

CCSR Member Briefing: ALJ Stay and the GAO Drug Scheduling Report

September 29, 2026

Summary

On September 29, 2026, Chief Administrative Law Judge Derek C. Julius stayed the marijuana rescheduling hearing (DEA Docket No. 1362, Hearing Docket No. 26-96) while he decides whether to add a new GAO report to the record. The stay is procedural: the judge has not admitted the report, has not granted supplemental briefing, and has made no finding on the merits.

- **What triggered it.** On September 28, three opposing Interested Parties (NDASA, DUID Victim Voices, and Kenneth Finn, M.D.) filed a joint motion asking the judge to admit GAO-26-108623 as Dr. Finn Exhibit 126, allow a 10-page supplemental brief, and hold his recommended decision until that briefing closes.
- **What the GAO report says.** GAO found that DEA and FDA lack written internal policies and procedures for conducting scheduling evaluations, including FDA criteria for assessing "potential for abuse." GAO also found that DEA's final decisions aligned with HHS's recommendation in all 84 completed cases it reviewed from 2020 through 2025. The report makes no finding about marijuana's scientific merits.
- **What the judge did.** He found "merit" in the argument that a stay would be warranted if the record were expanded, and stayed the matter while he considers the motion. The Government must respond by October 13, 2026 (20 pages maximum); other Interested Parties may respond by the same date.
- **What comes next.** After October 13, the judge will rule on the motion. The realistic outcomes range from denying the motion and lifting the stay, to admitting the report with short supplemental briefing (the movants proposed roughly 14 days), to a longer reopening.

The practical effect today is a pause of at least two weeks before the judge can issue his recommended decision to the DEA Administrator. The April 2026 final order placing state-licensed medical marijuana and FDA-approved marijuana products in Schedule III is a separate action and is not affected by this stay.

Where the proceeding stood before the stay

The evidentiary record was closed and the only remaining step was the judge's recommended decision. The hearing ran June 29 through July 15, 2026, and post-hearing briefs were filed August 17, 2026.

The proceeding considers the May 2024 proposed rule to transfer all marijuana to Schedule III (89 Fed. Reg. 44,597). It is separate from the April 28, 2026 final order (91 Fed. Reg. 22,714), which already placed FDA-approved marijuana products and marijuana subject to a state medical marijuana license in Schedule III under the Single Convention treaty authority.

Under DEA's hearing rules, once the judge serves his recommended decision, parties have 20 days to file exceptions, and the record may be certified to the Administrator no sooner than 25 days after service (21 C.F.R. § 1316.65(c)). The judge's authority to receive new evidence ends when the record is certified

(21 C.F.R. § 1316.52). Because no recommended decision has issued, the movants argue the judge still has authority to admit the GAO report.

Only opponents of rescheduling were designated as Interested Parties. DEA defended the proposal, and in its August brief asked the judge to "expeditiously recommend" transfer to Schedule III, according to [Marijuana Moment's reporting](#). The D.C. Circuit separately denied a request to stay the April final order while consolidated petitions (Nos. 26-1106, 26-1130, 26-1136) proceed.

What the GAO report found, and what it did not find

[GAO-26-108623](#), published September 23, 2026, is an internal-controls audit of how DEA and FDA document their scheduling work. It was requested by Senate Judiciary Ranking Member Richard J. Durbin and Senator Cory Booker and covers DEA scheduling actions from 2020 through 2025. It is not a scientific review of any drug.

Principal findings

Finding	Report page
DEA took scheduling actions on 208 substances in 2020–2025. HHS input was required for 95, and DEA obtained and considered it for all 95.	2, 9
DEA's final decision aligned with HHS's recommendation for all 84 substances with a published final decision. The other 11 were later placed in Schedule I in 2026, also consistent with HHS.	2, 10, 24
Aside from an information-sharing MOU with FDA, DEA has no written policies on how staff conduct evaluations, perform eight-factor analyses, or make final scheduling decisions.	12–13
FDA has some written procedures, but none that outline how staff conduct an eight-factor analysis or develop recommendations. Staff rely on person-to-person training.	13–14
FDA has no written definition or criteria for "potential for abuse," including relative abuse potential. The CSA does not define the term either. FDA officials use professional judgment and cited xylazine as a case where this was challenging.	14
The FDA–NIDA MOU on scheduling consultation is over 40 years old and names offices that no longer exist.	14–15
DEA–FDA scientific disagreements are rare and usually resolved before a proposed rule. GAO cited hydrocodone combination products (2008–2014) as an example.	15–16

GAO's stated risk is operational: undocumented procedures could produce inconsistency "in the event of staff turnover" or loss of institutional knowledge (p. 12).

Recommendations and agency responses

GAO made three recommendations: DEA should write scheduling policies and procedures; FDA should write eight-factor procedures, including criteria for "potential for abuse"; and FDA and NIH should update their MOU. DOJ (including DEA) and HHS concurred with all three. HHS stated that FDA will draft a new Manual of Policies and Procedures (MaPP) for eight-factor analyses, and that FDA and NIDA have begun revising their MOU (pp. 18, 26).

What the report says about marijuana

The report describes the marijuana process factually in Appendix I (pp. 21–23). It reports that FDA officials described the 2023 two-part test as an additional framework that did not replace the five-part test or FDA approval as ways to establish currently accepted medical use (p. 8). It also recounts the 2024 OLC opinion finding the two-part inquiry sufficient under the CSA.

What the report does not say

- It does not find that HHS's 2023 marijuana evaluation was flawed, incomplete, or improperly conducted.
- It does not recommend reopening, pausing, or revisiting any scheduling decision, including marijuana.
- It does not question the legality of the two-part test or the OLC opinion.
- It does not find that any past scheduling outcome was wrong. Its finding is that DEA's decisions have tracked HHS's recommendations.

The joint motion

The movants argue that the Government's case rests on HHS's 2023 evaluation, and that the GAO report is independent evidence the process behind it had no written standard. The motion was filed September 28, 2026, five days after the report's release, by the National Drug & Alcohol Screening Association (counsel David G. Evans) and by DUID Victim Voices and Kenneth Finn, M.D. (counsel Patrick D. Kenneally, Burke Law Group).

Relief requested

1. Admit the GAO report as Dr. Finn Exhibit 126, or in the alternative take official notice of its findings (5 U.S.C. § 556(e); 21 C.F.R. § 1316.59(e)).
2. Allow a supplemental brief of up to 10 pages within 7 days of an order.
3. Allow responses of up to 10 pages within 7 days after that.
4. Hold the recommended decision and certification of the record until briefing closes, about 14 days in total.

Arguments made

Section	Argument	Principal support cited
A. Authority and good cause	The judge's authority to take evidence continues until certification. The report	21 C.F.R. §§ 1316.52, 1316.57, 1316.59(a)

Section	Argument	Principal support cited
	did not exist until two months after the hearing and was filed within five days.	
B. Weight of HHS's evaluation	The Government relies chiefly on HHS. The weight of an agency judgment depends on the thoroughness and consistency of its process, which is what GAO audited.	<i>Skidmore v. Swift & Co.</i> (1944); GAO pp. 12–14
C. Reversal without a written yardstick	FDA found a high potential for abuse in 2015 and the opposite in 2023. Schedule III requires abuse potential "less than" Schedules I and II, and FDA has no written criteria for that comparison.	21 U.S.C. § 812(b)(3)(A); <i>Encino Motorcars</i> (2016); <i>State Farm</i> (1983); GAO p. 14
D. Evidence the parties could not develop	The Government declared the two-part test off limits and Touhy letters narrowed testimony, so GAO's findings are the rebuttal evidence the hearing could not produce.	5 U.S.C. § 556(d); Tr. 26, 97, 412, 440
E. The agencies' own remedy	The hydrocodone case shows DEA asking HHS to re-evaluate. The supplemental brief will ask the judge to recommend that the Administrator decline the rule and request a new HHS evaluation under FDA's forthcoming written policy.	21 U.S.C. § 811(b); 21 C.F.R. § 1316.65(a)(3); GAO pp. 15–16, 18
F. A short stay prejudices no one	A two-week pause now costs less than correcting a recommended decision issued on an incomplete record later.	5 U.S.C. § 556(c)(5); <i>Landis v. N. Am. Co.</i> (1936)

Hearing testimony

The motion leans on testimony already in the record, now framed through GAO's findings:

- Dr. Dominic Chiapperino (FDA) testified that FDA began its evaluation in late 2022 before the two-part test existed, was directed to apply it, never completed a five-part analysis, and agreed marijuana "would not have passed" the five-part test (Tr. 411–413, 426, 437).
- Dr. Luli Akinfiresoye (DEA) testified that her December 2024 DEA scientific review applied the five-part test and found no adequate and well-controlled efficacy studies (Tr. 1346–1368).

Facts relevant to weighing the motion

These points come from the GAO report and the rulemaking record and are not addressed in the motion:

- The criteria for assessing abuse potential are published. The May 2024 proposed rule explains that, because the CSA does not define "abuse," DEA and HHS apply factors drawn from the CSA's legislative history (H.R. Rep. No. 91-1444), the same framework used in DEA's 2016 denial (89 Fed. Reg. 44,597; 81 Fed. Reg. 53,740). GAO's finding concerns the absence of an internal FDA written policy, not an absence of criteria.
- HHS's 2023 evaluation compared marijuana against Schedule I, II, III, and IV comparators and alcohol across multiple databases (proposed rule, Factor 1 and Factor 5 discussion).
- GAO's policy findings are agency-wide and cover all scheduling actions, including the 84 decisions where DEA and HHS agreed. The report does not tie any finding to the marijuana evaluation.
- In the hydrocodone example, the HHS re-evaluation occurred before any proposed rule. GAO reports that DEA and FDA usually resolve differences before an NPRM (p. 15).

The ALJ's order

The order pauses the case to protect the record while the motion is briefed; it does not accept the movants' arguments on the merits. Judge Julius issued it on September 29, 2026, one day after the motion was filed and before the Government responded.

What the order does

- Stays "this matter" pending resolution of the motion, in response to the movants' request, which was only to hold the recommended decision and certification of the record.
- Orders the Government to respond by October 13, 2026, in no more than 20 double-spaced pages.
- Permits, but does not require, the other Interested Parties to respond by the same date under the same limits.

What the order does not do

- It does not admit the GAO report, as an exhibit or by official notice.
- It does not grant leave for the supplemental brief or adopt the movants' proposed 7-day schedule.
- It does not address any of the motion's merits arguments (burden, reasoned explanation, Touhy limits, or the requested recommendation for a new HHS evaluation).

The order's reasoning

The judge "finds merit in this argument that, if the record were to be extended to also include the GAO Report, a stay would be warranted to await briefing on it." He then applies the same logic to the period while he considers the motion.

Sentiment (our initial take)

Initial read is that the order is neutral and procedural, with a mild lean toward completeness of the record, and an even-hand, rather than toward either side.

This approach is consistent with the hearing, where the judge admitted most evidence and resolved most objections by going to weight rather than exclusion, including overruling Government Touhy objections.

Additionally, in the order, the judge describes briefing on how the report "impacts these proceedings, if at all", and has granted the government 14 days and 20-pages (beyond the movants request for 7 days and 10-pages).

The record provides no basis to predict how the judge will weigh the report if admitted. His closing statement on July 15 reminded parties that his decision is a recommendation and that the final decision rests with the DEA Administrator.

Possible paths to resolve the stay and conclude the hearing (DRAFT)

The stay ends when the judge rules on the motion, which cannot happen before responses are due on October 13, 2026. The order does not provide for a reply from the movants, so the judge could rule at any point after that date. The paths below are the outcomes available to him under the rules cited in the motion and order; they are not predictions.

Path	What it involves	Added time after the ruling (estimate)
1. Deny the motion and lift the stay	The judge finds the report not material to this record, for example because its findings are agency-wide and do not address the marijuana evaluation. He proceeds to the recommended decision.	None
2. Official notice of limited findings, no new briefing	The judge notices specific facts (such as the absence of written FDA procedures) without admitting the full report. Any party may ask to controvert the noticed facts (5 U.S.C. § 556(e)).	Days to a few weeks, if a party seeks to controvert
3. Grant the motion as proposed	Report admitted as Dr. Finn Exhibit 126. A 10-page supplemental brief is due in 7 days, with 10-page responses 7 days later. This is the movants' proposed schedule for briefing on the report itself; it is separate from the October 13, 20-page responses the judge already ordered on whether to grant the motion.	Approximately 14 days, per the movants' own proposal
4. Admit with a modified schedule	Report admitted or noticed, with briefing limits or deadlines the judge sets, possibly including an opportunity for the	Unknown

Path	What it involves	Added time after the ruling (estimate)
	Government to explain how FDA assessed abuse potential.	

Steps remaining once the stay is lifted

1. The judge issues his recommended decision (findings of fact, conclusions of law) to the Administrator.
2. Parties may file exceptions within 20 days.
3. The record is certified to the Administrator 25 days after the recommended decision is served (21 C.F.R. § 1316.65(c)).
4. The Administrator issues a final rule, which is subject to judicial review in the court of appeals (21 U.S.C. § 877).

Key dates thus far

The next date to watch is Oct 13, 2026, when the Government's response and any other party responses are due.

Date	Event
Oct 13, 2026	Government response due; other Interested Parties may respond
September 29, 2026	ALJ order staying the case
September 28, 2026	Joint motion filed by NDASA, DUID Victim Voices, and Dr. Finn
September 23, 2026	GAO-26-108623 published
September 3, 2026	HHS comment letter to GAO concurring with recommendations
August 17, 2026	Post-hearing briefs filed
June 29 – July 15, 2026	Hearing held
April 28, 2026	Final order on state-licensed medical and FDA-approved marijuana (91 Fed. Reg. 22,714); new notice of hearing (91 Fed. Reg. 22,777)
May 21, 2024	Proposed rule to transfer marijuana to Schedule III (89 Fed. Reg. 44,597)
August 29, 2023	HHS recommends Schedule III