

Behavioral Health Diversion Proposal

The attached legislative proposal establishes a post-filing diversion program for justice-involved individuals with diagnosable behavioral health disorders. In particular, criminal defendants who are not facing a class 1-3 person crime felony, nor a class 1-2 drug felony will be eligible.

The proposal calls for a database system, managed by the Department of Human Services, which will automatically compare the names of all individuals booked into a county jail within Colorado with a database of all individuals treated by a mental health or substance abuse facility licensed in the state. Those who are positively matched will be eligible. Additionally, persons may be recommended for the program by any law enforcement, jail, or court personnel who, upon observing behavior consistent with a behavioral health disorder, include a report in the person's charging documents to the court.

The proposal creates Court clinician positions, working for the Department of Human Services or contracted with licensed local facilities, to coordinate the diversion program by accessing the statewide behavioral health database, conducting clinical assessments when adequate documentation from a treatment facility is unavailable, and providing information to the Court necessary to evaluate a person's appropriateness for the program. For jurisdictions that do not already have a pretrial release program, additional Probation staff are requested to coordinate the supervision of bond release conditions.; for jurisdictions with existing pretrial release agencies, additional staff are requested to coordinate with the Court clinicians to implement this program.

The proposal provides for additional resources to ensure timely and quality behavioral health treatment be made available in every jurisdiction in the state for the participants in this program. Court clinicians, pretrial release agencies, and Probation will coordinate with county human services departments to secure participants with all public benefits for which they are eligible. The diversion component is post-filing which places the jurisdiction of the participant in the hands of the court, not the district attorney. If a participant is found to be compliant with all bond and program conditions for one year after the filing, the case will be dismissed.

The proposal orders the Division of Criminal Justice to report on the progress and outcomes of the program.

The proposal appropriates funding for the positions created and agencies mandated to implement the program; however, it is anticipated to be revenue neutral (or positive) due to cost avoidance in: jails, DOC, parole, and the courts.

Submitted by: Todd Spanier and Kally Enright
Arapahoe County Criminal Justice Planning Coordinators

Concerning the establishment of a criminal justice diversion program for those suffering from a behavioral health disorder, and in connection therewith, making an appropriation.

Section 1. Legislative declaration

(1) The general assembly finds and declares that:

(a) Behavioral health and behavioral health crises are healthcare issues that compromise the ability of citizens to remain law abiding;

(b) Our municipal and county jails and the state prison system have become de facto treatment centers for those suffering from behavioral health disorders;

(c) The constant entanglement between people suffering from behavioral health disorders and the criminal justice system exacerbates the underlying conditions with which they struggle, and compromises recovery;

(d) Establishing alternative criminal justice processes to handle defendants with behavioral health disorders will provide health benefits for the population of Coloradans suffering from those disorders, will reduce incarceration and Court processing costs, and increase economic activity for those who, properly treated for their disorders, can maintain productive lives;

(e) Establishing a coordination between the Court and the Department of Human Services for clinical assessment, treatment, and the provision of eligible public benefits will reduce the incidence of individuals suffering from behavioral health conditions becoming entangled in the criminal justice and penal systems;

(2) Therefore, the general assembly finds that steps should be taken to coordinate a behavioral health treatment solution to what has heretofore become a criminal justice problem. The steps include providing for clinicians to work in the Courts to provide clinical assessments and other records to the Court to identify those who could be diverted from pretrial confinement; providing for timely and quality treatment for their disorders; ordering the Department of Human Services to secure all eligible public benefits available and necessary to achieve a self-sustainable lifestyle for program participants; and establishing a one-year compliance period after which the charges will be dropped.

Section 2. Eligibility criteria

(1) (a) All persons arrested or detained on suspicion, or by probable cause, of having committed or committing a crime in the state. Defendants facing all potential offenses or potential offenses shall be eligible except for the following crimes: person crimes, as provided in Article 3 of Title 18, C.R.S., which are felonies in class 1, 2 or 3; drug crimes as provided in Part 4, Article 18 of Title 18, C.R.S. which are felonies in class 1 or 2.

(b) Further, to be eligible for the program, criminal defendants must have, or potentially have a mental illness, as provided in section 27-65-102(14)¹; or alcohol abuse disorder, as provided in section 27-81-102(1)²; or drug abuse disorder, as provided in section 27-82-102(8)³; or any combination of the above.

Section 3. Participant identification

(1) (a) In order to determine eligibility for this program, in accordance with section (b) of section 2, when defendants are booked into a municipal or county jail in the state, their name, date of birth and other identifying characteristics shall be compared with records kept by the Department for persons being treated by facilities defined as provided in section 27-81-102(2) and (3)⁴ for alcohol; section 27-82-102(2) and (3)⁵ for drugs; and 27-65-102(7)⁶ for mental illness. Positive matches will be eligible for further assessment as ordered by the Court; or

(b) On the recommendation of the arresting or responding officer that the defendant has exhibited or is exhibiting behavior indicating the possibility that the person is suffering from a behavioral health disorder; or

(c) On the recommendation of correctional staff that the defendant has exhibited or is exhibiting behavior indicating the possibility that the person is suffering from a behavioral health disorder. Questions answered by the defendant during the jail booking or housing classification process may also form the basis of the recommendation; or

(d) On the recommendation of Court staff or judicial officer that the defendant has exhibited or is exhibiting behavior indicating the possibility that the person is suffering from a behavioral health disorder; or

¹ “Person with a mental illness” means a person with one or more substantial disorders of the cognitive, volitional, or emotional processes that grossly impairs judgment or capacity to recognize reality or to control behavior. Developmental disability is insufficient to either justify or exclude a finding of mental illness within the provisions of this article.

² “Alcoholic” means a person who habitually lacks self-control as to the use of alcoholic beverages or uses alcoholic beverages to the extent that his or her health is substantially impaired or endangered or his or her social or economic function is substantially disrupted. Nothing in this subsection (1) shall preclude the denomination of an alcoholic as intoxicated by alcohol or incapacitated by alcohol.

³ “Drug abuser” means a person who habitually uses drugs or who uses drugs to the extent that his or her health is substantially impaired or endangered or his or her social or economic function is substantially disrupted. Nothing in this subsection (8) shall preclude the denomination of a drug abuser as a person under the influence of or incapacitated by drugs.

⁴ (2) “Approved private treatment facility” means a private agency meeting the standards prescribed in section 27-81-106 (1) and approved under section 27-81-106. (3) “Approved public treatment facility” means a treatment agency operating under the direction and control of or approved by the unit or providing treatment under this article through a contract with the unit under section 27-81-105 (7) and meeting the standards prescribed in section 27-81-106 (1) and approved under section 27-81-106.

⁵ (2) “Approved private treatment facility” means a private agency meeting the standards prescribed in section 27-82-103 (1) and approved under section 27-82-103. (3) “Approved public treatment facility” means a treatment agency operating under the direction and control of or approved by the unit and meeting the standards prescribed in section 27-82-103 (1) and approved under section 27-82-103.

⁶ “Facility” means a public hospital or a licensed private hospital, clinic, community mental health center or clinic, acute treatment unit, institution, sanitarium, or residential child care facility that provides treatment for a person with a mental illness.

(e) On the recommendation of defense counsel that the defendant has exhibited or is exhibiting behavior indicating the possibility that the person is suffering from a behavioral health disorder.

(2) Observations and/or statements made forming the basis of recommendations pursuant to this section shall not constitute a waiver of the defendant's 4th, 5th, or 6th Amendment rights.

(3) The recommendation shall accompany probable cause and other charge documents presented to the Court. The presiding judicial officer shall make a determination as to the defendant's entry into the Program based on recommendation(s) submitted, the defendant's informed consent, the defendant's criminal history, and applicable actuarial risk assessments available.

Section 4. Clinical assessment and records substantiating diagnoses

(1) If records can be accessed from facilities provided in Section 3(1)(a) and made available to the Court which satisfy the requirements set forth in Section 2(b), no further assessment shall be necessary for the determination of program entry.

(2) If records cannot be located in accordance with Section 4(1) or records are insufficient in the determination of the Court, a clinical assessment shall be ordered by the Court.

Section 5. Resource requirements

(1) The Department shall ensure that clinically credentialed staff shall be made available to every Court in the state, in proportion to the population served, to coordinate access to health records, clinical assessments, treatment plans, and to advise the Court on recommendations and Program compliance.

(2)(a) The Department shall provide, or have contracted from facilities defined as provided in 27-81-102(2), (3); and 27-82-102(2), (3); and 27-65-102(7), Court clinicians sufficient to serve the criminal-justice-involved population of each county with diagnosable behavioral health disorders.

(b) To support the requirement of Section 3 paragraph (a), the Department shall contract for the creation of a centralized database of all persons treated by facilities listed in section (3) (a). The database shall be available no later than January 1, 2019.

(3) On or before November 1, 2018, the Department shall prepare a report and submit such report to the Joint Judiciary Committee; the Joint Health and Human Services Committee; and the Joint Budget Committee; the Governor; and the Commission on Criminal and Juvenile Justice, on the number of Court clinicians necessary to serve each County and District Court in the state according to best practices on criminal justice case management caseloads.

(4) For jurisdictions which have existing pretrial release services as of the date of the enactment of this act, the Department shall coordinate with the pretrial agencies to provide clinical aspects of pretrial release for program participants.

(5) For jurisdictions which do not have pretrial release services as of the date of the enactment of this act, the Department shall coordinate with the Chief Judge and Chief Probation Officer in those jurisdictions to provide for bond-condition compliance aspects of pretrial release for program participants.

(a) Appropriations shall be made to support Probation in providing for pretrial release supervision for program participants in jurisdictions where it does not already exist.

(6) The Division of Criminal Justice shall research and report, on an annual basis, to the Joint Judiciary Committee; the Joint Health and Human Services Committee; the Governor; and the Commission on Criminal and Juvenile Justice. Appropriations shall be made to support the division for this provision.

Section 6. Treatment and services

(1) (a) The Department shall make quality treatment available on a timely basis to program participants. As such, the Department will coordinate with treatment providers to assess resource needs on an annual basis and the Department will allocate appropriations made by this act to meet those needs.

(b) As a benchmark, treatment for program participants shall be made available within two days of admission into the program.

(2) Court clinicians and pretrial release agencies shall coordinate with the Department to secure all available public benefits for which they might be eligible, to include the following, but not limited to:

- (i) Medicaid or other medical insurance;
- (ii) Social security disability income;
- (iii) Veterans benefits;
- (iv) Supplemental Nutrition Assistance;
- (v) Temporary Assistance to Needy Families;
- (vi) Job search and training benefits;
- (vii) Housing vouchers and other forms of housing subsidy.

Section 7. Criminal justice diversion

(1) (a) Once a determination is made on eligibility as provided in Section 2, the defendant shall be released from pretrial confinement on a personal recognizance bond.

(b) The Court shall set bond conditions as appropriate, in accordance with section 16-4-103, C.R.S., but with particular notice of the defendant's financial conditions, as set forth in paragraph (3)(a) of that section.

(c) Court clinicians, pretrial release agencies, or Probation in coordination with Court clinicians where applicable, shall keep the Court apprised of program participant compliance with program and bond conditions.

(2) For participants, the charges will be dismissed upon motion of defense counsel after one year has elapsed after of the filing of charges, except for those determined by the Court to be substantially non-compliant.

Fiscal note: Given the extraordinarily high cost of incarceration of individuals in municipal and county jails and state prison, and given the number of criminal accused who will avoid sentenced time in prison due to this act, it is anticipated that this act will have a positive fiscal impact on the state general treasury fund.