

## ISSUE PAPER

DATE: September 1, 2014

TO: SPE Policy Consortium

FROM: Washington Health Youth Coalition<sup>1</sup>

SUBJECT: **Policy Options Regarding Marijuana Products That Appeal To Kids**

### I. Background

#### A. Results Washington

Preventing or delaying the onset of underage marijuana use is essential to both short-term and long-term positive behavioral health outcomes for our state. Research indicates that the younger someone begins to use a substance, the more likely they are to have dependency issues and other long-term consequences as an adult. Longtime marijuana users report being less satisfied with their lives, having memory and relationship problems, poorer mental and physical health, lower salaries, and less career success.<sup>2</sup>

Kids are using marijuana in various forms. While smoking combusted marijuana (“useable marijuana” in state regulatory parlance) may still be the most prevalent form of youth marijuana use,<sup>3</sup> kids are also using marijuana extracts (“marijuana concentrates”) through e-cigarette or vaping devices,<sup>4</sup> and are also eating and drinking edible marijuana products (“marijuana-infused products”). A recent student survey conducted by Seattle Public Schools found that 38.5% of current marijuana users reported using marijuana that came from a medical marijuana dispensary within the last 30 days,<sup>5</sup> suggesting plentiful sources and supplies for

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<sup>1</sup> This paper was written by staff from various member organizations. Any opinions expressed herein are those of the writers only and do not necessarily represent the official position of their agencies on the matters discussed.

<sup>2</sup> Alcohol & Drug Abuse Institute, University of Washington, *Learn About Marijuana—Factsheet—Adolescents and Marijuana*, available at <http://www.learnaboutmarijuana.org/factsheets/adolescents.htm> (last visited August 27, 2014).

<sup>3</sup> Recent data indicate that 84% of Washington youth who have been treated for marijuana abuse smoke marijuana, suggesting that the remaining 16% of those in treatment consumed edibles or vaped marijuana extracts. (TARGET data run, August 7, 2014).

<sup>4</sup> For more information on the use of cannabis products in vaporized pens, see the Appendix hereto.

<sup>5</sup> Seattle School District Youth Risk Behavior Survey (2012).

underage users.<sup>6</sup> The district's current concerns include students overdosing on campus from consuming edible marijuana, and a proliferation of vaporizers, which the district began confiscating in the 2013-14 school year. In Colorado, middle school students have been suspended for eating marijuana-infused candies at school.<sup>7</sup>

The Washington Poison Center ("WAPC") "has encountered an increase in the number of human exposures related to accidental or excessive consumption/inhalation of marijuana and marijuana edibles, particularly among pediatrics." In all of 2013, there were 58 pediatric marijuana exposures reported to WAPC; through July 17, 2014, there were 54 pediatric marijuana exposures reported.<sup>8</sup> At the Emergency Department at St. Peter Hospital in Olympia, there has been a significant increase in the number of people, including minors, presenting with symptoms of psychosis from vaporizing marijuana hash oil. Thus, the Medical Director of Psychiatry and Chemical Dependency has instituted a new protocol for administering antipsychotic medications to those people who are treated in the Emergency Department and present with such symptoms.

The Results Washington initiative calls for the state to decrease the percentage of 10<sup>th</sup> graders who report using marijuana in the last 30 days from the 2012 baseline of 19.3% to 18.0% by 2017, as measured by the Washington State Health Youth Survey ("HYS"). During the SPE Policy Consortium's spring A3 meeting, marijuana products that appeal to kids were identified as posing a risk to the state's ability to meet its goal of reducing youth marijuana use. This policy paper is intended to provide the state with information that may assist it in mitigating that risk.

## B. Summary of Relevant Literature Regarding Sweetened and Flavored Products

Existing research on other products provides an understanding of how certain marijuana products are likely to appeal to kids, and can serve as a basis for identifying potential policy options. In general, sweet flavors encourage kids to try unfamiliar foods and beverages and are particularly palatable to kids.<sup>9, 10</sup> The intrinsic appeal that sweetened and flavored products have for kids has carried through to youth use of age-restricted products, as discussed below.

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<sup>6</sup> In its statement of purpose for a recently-adopted emergency rule regarding marijuana products that appeal to kids (see discussion *infra* at 8, the Liquor Control Board stated that "Many marijuana-infused products on the medical marijuana market today are appealing to children." See WSR 14-18-048 (filed June 25, 2014). It is beyond the scope of this paper to discuss policy options regarding the regulation of medical marijuana. However, the efficacy of the policy options regarding recreational marijuana discussed herein may depend to a significant degree upon the extent to which kids continue to have access to medical marijuana.

<sup>7</sup> See Trevor Hughes, *USA Today*, April 2, 2014, "Colo. kids getting into parents' pot-laced goodies." Available at: <http://www.usatoday.com/story/news/nation/2014/04/02/marijuana-pot-edibles-colorado/7154651/> (last visited August 27, 2014).

<sup>8</sup> *Washington Poison Center Cannabis Report* (July 17, 2014). Available at: <http://www.wapc.org/wp-content/uploads/WAPC-Cannabis-Report-7.17.14.pdf> (last visited August 27, 2014).

<sup>9</sup> Adam Drewnowski et al., *Sweetness and Food Preference*, 142 *J. Nutr.*, 1142S-48S (2012).

## 1. Tobacco

Sweet and flavored tobacco products have been found to be particularly appealing to kids. More than 40% of U.S. middle and high school smokers report using flavored little cigars or flavored cigarettes, making them much more likely than adults to use such products.<sup>11</sup> Younger adults (ages 18-34) have been found to be more likely to use flavored tobacco products than adults as a whole. Flavored tobacco use is likely to influence the establishment of lifelong tobacco use patterns.<sup>12</sup>

In a study of adult smokeless tobacco users, 60% were found to have used mint-flavored products as their first product used or for regular/daily use. Flavoring may make smokeless tobacco products more palatable, possibly contributing to initiation and maintenance of their use.<sup>13</sup>

The FDA has recognized that flavored tobacco products “containing flavors like vanilla, orange, chocolate, cherry and coffee are especially attractive to youth” and “are widely considered to be ‘starter’ products, establishing smoking habits that can lead to a lifetime of addiction.”<sup>14</sup> Among a national sample of smokers age 16-24 years, the use of flavored cigarettes was found to be inversely related to age. 17-year-olds were over twice as likely to have used flavored cigarettes as young adults aged 20-26.<sup>15</sup>

Recognizing the link between flavored tobacco products and youth tobacco use, Congress banned characterizing flavors in cigarettes (other than tobacco and menthol) through its enactment of the Tobacco Control Act in 2009.<sup>16</sup> In doing so, Congress cited flavored cigarettes such as “Midnight Berry,” “Mandalay Lime,” “Warm Winter Toffee” and “Mocha Taboo” as appealing to youth and thus subject to the law.<sup>17</sup>

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<sup>10</sup> Elizabeth D. Capaldi, *Conditioned Food Preferences*, In: *Why we eat what we eat: the psychology of eating*, 53-80 (Elizabeth D. Capaldi ed., 1996).

<sup>11</sup> Brian A. King et al., *Flavored-Little-Cigar and Flavored-Cigarette Use Among U.S. Middle and High School Students*, 54 J. of Adolesc. Health, 40-46 (2014).

<sup>12</sup> Andrea C. Villanti et al., *Flavored Tobacco Product Use Among U.S. Youth Adults*, 44 Am. J. Prev. Med., 388-91 (2013).

<sup>13</sup> Andrew J. Oliver et al., *Flavored and Nonflavored Smokeless Tobacco Products: Rate, Pattern of Use, and Effects*, 15 Nicotine Tob. Res., 88-92 (2013).

<sup>14</sup> U.S. Food and Drug Admin., *Flavored Tobacco Product Fact Sheet*, available at <http://www.fda.gov/downloads/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/UCM183214.pdf> (last visited August 27, 2014).

<sup>15</sup> Sarah M. Klein et al., *Use of flavored cigarettes among older adolescent and adult smokers: United States, 2004-2005*, 10 Nicotine Tob. Res., 1209-14 (2008).

<sup>16</sup> In a recent letter to the FDA, twenty-nine state attorneys general urged the FDA to ban flavors in all other tobacco products and in electronic cigarettes. See Mike Esterl, *The Wall Street Journal*, August 8, 2014, “States Urge Tougher Curbs on E-Cigarettes.” Available at: <http://online.wsj.com/articles/state-attorneys-general-urge-tougher-curbs-on-e-cigarettes/1407514160> (last visited August 27, 2014).

<sup>17</sup> H.R. Rep. No. 111-58, pt. 1, at 37-40 (2009), reprinted in 2009 U.S.C.C.A.N. 468.

An analysis of menthol cigarettes by the FDA's Tobacco Product Scientific Advisory Committee found that the weight of evidence supports the conclusion that menthol in cigarettes is likely associated with increased smoking initiation by youth and young adults, and progression to regular smoking. The marketing of menthol cigarettes is associated with menthol brand preference among adolescents and the African American community.<sup>18</sup>

An analysis of internal tobacco company documents and patent information found that flavored cigarettes would be much more popular among young and inexperienced smokers. Differences in taste and flavor preferences by age group confirmed that younger smokers are more open to unique and exotic flavors than older smokers. The possible "consumer benefits" of flavored cigarettes include increased social acceptance via a pleasant aroma and aftertaste, increased excitement (for example, sharing flavors), smoking enjoyment and a "high curiosity to try" factor.<sup>19</sup> Through the manipulation of flavor chemicals, "[t]he same, familiar, chemical-specific cues that are associated with fruit flavors in popular candy and drink products are being exploited in the engineered designs of flavored tobacco products."<sup>20</sup>

## 2. Alcohol

Research involving sweetened or flavored alcohol has similarly identified a particular appeal of such products to youth. A survey of 13-20-year-old past 30 day drinkers found that 50% had consumed a flavored alcoholic beverage during the past 30 days.<sup>21</sup> Other research has noted youth susceptibility to the marketing of flavored malt beverages and their intrinsic appeal to kids. Alcopops play a transition role of introducing younger teenagers, particularly girls, to alcoholic beverages.<sup>22</sup>

Because it is unethical to use kids as subjects in experiments involving the consumption of alcohol, laboratory rats have been used to analyze the effects of sweetened alcohol on consumption patterns. In one such experiment, it was found that adolescent rats' consumption

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<sup>18</sup> Tobacco Product Scientific Advisory Committee (Food and Drug Administration). *Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol Versus Nonmenthol Cigarettes* (March 23, 2011). Available at: <http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoProductsScientificAdvisoryCommittee/UCM269697.pdf>

<sup>19</sup> Carrie M. Carpenter et al., *New Cigarette Brands With Flavors That Appeal To Youth: Tobacco Marketing Strategies*, 24 Health Aff., 1601-10 (2005).

<sup>20</sup> Robert A. Basset et al., *Candy Flavorings in Tobacco*, 370 New Eng. J. Med., 2250-52 (2014).

<sup>21</sup> Erin K. Fortunato et al., *Brand-specific consumption of flavored alcoholic beverages among underage youth in the United States*, 40 Am. J. Drug Alcohol Abuse, 51-57 (2014).

<sup>22</sup> James F. Mosher, *Joe Camel in a Bottle: Diageo, the Smirnoff Brand, and the Transformation of the Youth Alcohol Market*, 102 Am. J. Pub. Health, 56-63 (2012).

of sweetened ethanol was associated with increased consumption as adults, and with consumption of unsweetened ethanol as adults.<sup>23</sup>

### 3. Electronic Cigarettes

Even in the context of electronic cigarette or “vapor” products, flavors are appealing to kids. Lorillard, the owner of the blu e-cigarette brand, has admitted that “[k]ids may be particularly vulnerable to trying e-cigarettes due to an abundance of fun flavors such as cherry, vanilla, pina colada and berry.”<sup>24</sup> In a recent systematic content analysis of e-cigarette website marketing, it was reported that “[c]andy, fruit, and coffee flavors are offered on most sites.”<sup>25</sup> In a separate survey of nine e-cigarette websites, it was found that six of the surveyed companies “use a wide range of flavorings that could appeal to kids.”<sup>26</sup> Given recent reports of marijuana being used in e-cigarettes devices and vapor pens,<sup>27</sup> the youth appeal of flavored marijuana extracts cannot be ignored.

## II. Specific Policy Options

There are different ways one can gauge the risk that flavored marijuana products pose to kids. For example, one way is to focus on the specific flavors themselves (*e.g.*, strawberry, chocolate). Some flavors are more likely than others to appeal to kids. Another way to gauge risk is to focus on the particular THC delivery method (*e.g.*, marijuana-infused products vs. marijuana extracts vs. usable marijuana). For example, some delivery methods pose greater risks of overdose than others. Others allow stealthy use. Small edible items can be easily hidden and consumed, in addition to being passed off as “regular” food products without THC. E-cigarette/vape pen/e-hookah devices are relatively easy to conceal and use without detection,

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<sup>23</sup> Margaret Broadwater et al., *Effects of voluntary access to sweetened ethanol during adolescence on intake in adulthood*, 37 *Alcohol. Clinical Exp. Res.*, 1048-55 (2013).

<sup>24</sup> Real Parents Real Answers, *What you need to know about e-cigarettes – Infographic*, (Apr.23, 2014) available at <http://www.realparentsrealanswers.com/what-you-need-to-know-about-e-cigarettes-infographic/> (last visited August 27, 2014). Lorillard’s own blu brand offers flavor cartridges in pina colada, peach schnapps, cherry, vanilla, java, and menthol. Lorillard Tech., Inc., *blu Cartridge Flavors*, available at <http://www.blucigs.com/product/flavor-cartridges/> (last visited August 27, 2014).

<sup>25</sup> Rachel A. Grana & Pamela M. Ling, *Smoking Revolution? A content analysis of electronic cigarette retail websites*, 46 *Am. J. Prev. Med.*, 395-403 (2014).

<sup>26</sup> Gateway to Addiction? A Survey of Popular Electronic Cigarette Manufacturers and Targeted Marketing to Youth (April 14, 2014), at 11. A report written by the staff of Senator Richard J. Durbin, Representative Henry A. Waxman, Senator Tom Harkin, John D. Rockefeller, Richard Blumenthal, Edward J. Markey, Sherrod Brown, Jack Reed, Barbara Boxer, Jeff Merkley, and Representative Frank Pallone Jr. (Reported flavors included cherry, chocolate, vanilla, kiwi strawberry, blackberry, grape, mango, cinnamon, peach, and banana, among others).

<sup>27</sup> Ann Givens & Pei-Sze Cheng, *I-Team: E-cigarettes, Used to Smoke Marijuana, Spark New Concerns*. NBC Channel 4 N.Y., (Oct. 11, 2013, 9:54 AM), available at <http://www.nbcnewyork.com/investigations/ECigarettes-Drugs-Marijuana-Vapor-Pens-Smoking-I-Team-227269001.html> (last visited August 27, 2014).

both for nicotine and marijuana products. One such device, the Konyo Triad Vape Pen,<sup>28</sup> has been described by Susanne E. Tanski, M.D., MPH, FAAP, a pediatrician with the American Academy of Pediatrics, as the marijuana vape pen.<sup>29</sup>

There are varying degrees of subjectivity and available data associated with evaluating these approaches. For discussion purposes, we have conceptualized marijuana products that may appeal to kids in the following way: (1) Products with flavors that appeal to kids; (2) products with packaging that appeals to kids; and (3) products which may appeal to kids and/or create confusion by virtue of their appearance. The following policy options are presented without any intention to make value judgments. Rather, we present them simply in an effort to identify potential cause-and-effect relationships between various approaches and mitigating the risk of youth use of marijuana.

#### A. Products with flavors that appeal to kids

The most aggressive approach would be to prohibit the sale<sup>30</sup> of all sweetened and fruit-flavored products<sup>31</sup> – marijuana-infused products, usable marijuana, and marijuana concentrates.

A somewhat less aggressive approach would entail prohibiting sweetened or fruit-flavored products only with respect to specified THC delivery methods – marijuana-infused products, for example. This approach would make sense if one can objectively distinguish between the relative appeal and risks that each THC delivery method poses to kids.

A variant on this approach is the Liquor Control Board's (LCB) emergency rule that prohibits the sale of "marijuana-infused products that are designed to be especially appealing to

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<sup>28</sup> Konyo, *Triad Vape Pen - The Only true 3 in 1 Vaporizer Pen*, <http://konyovapepen.com/vaporizers/vaporizer-pens/triad-vape-pen> (last visited August 27, 2014).

<sup>29</sup> Webcast, Julius B. Richmond Center of Excellence, *E-cigarettes - All that Vapes is not Nicotine* (June 3, 2014) available at <http://www2.aap.org/richmondcenter/RichmondCenterWebinarSeries.html>.

<sup>30</sup> Home-made flavored products for the maker's own use would not be prohibited.

<sup>31</sup> In the tobacco products realm, flavor restrictions have been made operational through the defining of key terms such as "tobacco product," "flavored tobacco product," "constituent" and "characterizing flavor." See, e.g., *City of Providence, Chapter 2012-16, Ordinance No. 42 (January 9, 2012)*; ChangeLab Solutions, *Model California Ordinance Restricting Sales of Flavored Tobacco Products*, available at [www.changelabsolutions.org/tobacco-control](http://www.changelabsolutions.org/tobacco-control). The City of Providence ordinance defines "flavored tobacco product" to mean "any tobacco product or component part thereof that contains a constituent that imparts a characterizing flavor." "Constituent" is defined to mean "any ingredient, substance, chemical or compound, other than tobacco, water or reconstituted tobacco sheet, that is added by the manufacturer to a tobacco product during the processing, manufacture or packing of the tobacco product. Such term shall include a smoke constituent." "Characterizing flavor" is defined to mean "a distinguishable taste or aroma, other than the taste or aroma of tobacco, menthol, mint or wintergreen, imparted either prior to or during consumption of a tobacco product or component part thereof, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverages, herb or spice; provided, however, that no tobacco product shall be determined to have a characterizing flavor solely because of the use of additives or flavorings or the provision of ingredient information."

children.”<sup>32</sup> LCB staff has informally indicated that under this emergency rule marijuana-infused products, such as cotton candy, gummy candies and lollipops, will be prohibited but that brownies (for example) will not be prohibited at this time. The LCB approach could be objectified through a definition such as that which the Department of Revenue adopted for “candy” for purposes of determining the applicability of a sales and use tax exemption:

- (i) “Candy” means a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces.
- (ii) “Candy” does not include any preparation containing flour and does not require refrigeration.<sup>33</sup>

#### B. Products with packaging that appeals to kids

Product packaging can be appealing to kids, including where the products are age-restricted. For example, in the case of cigarettes it has been found that in addition to the flavors themselves, the marketing of flavored products can be particularly appealing to kids. Among high sensation-seeking high school students, the appeal of cigarette brands is enhanced through the use of flavors and associated descriptions on product packaging.<sup>34</sup> Cigarette pack design is an important communications device for cigarette brands and acts as an advertising medium.<sup>35</sup> By contrast, it has been found that plain packaging and the removal of brand descriptors are likely to reduce the appeal of smoking for youth and young adults.<sup>36</sup>

Sellers of legal products and services have a constitutional right to engage in commercial speech that is not misleading. At least one court has concluded that packaging and product shape and color convey meaning that represents constitutionally-protected speech.<sup>37</sup> In order to regulate that speech, the government must have a substantial interest in doing so and its regulation must directly advance the government’s asserted interest and not be more extensive than is necessary to serve that interest.<sup>38</sup> A blanket ban on color and graphics in marijuana products likely would be unconstitutional. On the other hand, where colors, shapes and images

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<sup>32</sup> WAC 314-55-077(5) (effective June 25, 2014).

<sup>33</sup> WAC 458-20-244(3)(e).

<sup>34</sup> Dr. Kenneth C. Manning et al., *Flavoured cigarettes, sensation seeking and adolescents’ perceptions of cigarette brands*, 18 *Tob. Control*, 459-65 (2009).

<sup>35</sup> Melanie Wakefield et al., *The cigarette pack as image: new evidence from tobacco industry documents*, 11 *Tob. Control*, i73-i80 (2002).

<sup>36</sup> Melanie Wakefield et al., *Introduction effects of the Australian plain packaging policy on adult smokers: a cross sectional study*, 3 *BMJ Open* (2013), available at <http://bmjopen.bmj.com/content/3/7/e003175.full>.

<sup>37</sup> *Discount Tobacco City & Lottery, et al. v. United States, et al.*, 674 F.3d 509, 547-48 (6th Cir. 2012).

<sup>38</sup> *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

have special appeal to kids, regulation that is carefully tailored to target such characteristics while permitting others may be permissible.<sup>39</sup>

### C. Product shapes and appearances that may mislead or confuse consumers

Where a product's very shape or appearance may mislead a consumer regarding the nature of the product – such as one kind of food product that is made to appear identical to a fundamentally different product – the government may be able to impose a disclosure requirement that helps to mitigate the risk of confusion. In such a situation, the government may require “purely factual and noncontroversial” disclosures if they are “reasonably related to the State’s interest in preventing deception of consumers,” provided the requirements are not “unjustified or unduly burdensome.”<sup>40</sup> However, the harm sought to be prevented must be “potentially real, not purely hypothetical.”<sup>41</sup> These principles may be useful in considering policy options regarding particular marijuana products that closely resemble non-marijuana products.

Recently-adopted LCB emergency rules require approval for all marijuana-infused products, labeling, and packaging prior to offering these items for sale (WAC 314-55-077). Current practice includes rejecting product labels that mimic other products with the potential of creating product confusion. This approval process provides the opportunity to reject these products before they appear on the shelf, thereby mitigating potential harm.

### Conclusion

Research regarding youth attraction to flavored and sweetened food and beverage products in general, and to flavored or sweetened tobacco and alcohol products in particular, provides ample reason for policy makers to be concerned about the potential for significant youth attraction to flavored or sweetened marijuana products. Flavored or sweetened edible marijuana products may pose the most significant risks to kids, given the relative ease with which their use can be concealed and their potential for inducing overdoses. However, the experience with flavored tobacco and alcohol products, as well as emerging evidence regarding the proliferation of flavored electronic cigarettes and youth use of marijuana in vape pen devices, should alert policy makers to the fact that combusted and vaporous flavored marijuana products will likely appeal to kids as well.

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<sup>39</sup> *See Id.* at 571 (“In the absence of a showing that more limited speech regulation would be ineffective” Supreme Court would not sanction “complete suppression” of advertising).

<sup>40</sup> *Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)

<sup>41</sup> *Ibanez v. Florida Dep’t of Bus. & Prof. Reg.*, 512 U.S. 136, 146 (1994).