with the medical use of marijuana.

Clarity is needed to ensure that a facility can allow a patient to store their legal medical marijuana in their room and access that medicine without requiring the facility itself to register as a caregiver and store or handle the patient’s cannabis.
Restrictions on Patient Access to a Medical Provider

Section 4-F of the proposed rule changes would prohibit mobile doctor’s visits and teleconferencing for certifying a patient’s medical use of marijuana, by changing the definition of “bona fide medical provider-patient relationship.”

Current rules specify that a written certification for medical use of marijuana must be made in the course of a bona fide physician-patient relationship as indicated by the existence of an evaluation, treatment plan, periodic review and documentation and other professional principles of treatment, after the physician has completed a full assessment of the patient’s medical history.

The current rules do not restrict the certification to only taking place at a fixed doctor’s office. Many Maine patients have been able to access their needed medicine solely because their medical provider was able to visit them at home.

The new rules would specify that in order to establish a bona fide medical provider-patient relationship required for medical marijuana certification, the medical provider shall perform an in-person encounter and relevant physical examination occurring at a permanent location that, similar to a covered office visit or outpatient treatment in terms of site, extent, duration and frequency, is clinically appropriate for conducting medical services and effective for addressing the patient’s debilitating condition and that enables the patient to return for follow up, consultation or assistance.

These rule changes developed within the department, as there has been no legislation passed to require this change.

The practice of mobile visits from a medical provider to a patient’s home has a long history in Maine, and is necessary in order for certain patients to be able to access needed medical care.

The state has been encouraging telemedicine in other areas of medical care, and it is inconsistent to prohibit its use in cases where a patient may be unable to travel due to medical conditions. These rules would prohibit use of telemedicine even in cases where the patient already has an established history with that medical provider.

This rule change would have negative impacts on patients in rural areas, low-income patients and those with limited mobility due to medical conditions.