

SB19-008: SUBSTANCE USE DISORDER TREATMENT IN CRIMINAL JUSTICE SYSTEM

Concerning treatment of individuals with substance use disorders who come into contact with the criminal justice system

Details

Bill Sponsors:	House – <i>Kennedy (D) and Singer (D)</i> Senate – <i>Moreno (D) and Priola (R)</i> , Pettersen (D)
Committee:	Senate Committee on Judiciary
Bill History:	1/4/2019 Introduced to Senate
Next Action:	TBD- Hearing in Senate Committee on Judiciary
Fiscal Note:	Not available at time of submission

Bill Summary

This bill concentrates on a variety of factors in regards to substance use disorders (SUDs) and the interaction with the criminal justice system. The following items are addressed in the bill:

- The Commission on Criminal and Juvenile Justice (CCJJ) is to study and make recommendations on certain issues surrounding individuals with a SUD who come in contact with the criminal justice system.
- The Colorado Department of Corrections is to allow medication-assisted treatment (MAT) to be provided to individuals who were receiving MAT in a county jail prior to their transfer.
- The Substance Abuse Trend and Response Task Force is to formulate a response to the use of drop-off treatment services, mobile and walk-in crisis centers, and withdrawal management programs, rather than continued criminal justice involvement for offenders of low-level drug offenses.
- The Colorado Department of Health Care Policy and Financing is to seek federal approval for a Medicaid Section 1115 waiver that would allow for treating individuals confined in jails to be treated for SUDs with Medicaid financial participation.
- A simplified process for sealing convictions of level 4 drug felonies, and all drug misdemeanors is created.
- County jails receiving funds through the Jail Based Behavioral Health Services (JBBS) program are mandated to allow MAT.
- An appropriation is included to increase the law-enforcement-assisted diversion pilot program from four locations to ten locations.
- An appropriation is included to increase the co-responder program funding.

Issue Summary

Medication-Assisted Treatment (MAT) in State Prisons and County Jails

Inmates that have been recently¹ released are 129 times more likely to die from drug overdose than the general population.² A recent study in Rhode Island has implied that there is a reduction in fatal drug overdoses when criminal justice facilities implement a MAT program.³ Rhode Island offers all prisoners with

¹ Within 2 weeks of release

² Binswanger, I. A., Stern, M. F., Deyo, R. A., Heagerty, P. J., Cheadle, A., Elmore, J. G., & Koepsell, T. D. (2007). Release from Prison — A High Risk of Death for Former Inmates. *New England Journal of Medicine*, 356(2), 157-165. doi:10.1056/nejmsa064115

³ Green, T.C., Clarke, J., Brinkley-Rubinstein L, et al. (2018) Postincarceration Fatal Overdoses After Implementing Medications for Addiction Treatment in a Statewide Correctional System. *JAMA Psychiatry*, 75(4):405–407. doi:10.1001/jamapsychiatry.2017.4614

an opioid use disorder to be inducted or continued on a selection of methadone, buprenorphine, and extended release naltrexone (i.e. Vivitrol®). The contractor who provides the medication is a community provider, making linkage to care more effective.

There have been a variety of lawsuits throughout the country regarding SUD treatment in correctional facilities. One lawsuit in Maine, brought by the American Civil Liberties Union (ACLU), regarding the continuation of MAT medication while in a correctional facility was settled and the Maine Department of Corrections agreed to continue the MAT for an inmate while in state custody.⁴

Medicaid Coverage of and Health Care for Confined Individuals

Federal law does not prohibit individuals from being enrolled in Medicaid while incarcerated but it prohibits states from using federal matching funds for health care services for adult and juvenile inmates of public institutions, except when the inmate is admitted to an off-site hospital or other qualifying facility for at least 24 hours.^{5,6} The Centers for Medicare and Medicaid Services (CMS) provided guidance in 2015 to clarify when an individual is considered an inmate of a public institution, the following table illustrates that guidance.⁷

Federal matching funds are available for individuals:	Federal matching funds are NOT available for individuals living in:
On parole, probation, or released to the community pending trial	State/federal prisons, local jails, or detention facilities
Living in a halfway house where individuals can exercise personal freedom	Federal residential reentry centers
Voluntarily living in a public institution	Residential mental health & SUD treatment facilities for incarcerated individuals
On home confinement	Hospitals or nursing facilities that exclusively serve incarcerated individuals

Most states, including Colorado, suspend rather than terminate Medicaid benefits during periods of incarceration. This allows for coverage to be reactivated more quickly than if the individual has to reenroll for the program.

Of the 17,977 offenders incarcerated in Colorado prisons as of the end of 2015, auditors found 43 percent had a psychiatric diagnosis and 74 percent needed substance use disorder treatment.⁸ These proportions may have changed since the report that found these numbers was published, as SB17-207 was passed by the Colorado General Assembly in 2017 and prohibited individuals being held on an emergency 72-hour mental health hold from being detained or housed in a jail.⁹

⁴ American Civil Liberties Union (Sept. 28, 2018). *Doc will provide doctor-prescribed medication to prisoner with opioid use disorder*. Retrieved from <https://www.aclu.org/news/doc-will-provide-doctor-prescribed-medication-prisoner-opioid-use-disorder>

⁵ 42 USC § 1393d(a)(29)(A)

⁶ The Pew Charitable Trusts (Aug. 2, 2016). *How and When Medicaid Covers People Under Correctional Supervision: New federal guidelines clarify and revise long-standing policies*. Retrieved from <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/08/how-and-when-medicaid-covers-people-under-correctional-supervision>

⁷ Medicaid and CHIP Payment and Access Commission [MACPAC] (July 2018). *Medicaid and the Criminal Justice System*. Retrieved from <https://www.macpac.gov/wp-content/uploads/2018/07/Medicaid-and-the-Criminal-Justice-System.pdf>

⁸ Colorado Office of the State Auditor (Nov. 2016). *Department of Corrections: Behavioral Health Programs*. Retrieved from http://leg.colorado.gov/sites/default/files/documents/audits/1556p_behavioral_health_programs.pdf

⁹ SB17-207: Strengthen Colorado Behavioral Health Crisis System. Retrieved from <https://leg.colorado.gov/bills/sb17-207>

Section 1115 Medicaid Waivers

Section 1115 of the Social Security Act allows states to apply to the federal government for demonstration project waivers that further the goals and intentions of Medicaid while providing more flexibility to states. These demonstration projects are aimed to either build upon existing or novel approaches that promote the objectives of Medicaid. The important aspect of these propositions is that they must be budget neutral.¹⁰ To be budget neutral in these demonstrations the expectation is that expenditures by the federal government will not exceed it would have spent without the demonstration.³ No state has been approved to provide Medicaid coverage with Federal financial participation to incarcerated individuals.

Sealing of Certain Criminal Conviction Records

Other states have enacted laws that seal different types of conviction records. Some states require the individual to request or petition the courts to get their records sealed or otherwise dispensed. For example, in Arkansas minor felonies and drug convictions are eligible for sealing after 5 years, if there is no more than one previous felony.¹¹ In Illinois, there is sealing for most misdemeanors and felonies after a three year waiting period and there are exceptions for some serious offenses. Other states may offer the ability to seal conviction records but each state handles the process and specifications in different manners. In Indiana, most felony and misdemeanor offenses are expunged after a waiting period of five to ten years and records of misdemeanors and minor felonies are automatically sealed upon expungement, which limits access to those records.

Jail Based Behavioral Health Services (JBBS) Program

The JBBS program became operational in October 2011 with the goal of providing appropriate behavioral health services to those individuals in jails and support the continuity of care after release from custody.¹² In 2018, 45 of the 64 counties in Colorado participated in the program.¹³ The goals of the program include: screening all inmates, identifying veterans and active duty military inmates, providing culturally competent and appropriate treatment services for individuals with SUDs and those inmates with co-occurring mental health conditions, and providing community transition case management services. The protocols and procedures to meet this goals vary by county. The funds are also allowed to be used to support the purchase of medications and psychiatric prescription services. Throughout the program's operation, 21,423 inmates were screened, of which 69 percent were positive for a SUD.¹³

In Larimer, the jail has partnered with Summitstone Health Partners to provide JBBS services. In fiscal year 2016-2017 the jail provided assessment for 318 individuals, provided SUD individual treatment to 27, and tracked the transition of 390 people.¹⁴ By 12 months after release the 108 individuals were still being tracked and 13.89 percent of those were not in treatment.¹⁴

Law-Enforcement-Assisted Diversion (LEAD) Pilot Program

The LEAD program is a pre-booking diversion program, at the discretion of the police officers, which aims for law enforcement officers to have the appropriate knowledge and tools to re-route individuals with low-level drug and prostitution offenses from the criminal justice system to case managers and appropriate services. Currently, Alamosa, Denver County, Longmont, and Pueblo County receive up to \$575,000 per year from the

¹⁰ U.S. Centers for Medicare and Medicaid Services (n.d.). *About Section 1115 Demonstrations*. Retrieved from <https://www.medicare.gov/medicaid/section-1115-demo/about-1115/index.html>.

¹¹ Restoration Rights Project (2018). *50-State Comparison: Judicial Expungement, Sealing, and Set-Aside*. Retrieved from <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside/>

¹² Colorado Department of Human Services [CDHS](2018). *Jail Based Behavioral Health Services*. Retrieved from <https://www.colorado.gov/pacific/cdhs/jail-based-behavioral-health-services>

¹³ Colorado Office of Behavioral Health [OBH], CDHS (July 20, 2018). *Initial Evaluation of Colorado Jail Based Behavioral Health Services*. Retrieved from https://drive.google.com/file/d/1TFKOLZmM_f1OUyao2QppRdoaNgu4llc5/view?pli=1

¹⁴ OBH, CDHS (Dec. 2017). *Jail Based Behavioral Health Services Annual Report: Fiscal Year 2017*. Retrieved from <https://drive.google.com/file/d/1OCoi-8UUX9XMzgFBcijtXugOL-rGEpOu/view>

state to pilot the LEAD program.¹⁵ The pilot program currently is funded from April 1, 2018 through June 30, 2020.¹⁶ The goals of the pilot program are to: increase public safety, decrease recidivism, reduce justice system costs, decrease individual-level harm for participants, increase access to services and create systems change.

Co-Responder Program

The co-responder model partners behavioral health specialists with law enforcement officers to respond to behavioral health-related calls. The teams work to de-escalate the situation and divert individuals to crisis services and assessments instead of arrest and criminal justice involvement. There are generally two approaches to the program, either an officer with a behavioral health specialist ride together in the same vehicle for an entire shift or the behavioral health specialist is called to the scene and the call is handled with an officer.¹⁷ The goals of the program are to prevent unnecessary incarceration or hospitalization, provide alternative care in the least restrictive environment, prevent duplication of services, and facilitate the return of law enforcement to patrol.¹⁷ Currently, Broomfield, Denver County, El Paso County, Evans, Grand Junction, Larimer County, Longmont, and Pitkin County receive up to \$362,500 per fiscal year from the state to operate the programs for 5 years.¹⁸ In Larimer County, the Fort Collins Police Department, Loveland Police Department, and Larimer County Sheriff's Office are participating in the program.

This Legislation

The Colorado Commission on Criminal and Juvenile Justice (CCJJ) is tasked with studying and making recommendations on specific issues regarding individuals with a substance use disorder (SUD) who contact the criminal justice system. The issues to for the CCJJ to study are:

- Alternatives to filing criminal charges against individuals with a SUD who have been arrested for drug-related offenses
- Best practices for investigating unlawful opioid distribution in Colorado, which may include the creation of black market opioid investigatory entities at the state and local level
- Process for automatically sealing criminal records of convictions for drug offenses

On or before July 1, 2020 the CCJJ is to provide a report to the House and Senate Judiciary Committees as well as the House Public Health Care and Human Services Committee and the Senate Health and Human Services Committee. This requirement is repealed June 30, 2021.

The Colorado Department of Corrections shall allow medication-assisted treatment (MAT)¹⁹ to be provided to individuals in the custody of the Department who were receiving treatment in local jails prior to being the Department's custody. In order to assist in the development and administration of MAT, the Department can enter into agreements with community agencies, behavioral health organizations (BHOs), and substance use treatment organizations.

The Substance Abuse Trend and Response Task Force is charged with investigating the use of drop-off treatment services, mobile and walk-in crisis centers, and withdrawal management programs rather than continued criminal justice involvement for offenders of low-level drug offenses.

¹⁵ CDHS (Jan. 10, 2018). *CDHS Announces New Community Behavioral Health Partnerships with Local Law Enforcement*. Retrieved from <https://www.colorado.gov/pacific/cdhs/2018-01-10-cdhs-new-behavioral-health-partnerships-law-enforcement>

¹⁶ OBH, CDHS (Dec. 2018). *Law Enforcement Assisted Diversion (LEAD)*. Retrieved from <https://drive.google.com/file/d/1h04sgDqCdERtSrnpuAmqLs8EheA0wiy/view>

¹⁷ OBH, CDHS (Dec. 2018). *Co-Responder Programs*. Retrieved from https://drive.google.com/file/d/1X6sGTS18Zv4bjEKIcjWA_8DAwFTN_H3v/view

¹⁸ CDHS (Jan. 10, 2018). *CDHS Announces New Community Behavioral Health Partnerships with Local Law Enforcement*. Retrieved from <https://www.colorado.gov/pacific/cdhs/2018-01-10-cdhs-new-behavioral-health-partnerships-law-enforcement>

¹⁹ Defined in statute, C.R.S. 23-21-802, as "a combination of behavioral therapy and medications, such as buprenorphine and all other medications and therapies, approval by the federal Food and Drug Administration (FDA) to treat opioid use disorder."

The Department of Health Care Policy and Financing must seek federal authorization, no later than October 1, 2019, to provide SUD treatment (must include MAT and withdrawal programs) to confined individuals with full federal financial participation.

The bill would allow individuals to petition district or municipal courts to seal conviction records, except basic identifying information, of certain controlled substance-involved offenses. This could occur if the petition is filed three or more years after the date of final disposition of the criminal proceedings or release of defender (whichever is later) and the individual has not been charged or convicted for an offense in those intervening years. The process for and administration of the petition is outlined in the bill. The individual must filing a petition in the case they were convicted for and provide the prosecuting attorney with written notice and a copy of the petition. Upon filing of the petition, the court will review and determine whether there are grounds to proceed to a hearing. If the court determines that the petition is insufficient or the defendant is not entitled to relief the court can enter an order denying the petition, which specifies the reasons for the denial, and mail the copy to the defendant. If the court determines that the petition is sufficient and no grounds for denial exist, the court shall set a date for the hearing and notify all parties. After the hearing is conducted and the court finds that the harm to the privacy of the defendant or the dangers of unwarranted, adverse consequences to the defendant outweigh the public interest in retaining the conviction records, the court may order the records, except the basic identifying information, to be sealed. In making this determination, the court must consider (at a minimum):

- Severity of the offense that is the basis of the conviction records
- Criminal history of the defendant
- Number of convictions and dates of the convictions sought to be sealed
- Need for the government agency to retain the records
- Whether the person has completed a veteran's treatment court or any other substance use treatment program²⁰

When the court seals conviction records the court shall provide a copy of the court order to the Colorado Bureau of Investigation (CBI) and the defendant shall pay the CBI any costs related to sealing the records in the custody of the CBI. Also, the court shall provide the court order to each custodian that might have records that are subject to the order. In conjunction with the petition, the defendant shall provide the court with a list of all agency custodians that may have custody of records that would be subject to the order. The defendant may provide a copy of the order to any other custodian of the records subject to the order. Each custodian that receives the order shall remove the applicable records from its records. This section does not apply to records sealed pursuant to C.R.S. 18-13-122 (13), where the records were sealed because the defendant was underage and completed certain actions. A defendant that has petitioned to seal their records must pay a processing fee of \$65, which may be waived by the court upon determining their inability to pay. If the motion to seal is filed in state court, the processing fee is to be transmitted to the State Treasurer and credited to the Judicial Stabilization Cash Fund.²¹ If the motion to seal is filed in municipal court, the fees must be transmitted to the municipality's treasurer and deposited in the municipality's general fund. Such a petition can only apply pertaining to convictions for:

- Level 4 drug felony or drug misdemeanor involving possession of a controlled substance
- Any conviction prior to October 1, 2013 for a felony or misdemeanor where the basis of the offense demonstrates that it would have been classified as a level 4 drug felony or drug misdemeanor involving possession of a controlled substance if it had been committed on or after that date.
- Any conviction for a violation of any municipal code where the offense involves the possession of a controlled substance

²⁰ This factor should be considered by the court favorably.

²¹ The Judicial Stabilization Cash Fund, created in C.R.S. 13-32-101(6), in a fund for the expenses of trial courts in the judicial department, subject to annual appropriations by the General Assembly.

Unless law states to the contrary, the motions that are filed pursuant to this section are procedural in nature and the sealing applies retroactively for all eligible cases. This section does not apply to records that are in the possession of a criminal justice agency when an inquiry regarding the records is made by another agency.

The Office of Behavioral Health, within the Colorado Department of Health and Human Services, will require county jails that receive funding through the Jail Based Behavioral Health Services program to allow MAT to be provided, as necessary, to those individuals within the jail's custody. Sheriffs, as the custodians of jails, may enter into agreements with community agencies, BHOs, and SUD treatment organizations to assist in developing and administering MAT in the jails.

For the 2019-2020 state fiscal year, \$3.45 million is appropriated to the Office of Behavioral Health for the expansion of the law-enforcement-assisted (LEAD) pilot program. Another appropriation is directed to the Office of Behavioral Health for the same period in order to increase funding to the co-responder program.

Reasons to Support

Tasking the CCJJ to research specific issues regarding individuals with SUDs that are involved in the criminal justice system is an appropriate next step in determining what alternatives to current practices or changes in the system would be benefit Colorado. Charging the Substance Abuse Trend and Response Task Force with alternatives for individuals instead of continued criminal justice involvement aims to ensure that they are reasonable and appropriate in Colorado, the process, and what policy (if any) would need to change to ensure the success of those options. By researching before changing statewide policy, it allows for these options to be implemented in the future if they seem feasible for state and local systems and not investing resources into options that may turn out to be unsustainable.

Increasing the entities that can provide MAT to the criminal justice system may help reduce the costs, to both the state and local governments, of re-arrests and re-incarceration as well as the societal, human, and health care costs associated with SUDs. MAT is an evidence based practice that can help individuals with an opioid use disorder or alcohol use disorder.

Having Federal financial participation in providing Medicaid behavioral health treatment coverage for eligible incarcerated populations would allow more clients to be served as both the state and local dollar would go further than it currently does. This would allow correctional facilities to more appropriately provide behavioral health treatments to incarcerated individuals as more treatments options on the continuum of care would be available to the provider.

The bill proposes to seal conviction records, but places the obligation on the people that were convicted to begin the petition process. Although this process could mean that only a fraction of the people eligible for the process would actually file the petition, the bill tasks the CCJJ with investigating and reporting the possibility of automatically sealing conviction records. The process of slowly moving to sealing records with research and forethought on how that would affect Colorado's criminal justice system is appropriate with such an expansive change to the system.

Expanding the number of locations that the LEAD program is piloted to diverse locations could enhance the evaluation of the program to determine its successes and weaknesses. Increasing funding to the co-responder would allow there to be an increase in the number of behavioral health specialists and increase the number of shifts that have a co-responder available.

Supporters

- No supporters have been made publicly available at this time.

Reasons to Oppose

With the substance use crisis that the state is in, it would be more expedient to implement the alternatives and ideas that the CCJJ and the Substance Abuse Trend and Response Task Force have been tasked with studying. As overdose deaths continue to rise, it is important to act now in every sphere in order to have a positive impact on those rates.

Factors that may limit the willingness or ability to incorporate MAT into the JBBS program and allow the use in state prisons may include a preference for drug-free treatment, limited knowledge of the benefits of MAT, security concerns, regulations prohibiting use of certain MAT by certain agencies, as well as the lack and cost of qualified medical staff. Some may believe that tying JBBS funds to the implementation of MAT may mean some jails will forgo the JBBS money and provide fewer behavioral health services than they currently do.

Seeking approval for federal financial participation in providing Medicaid coverage for certain services for those in correctional facilities is a long process with the expenditure of state resources. The appropriation for a 1115 waiver application may be unjustified as no other state has such a waiver and it seems to many to be unlikely to gain approval from the administration.

The bill proposes to seal conviction records, but places the obligation on the people that were convicted to begin the petition process. This process could mean that only a fraction of the people eligible for the process would actually file the petition. There are more immediate and effective ways of reaching the same result without placing the responsibility on the individual.

It may be more appropriate for the General Assembly to wait to expand the locations for the LEAD program before the initial sites have been evaluated for successes and weaknesses. Similarly, it may be appropriate wait to increase funding for the co-responder program until the originally implemented programs in those departments and offices have been evaluated.

Opponents

- No opposition has been made publicly available at this time.

Other Considerations

The bill does not address the fact that individuals that are newly released from incarceration are far more likely to die from a drug overdose than the general public. It may be appropriate to provide naloxone, also known as Narcan, upon release from a correctional facility to those with opioid use disorder in order to reduce the risk of fatal overdose. In statute, C.R.S. 23-21-802, MAT is defined as “a combination of behavioral therapy and medications, such as buprenorphine and all other medications and therapies, approval by the federal Food and Drug Administration (FDA) to treat opioid use disorder.” This definition does not include the fact that certain medications, such as naltrexone, as can be used to treat alcohol use disorders.²² The definition in statute is narrow and only applies to opioid use disorders, which limits the scope in which MAT can be used for correctional facilities and in future circumstances.

About this Analysis

This analysis was prepared by Health District of Northern Larimer County staff to assist the Health District Board of Directors in determining whether to take an official stand on various health-related issues. The Health District is a special district of the northern two-thirds of Larimer County, Colorado, supported by local property tax dollars and governed by a publicly elected five-member board. The Health District provides medical, mental health, dental, preventive and health planning services to the communities it serves. This analysis is accurate to staff knowledge as of

²² Substance Abuse and Mental Health Services Administration and National Institute on Alcohol Abuse and Alcoholism, Medication for the Treatment of Alcohol Use Disorder: A Brief Guide. HHS Publication No. (SMA) 15-4907. Rockville, MD: Substance Abuse and Mental Health Services Administration, 2015. Retrieved from <https://store.samhsa.gov/system/files/sma15-4907.pdf>

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