

LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

MODEL LAW ENFORCEMENT AND OTHER FIRST RESPONDER DEFLECTION ACT

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SECTION I. SHORT TITLE.

This Act may be cited as the “Model Law Enforcement and Other First Responder Deflection Program Act,” “Model Act,” or “Act.”

SECTION II. LEGISLATIVE FINDINGS AND PURPOSE.¹

(a) Legislative findings.—The [legislature]² finds that:

- (1) Untreated substance use disorder and mental illness is prevalent in the United States and communities throughout [state];³
- (2) There is a strong correlation between individuals’ illegal drug use and their likelihood of engaging in future criminal behavior;⁴
- (3) Approximately one-third of individuals with severe mental illness have their first contact with mental health treatment through a law enforcement encounter;⁵
- (4) Not surprisingly, incarcerated individuals have substance use disorder, mental health disorder, or co-occurring disorders at much higher rates than individuals in the general public;⁶

¹ The footnotes and commentary throughout this Act identify many resources used by the drafters to develop this Act. Three primary resources relied on by the drafters warrant specific mention at the outset. These resources are: (1) Illinois Public Act 100-1025 (effective January 1, 2019), now codified at 5 ILL. COMP. STAT. ANN 820/1, *et seq.*; (2) Section 10-116.5 of Illinois Public Act 101-652 (effective July 1, 2021), amending 5 ILL. COMP. STAT. ANN 820/1, *et seq.*; and (3) the *Model Deflection to Treatment Act*, NAT’L ALL. FOR MODEL STATE DRUG L. (July 2019), <https://namsdl.org/wp-content/uploads/Model-Deflection-to-Treatment-Act.pdf>.

² This Act contains certain bracketed words and phrases (*e.g.*, “[legislature]”). Brackets indicate instances where state lawmakers should insert state-specific terminology, facts, and/or statutory citations.

³ For example, among people aged 12 or older in 2019 who had a past year substance use disorder, only 10 percent of them received any substance use treatment in the prior year. *Key Substance Use and Mental Health Indicators in the United States: Results from the 2019 National Survey on Drug Use and Health*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN. 52 (Sept. 2020), <https://www.samhsa.gov/data/sites/default/files/reports/rpt29393/2019NSDUHFWRPFWHTML/2019NSDUHFWR1PDFW090120.pdf>. Among adults aged 18 or older in 2019 who live with any mental illness during the past year, 44 percent received mental health services. *Id.* at 59.

⁴ Trevor Bennett, et al., *The Statistical Association Between Drug Misuse and Crime: A Metaanalysis*, 13 AGGRESSION AND VIOLENT BEHAVIOR, 107 (2008), <http://doi.org/10.1016/j.avb.2008.02.001>.

⁵ *Road Runners: The Role and Impact of Law Enforcement in Transporting Individuals with Severe Mental Illness, A National Survey*, TREATMENT ADVOC. CTR. 1 (May 2019), <https://www.treatmentadvocacycenter.org/storage/documents/Road-Runners.pdf>, (citing to Judith Adelman, *Study in Blue and Grey, Police Interventions with People with Mental Illness: A Review of Challenges and Responses*, CANADIAN MENTAL HEALTH ASS’N, BC DIVISION (Dec. 2003), <https://cmha.bc.ca/wp-content/uploads/2016/07/policereport.pdf>).

⁶ Jennifer Bronson, et al., *Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007-2009*, BUREAU OF JUST. STATISTICS, U.S. DEP’T OF JUST. (June 2017), ; Jennifer Bronson and Marcus Berzofsky, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-12*, BUREAU OF JUST. STATISTICS, U.S. DEP’T OF JUST. (June 2017), <https://bjs.ojp.gov/content/pub/pdf/imhprj1112.pdf>. In nationwide data collected through National Inmate Surveys, researchers found that 58 percent of state prisoners and 63 percent

- (5) Meanwhile, state budget proposals over past decade often targeted state-funded behavioral health programs for funding cuts;⁷
- (6) Traditionally, law enforcement and other first responders had few options when encountering someone believed to be living with a substance use disorder, mental health disorder, or co-occurring disorders. For law enforcement, these limited options were arrest, issuance of a warning, or leaving the person in question in the same social and material conditions that precipitated the law enforcement encounter. Fire and emergency medical services personnel had even more limited options; administering naloxone, when appropriate, and taking the person to an emergency department;
- (7) Today, however, law enforcement and other first responders are encouraged to use alternative approaches including pre-arrest deflection to community-based substance use disorder or mental health disorder prevention, intervention, or treatment services when warranted;⁸
- (8) Deflection is any collaborative intervention connecting law enforcement and other first responders with public health systems to create non-arrest pathways to treatment and services for people with substance use disorder, mental health disorders, or co-occurring disorders, and who often have other service needs. Importantly, deflection occurs only as an offer with the individual's consent and

of sentenced jail inmates met the criteria for drug dependence or abuse, compared to approximately 5 percent of the general public age 18 or older. Additionally, these surveys show that 14 percent of prisoners and 26 percent of jail inmates met the threshold for serious psychological distress in the previous 30 days, compared to 5 percent of the general public.

⁷ See, e.g., Matt Volz, *As Demand for Mental Health Care Spikes, Budget Ax Set to Strike*, KAISER FAMILY FOUNDATION (Feb. 5, 2021), <https://khn.org/news/article/as-demand-for-mental-health-care-spikes-budget-ax-set-to-strike/> (reporting on Montana); David Williams, *Indiana may cut millions in funding for mental health, addiction services*, WISH-TV (Mar. 10, 2021), <https://www.wishtv.com/news/indiana-may-cut-millions-in-funding-for-mental-health-addiction-services/>; Aviva Aron-Dine, et al., *With Need Rising, Medicaid Is at Risk for Cuts*, CTR. ON BUDGET AND POL'Y PRIORITIES 8 (July 22, 2020), <https://www.cbpp.org/research/health/with-need-rising-medicaid-is-at-risk-for-cuts> (noting that states are making budget cuts to “non-Medicaid health programs” such that “roughly 3 in 4 states cut [] mental health budgets in each of 2009, 2010, and 2011. The same seems to be occurring already in this recession, even as overdose deaths surge and many health experts have raised concerns about the impact of the pandemic and measures to control it on mental health.”).

⁸ *Policing in Vulnerable Populations. Practices in Modern Policing*, INT'L ASS'N OF CHIEFS OF POLICE 20 (Nov. 2018), https://www.theiacp.org/sites/default/files/2018-11/IACP_PMP_VulnerablePops.pdf (“Law enforcement agencies should empower police officers and deputies in those circumstances to use alternative remedies such as drug and alcohol treatment, hospitalization, and other diversionary programs, when appropriate, as these outlets can simultaneously help citizens, save money, and reduce recidivism.”).

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creates an off-ramp from an individual's entry into the justice system without the fear of arrest;

(9) Deflection programs formally came into existence in 2011. At present, over 850 known deflection programs exist in the United States, with almost all the growth occurring after 2015;⁹ and

(10) Given their widespread presence in the community, law enforcement and other first responders have a unique opportunity to have a positive impact on an individual's life and facilitate connections to community-based organizations that provide treatment for substance use disorder or mental health disorder, recovery support services, housing, and other needed services via peer support and case management. Law enforcement and other first responders are often the first point of contact after an overdose event and should be utilized as part of the solution for this public health crisis. Intervention at this point may be the only opportunity for people to be provided a warm handoff to community resources.

(b) Purpose.—It is the intent of the [legislature] through this Act:

(1) To authorize law enforcement and other first responders to develop and implement collaborative deflection programs throughout [state] that provide proactive policing to assist individuals who are at risk for future calls for service as well as alternatives for eligible individuals to traditional case processing, involvement in the justice system, and unnecessary admission to emergency departments due to non-life-threatening drug use;

(2) That these deflection programs offer immediate pathways to treatment, recovery services, housing, medication for addiction treatment, whole family services, and other needed supports, via peer support and case management, for individuals at-risk of future law enforcement contact and/or living with substance use disorder, mental health disorder, or co-occurring disorders;

⁹ Jac A. Charlier and Jessica Reichert, *Introduction: Deflection—Police-Led Responses to Behavioral Health Challenges*, 3 J. FOR ADVANCING JUST. 4 (2020), https://www.nadcp.org/wp-content/uploads/2020/10/Journal-for-Advancing-Justice-Volume-III_final.pdf; *Report of the National Survey to Assess First Responder Deflection Programs in Response to the Opioid Crisis*, COMPREHENSIVE OPIOID, STIMULANT, AND SUBSTANCE ABUSE PROGRAM 7 (May 2021), https://www.cossapresources.org/Content/Documents/Articles/CHJ-TASC_Nation_Survey_Report.pdf.

- (3) To require deflection programs to have certain threshold elements to be eligible to receive grant funding from the state administering agency on criminal justice; and
- (4) To require agencies establishing deflection programs to develop comprehensive memoranda of understanding in conjunction with, and agreed to by, all deflection program partners.

Commentary¹⁰

Substance use disorder, mental health disorder, and co-occurring disorders are major societal issues with public health and justice system implications. In short, there are too many individuals in the United States with these illnesses who are entangled in the justice system—either through incarceration or open criminal cases, community supervision, debt obligations, etc.—that should instead be linked to treatment, recovery support services, housing assistance, and other needed services. The purpose of this Act is to encourage the development and use of deflection programs throughout a state to unite law enforcement, substance use disorder and mental health providers, and other community providers in the shared goal of deflecting individuals away from traditional criminal justice processing, thereby providing the opportunity to better address the needs of individuals living with substance use disorder, mental health disorder, or co-occurring disorders.

Deflection is an emerging concept in the public health and safety arena. Only a few years after the first law enforcement-based program started in 2011,¹¹ the Treatment Alternatives for Safe Communities (TASC) Center for Health and Justice coined the term “deflection” by using it in an article published in 2015.¹² TASC’s purpose in creating a new term was “to distinguish the work of the emerging field from the longstanding term diversion.”¹³ Traditional diversion programs generally involve prosecutors, courts, probation, and/or parole officers offering post-arrest alternative programming or services to individuals in lieu of conviction, traditional sentencing, or violations of supervision conditions.¹⁴ Further, diversion is centered in the justice system. Deflection, by contrast, focuses on interactions with individuals before they become involved with the justice system. Indeed, other than the initial contact with a police officer in

¹⁰ The commentary area serves two primary purposes. The first purpose is to provide the reader with background information about the genesis of language in the Act. To the extent that the model language is based on already proposed legislation or a particular document, the commentary notes this. The second purpose is to provide an explanation regarding why the Act contains particular provisions and the rationale behind these decisions, along with a discussion of issues (occasionally controversial) with which policymakers must grapple when state-specific legislation is introduced, negotiated, and amended.

¹¹ The Law Enforcement Assisted Diversion (LEAD) program in Seattle, Washington.

¹² Charlier & Reichert, *supra* note 9, at 8 n.1 (referencing Jac Charlier, *Want to Reduce Drugs in Your Community? Why Not Deflect Instead of Arrest?*, POLICE CHIEF MAG. (Sept. 2015), https://www.policechiefmagazine.org/wp-content/uploads/Policyreform_September2015.pdf).

¹³ *Id.* at 6.

¹⁴ *Id.* at 8 n.1.

some (but not all) deflection programs, an individual who successfully navigates a deflection program will have no other contact with the justice system.

Use of the term “deflection” is not consistent throughout the country. Stakeholders refer to deflection pathways or deflection programs by a host of other names, including pre-arrest diversion, pre-booking diversion, law enforcement diversion, first responder diversion, co-responder teams, crisis intervention teams, civil citation programs, and mobile crisis teams. For example, the Bureau of Justice Assistance’s Comprehensive Opioid, Stimulant, and Substance Abuse Program uses both “diversion” and “deflection” in informational materials.¹⁵ Here, the Model Act’s drafters chose to use the term deflection, as it is the term used by TASC and the Illinois law that serves as a primary resource.¹⁶

Support for deflection programs continues to grow. In 2018, the International Association of Chiefs of Police recommended that, for minor non-violent offenses and noncriminal behavior, “[l]aw enforcement agencies should empower police officers . . . to use alternative remedies such as drug and alcohol treatment, hospitalization, and other diversionary programs, when appropriate, as these outlets can simultaneously help citizens, save money, and reduce recidivism.”¹⁷ Likewise, the Office of National Drug Control Policy, Executive Office of the President, specifically included deflection as part of the National Drug Control Strategy published in 2019 and 2020.¹⁸

Initially, deflection encompassed only law enforcement-based programs—providing occasion for officers to turn some of the millions of police encounters with individuals each year not resulting in arrest into opportunities for linkage to treatment, recovery support services, housing, and other needed services via a warm-handoff to community providers.¹⁹ More recently, however, deflection programs involving first responders other than law enforcement, such as fire and emergency medical services (EMS), or no first responders at all, such as

¹⁵ See, e.g., *Peer Support in First Responder-Led Diversion and Deflection Programs: Necessary Tools in the Fight Against COVID-19*, COMPREHENSIVE OPIOID, STIMULANT, AND SUBSTANCE ABUSE PROGRAM (Feb. 2021), https://www.cossapresources.org/Content/Documents/Articles/Altarum_Peer_Support_in_Diversion_Programs.pdf.

¹⁶ See *supra* note 1. Additionally, “drug diversion” is a commonly used phrase in the law enforcement context. Drug diversion refers to the transfer of any legally prescribed controlled substance from the individual for whom it was prescribed to another person for any illicit use. See *Drug Diversion in the Medicaid Program, State Strategies for Reducing Prescription Drug Diversion in Medicaid*, DEP’T OF HEALTH AND HUMAN SERVS., CTRS. FOR MEDICARE AND MEDICAID SERVS. (Jan. 2012), <https://www.cms.gov/Medicare-Medicaid-Coordination/Fraud-Prevention/MedicaidIntegrityProgram/downloads/drugdiversion.pdf>. Using the term “deflection” in this Model Act, instead of diversion, avoids this potential confusion.

¹⁷ INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 8.

¹⁸ *National Drug Control Strategy*, OFF. OF NAT’L DRUG CONTROL POL’Y 11 (Feb. 2020), <http://legislativeanalysis.org/wp-content/uploads/2020/02/2020-ONDCP-National-Drug-Control-Strategy.pdf> (last visited Aug. 12, 2021); *National Drug Control Strategy*, OFF. OF NAT’L DRUG CONTROL POL’Y 11 (Jan. 2019), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2019/01/NDCS-Final.pdf> (last visited Aug. 12, 2021).

¹⁹ The U.S. Department of Justice estimates that in 2015, law enforcement had roughly 42 million personal encounters with people annually that did not result in incarceration. Elizabeth Davis, et al., *Contacts Between Police and the Public, 2015*, BUREAU OF JUST. STATISTICS, U.S. DEP’T OF JUST. (Oct. 2018), <https://bjs.ojp.gov/content/pub/pdf/cpp15.pdf> (estimating 53.5 million total encounters, out of which 12 million resulted in incarceration).

behavioral health providers teamed with others (termed “community responders”), are more common. Considering this broadening of scope, the Model Act covers deflection programs that include members from law enforcement and/or other first responders, including co-responder programs.

At present, 25 states and the District of Columbia have statutory provisions that explicitly encourage deflection programs.²⁰ Illinois is a leader in this regard. In 2018, Illinois legislators enacted the most comprehensive deflection law in the United States, entitled the “Community-Law Enforcement Partnership for Deflection and Substance Use Disorder Treatment Act” (Illinois Deflection Act).²¹ Initially, the Illinois Deflection Act applied only to law enforcement-based programs. However, amendments to the legislation that took effect in July 2021 expand the law to include other first responder-led deflection programs, as well as training for program participants.²² The Illinois Deflection Act, as amended, serves as the primary foundation for the provisions in this Model Act.

Finally, while the ultimate goal of this document is to encourage the enactment of model deflection legislation, it is worth expressly noting that the failure to enact this or other similar legislation does not disavow or prohibit entities from forming deflection programs.

SECTION III. DEFINITIONS.

[States may already have definitions in place for some or all of the following listed terms. In such case, states are free to use those definitions in place of those listed below.]

For purposes of this Act, unless the context clearly indicates otherwise, the words and phrases listed below have the meanings given them in this section:²³

- (a) Active outreach deflection.—“Active outreach deflection” is a type of deflection initiated by law enforcement or other first responders by intentionally identifying or seeking out an individual or group of individuals to provide a warm hand-off to services.²⁴ The individual or group of individuals would not meet the reasonable suspicion or probable

²⁰*Deflection Programs Summary of State Laws*, LEGIS. ANALYSIS AND PUB. POL’Y ASS’N 6 (July 2021), <http://legislativeanalysis.org/wp-content/uploads/2021/07/Deflection-Programs-Summary-of-State-Laws.pdf>.

Nineteen of these 26 jurisdictions have statutory descriptions of deflection programs. Five states do not describe deflection programs in law but do address funding for potential programs. In Connecticut and the District of Columbia, enacted legislation directs either municipal police departments or a police reform commission to study and evaluate the potential impact of instituting deflection programs.

²¹ 5 ILL. COMP. STAT. ANN. 820/1 to 820/35 (West 2021).

²² 5 ILL. COMP. STAT. ANN. 820/21 (West 2021).

²³ Where a definition is based on, or directly pulled from, language from enacted statute, proposed legislation, or other research material, the footnote referenced at the end of the definition provides that source. Additional information about the reasoning for certain definitions is included in the Section III commentary.

²⁴ See Charlier & Reichert, *supra* note 9, at 2 (Table 1); 5 ILL. COMP. STAT. ANN. 820/10 (West 2021) (describing active outreach deflection within the definition for “deflection program”).

- cause criteria for an arrest through these encounters;
- (b) Case management.—“Case management” means a set of social service functions, including screening, assessment, planning, linkage, monitoring, and advocacy, that help individuals access the resources needed to recover from substance use disorder, mental health disorder, or co-occurring disorders. These resources may be external to the individual, such as medication for addiction treatment, housing, and education, or internal to the individual, such as identifying and developing skills;²⁵
- (c) Case manager.—“Case manager” means an individual with a basic foundation of tools and skills for delivering case management to individuals with substance use disorder, mental health disorder, or co-occurring disorders;²⁶
- (d) Community member or organization.—“Community member or organization” means an individual, entity, or organization with a demonstrative capacity and commitment to improving mental and physical well-being and the overall social welfare of the community, and may include individuals, entities, recovery community organizations, civic organizations, community-based non-profits, or other organizations that provide recovery support services, housing, case management, or other services;²⁷
- (e) Co-occurring disorders.—“Co-occurring disorders” means the co-existence of both a substance use disorder and a mental health disorder;²⁸
- (f) Co-responder model.—“Co-responder model” describes a type of deflection program that features a specially trained team, containing at least one member employed by law enforcement or other first responder and at least one member who is a behavioral health professional or peer support specialist, that responds together to situations likely to involve a behavioral health crisis;²⁹
- (g) Crisis intervention team.—“Crisis intervention team” is a type of deflection program involving intervention deflection or prevention deflection pathways that is designed to

²⁵ See *Comprehensive Case Management for Substance Abuse Treatment*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN. 3 (2000), <https://store.samhsa.gov/sites/default/files/d7/priv/sma15-4215.pdf> (describing the types of services case management entails).

²⁶ See *id.*, at 51 (describing the skills needed for a case manager).

²⁷ See 5 ILL. COMP. STAT. ANN. 820/10 (West 2021) (definition of “community member or organization”).

²⁸ *Mental Health and Substance Use Disorders*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., <https://www.samhsa.gov/find-help/disorders> (last modified Apr. 30, 2020).

²⁹ See Charlier & Reichert, *supra* note 9, at 18.

train and assist law enforcement to reduce harm when responding to crisis situations involving individuals with substance use disorder, mental health disorder, or co-occurring disorders. Crisis intervention teams often constitute a community partnership of law enforcement, 911 dispatchers, healthcare providers, and mental health professionals;³⁰

- (h) Deflection.—“Deflection” means a collaborative intervention to assist individuals with substance use disorder, mental health disorder, or co-occurring disorders, in which law enforcement or other first responders connect with behavioral health systems to create community-based pathways to treatment, recovery support services, housing, case management, or other services;³¹
- (i) Deflection program.—“Deflection program” means a formalized system of deflection developed pursuant to the provisions of this Act, including co-responder models and crisis intervention teams. A deflection program may utilize one or more of the five deflection pathways defined in this Act: active outreach deflection, intervention deflection, prevention deflection, post-overdose deflection, or self-referral deflection;
- (j) Diversity.—“Diversity” means systematically engaging with a broad range of people from diverse demographics including, but not limited to, race, ethnicity, national origin, gender or gender identity, age, ability and disability, sexual orientation, health status, geographical orientation, and socioeconomic status;³²
- (k) Equity.—“Equity” means promoting fair opportunity and access to participate in a deflection program, whether as an enrollee or an equal partner in planning and operations, regardless of race, ethnicity, national origin, language, gender or gender identity, age, ability and disability, sexual orientation, health status, geographical orientation, and socioeconomic status;³³
- (l) Evidence-based practice.—“Evidence-based practice” means health care that is conscientious, explicit, and judicious in the use of current best evidence in making

³⁰ See Charlier & Reichert, *supra* note 9, at 7; ARK. CODE ANN. § 20-47-803(5), (6) (West 2020); VA. CODE ANN. § 9.1-187(A) (West 2021).

³¹ See Charlier & Reichert, *supra* note 9, at 1.

³² *Community, Diversity, and Equity Strategy Area*, PTACC COLLABORATIVE, https://ptaccollaborative.org/strategy-areas/cdi_strategy_area/ (last visited Aug. 13, 2021).

³³ *Id.*

decisions regarding the care of individual patients;³⁴

- (m) Intervention deflection.—“Intervention deflection” is a deflection pathway where law enforcement engages with an individual placed under arrest, or who could face criminal charges, but the charges are either filed against the individual and held in abeyance or law enforcement issues a citation with a requirement to take certain actions;³⁵
- (n) Law enforcement.—“Law enforcement” means: (1) a police department or sheriff’s office that is part of, or administered by, [state] or any political subdivision thereof; (2) a private police department in [state] that is responsible for the prevention and detection of crime and the enforcement of the penal, traffic, or highway laws of [state]; (3) any full-time or part-time, paid or volunteer, staff or employee of such police department or sheriff’s office; or (4) any full-time or part-time, paid or volunteer, staff or employee of a local, state, or federal prosecutor’s office;³⁶
- (o) Mental health disorder.—“Mental health disorder” means a syndrome characterized by a clinically significant disturbance in an individual’s cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning;³⁷
- (p) Prevention deflection.—“Prevention deflection” is a type of deflection where law enforcement or other first responders engage with an individual in response to a community call or on routine patrol, but where no criminal charges are brought against the individual, nor could any such charges be filed;³⁸

³⁴ *Model Access to Medication for Addiction Treatment in Correctional Settings Act*, LEGIS. ANALYSIS AND PUB. POL’Y ASS’N 7 (Oct. 2020), <https://legislativeanalysis.org/model-access-to-medication-for-addiction-treatment-in-correctional-settings-act/> (definition based on W. David Dotson, *Evidence-Based Practice: What It Is and Why It Matters*, CTRS. FOR DISEASE CONTROL AND PREVENTION (2020), https://www.cdc.gov/genomics/about/file/print/Evidence-Based_Practice_508.pdf).

³⁵ Charlier & Reichert, *supra* note 9, at 2 (Table 1); *see also* 5 ILL. COMP. STAT. ANN. 820/10 (West 2021) (describing intervention deflection within the definition for “deflection program”); *Law Enforcement and First Responder Diversion: Pathways to Diversion Case Studies Series*, COMPREHENSIVE OPIOID, STIMULANT, AND SUBSTANCE ABUSE PROGRAM, https://www.cossapresources.org/Content/Documents/Articles/Pathways_to_Diversion_Case_Studies_Series_Officer_Intervention.pdf.

³⁶ *See Model Overdose Mapping and Response Act*, LEGIS. ANALYSIS AND PUB. POL’Y ASS’N 7-8 (March 2020), <http://legislativeanalysis.org/wp-content/uploads/2021/03/Model-Overdose-Mapping-and-Response-Act.pdf> (definition of “law enforcement officer”).

³⁷ *Model Withdrawal Management Protocol in Correctional Settings Act*, LEGIS. ANALYSIS AND PUB. POL’Y ASS’N 8 (June 2021), <http://legislativeanalysis.org/wp-content/uploads/2021/07/Model-Withdrawal-Management-Protocol-in-Correctional-Settings-Act-FINAL-1.pdf>.

³⁸ *See* Charlier & Reichert, *supra* note 9, at 2 (Table 1); 5 ILL. COMP. STAT. ANN. 820/10 (West 2021) (describing prevention deflection within the definition for “deflection program”).

- (q) Other first responder.—“Other first responder” or “other first responders” means: (1) an emergency medical services or firefighting service provider that is a public unit of government, fire department, or district; (2) a private entity providing emergency medical services or firefighting services pursuant to a contract or other agreement with a public unit of government, fire department, or district; and (3) any full-time or part-time, paid or volunteer, staff or employee of such public or private provider, including, but not limited to emergency medical technicians, paramedics, and firefighters;³⁹
- (r) Peer support.—“Peer support” means non-clinical care and assistance that encompasses a range of activities and interactions between people who share similar experiences of navigating substance use disorder, mental health disorder, or co-occurring disorders in an effort to aid persons in long-term recovery. These activities include but are not limited to:
- (1) Supporting persons in seeking recovery;
 - (2) Sharing resources and building skills; and
 - (3) Building community and relationships;⁴⁰
- (s) Post-overdose deflection.—“Post-overdose deflection,” also known as naloxone plus deflection, is a type of deflection initiated by law enforcement or other first responders after an individual overdoses, or, in cases of severe substance use disorder, where an individual faces acute risk of overdose;⁴¹
- (t) Recovery support services.—“Recovery support services” means non-clinical supports, including peer support, often provided by individuals who are in recovery themselves that assist individuals in initiating and sustaining recovery from substance use disorder, mental health disorder, or co-occurring disorders.⁴²
- (u) Self-referral deflection.—“Self-referral deflection” is a type of deflection initiated by an individual who contacts law enforcement or other first responders without fear of arrest, seeking access to treatment, recovery support services, housing, case management, or

³⁹ See 2020 ILL. LEGIS. SERV. P.A. 101-652, § 10-116.5 (West) (definition of “other first responder”).

⁴⁰ *Model Expanding Access to Peer Recovery Support Services Act*, LEGIS. ANALYSIS AND PUB. POL’Y ASS’N 7 (Oct. 2020), <http://legislativeanalysis.org/wp-content/uploads/2021/03/Model-Expanding-Access-to-Peer-Recovery-Support-Services-Act.pdf>.

⁴¹ See Charlier & Reichert, *supra* note 9, at 2 (Table 1); 5 ILL. COMP. STAT. ANN. 820/10 (West 2021) (describing post-overdose deflection within the definition for “deflection program”).

⁴² *What are Recovery Support Services?*, NEW JERSEY COAL. FOR ADDICTION RECOVERY SUPPORT, <https://nj-cars.org/about/what-are-recovery-support-services/> (last visited Aug. 13, 2021).

other needed services;⁴³

- (v) [Single state authority on drugs and alcohol]⁴⁴.—“[Single state authority on drugs and alcohol]” means the state agency designated to plan, manage, monitor, coordinate, and evaluate substance use disorder treatment and recovery support services in [state], and to administer the federal Substance Abuse Prevention and Treatment Block Grant;⁴⁵
- (w) [State administering agency on criminal justice].—“[State administering agency on criminal justice]” means the state agency designated to set priorities and allocate Bureau of Justice Assistance, Office of Justice Program funding within [state];⁴⁶
- (x) [State mental health agency].—“[State mental health agency]” means the state agency responsible for ensuring that children, adolescents, and adults throughout the state who are diagnosed with a mental health disorder or emotional disturbance and an impaired level of functioning based on a mental health assessment have the availability of and access to publicly-funded mental health services;⁴⁷
- (y) Substance use disorder.—“Substance use disorder” means a pattern of use of alcohol or other drugs leading to impairment that meets the applicable diagnostic criteria delineated in the Diagnostic and Statistical Manual of Mental Disorders (DSM–5) of the American Psychiatric Association, or in any subsequent editions;⁴⁸
- (z) Treatment.—“Treatment” means the management of, and care for, individuals with substance use disorder, mental health disorder, or co-occurring disorders and the individual’s family, in accordance with an individualized assessment and clinical placement criteria, with care that includes assessment, diagnosis, case management, medical, psychiatric, psychological and social services, medication for addiction

⁴³ Charlier & Reichert, *supra* note 9, at 2 (Table 1); *see also* 5 ILL. COMP. STAT. ANN. 820/10 (West 2021) (describing self-referral deflection within the definition for “deflection program”).

⁴⁴ This defined term, as well as the terms “state administering agency on criminal justice” and “state mental health agency” found later in Section III, are in brackets because the Model Act’s drafters assume that state legislators will insert the formal name of the agencies into legislation.

⁴⁵ *Model Deflection to Treatment Act*, NAT’L ALL. FOR MODEL STATE DRUG L. 8 (July 2019), <https://namsdl.org/wp-content/uploads/Model-Deflection-to-Treatment-Act.pdf>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Recovery Residence Certification Act*, LEGIS. ANALYSIS AND PUB. POL’Y ASS’N 11 (Feb. 2021), <http://legislativeanalysis.org/wp-content/uploads/2021/03/LAPPA-Model-Recovery-Residence-Certification-Act-1.pdf>.

treatment, counseling, and recovery support services;⁴⁹ and

- (aa) Treatment provider.—“Treatment provider” means any individual, facility, or program that is licensed, certified, registered, or approved by [state]⁵⁰ to provide comprehensive treatment or recovery support services for individuals with substance use disorder, mental health disorder, or co-occurring disorders, with or without the support of medications.⁵¹

Commentary

The Model Act’s drafters are aware that individual states may have currently-in-force statutory or regulatory definitions for some of the terms contained in this section and that lawmakers may want to default to that language. Nevertheless, this Act includes sample definitions designed to articulate the intended scope of each term related to deflection. The basis for, and reasoning behind, many of these definitions is set forth below.

There are two main differences between Section III above and the Illinois Deflection Act, as recently amended. First, in Section III and elsewhere, the Model Act expressly includes individuals with substance use disorder and/or mental health disorder. In contrast, the language of the Illinois Deflection Act is not clear about the extent to which it applies to mental illness.⁵² Given that: (1) the Model Act is broad legislation authorizing—but not mandating—deflection programs; (2) individuals with whom law enforcement or other first responders interact are as likely to need deflection to mental health services as to substance use disorder services; and (3) individuals living with substance use disorder often have a co-occurring mental health disorder, the drafters believe that it makes sense to explicitly include both mental health and substance use in the language.

Second, the definition of “deflection program” in Illinois law is quite lengthy (over 200 words) and includes several sub-definitions, including a description of what “facilitation” entails and the various types of deflection. Rather than follow that example, the drafters chose to simplify the definition of deflection in the Model Act, creating separate definitions for each type of deflection. Moreover, the details regarding how law enforcement or other first responders facilitate connections to treatment and other services are addressed in Section V below, as part of the deflection program’s memorandum (or memoranda) of understanding.

⁴⁹ See 5 ILL. COMP. STAT. ANN. 820/10 (West 2021) (definition of “treatment”); *Model Deflection to Treatment Act*, *supra* note 45, at 9.

⁵⁰ There are a variety of avenues by which a treatment provider may become “formally approved” by a state, depending on regulations adopted by their respective governing boards. The purpose of this language is to cover all such avenues, so as to not unintentionally omit a treatment provider.

⁵¹ See *Model Deflection to Treatment Act*, *supra* note 45, at 9.

⁵² Within the text of the Illinois Deflection Act, the phrase “mental health” appears only three times— in the Act’s purpose, in the definition for “case management,” and in one subsection pertaining to authorization. 5 ILL. COMP. STAT. ANN. 820/5, 820/10, 820/15(c) (West 2021). Additionally, the phrase “mental illness” appears only once, in the definition for “treatment.” 5 ILL. COMP. STAT. ANN. 820/10 (West 2021).

Some readers may be unfamiliar with real-world examples of the various deflection programs described in Section III. Using information developed by TASC⁵³ as well as other sources, below is a brief description of each type of deflection (in alphabetical order):

- **Active outreach deflection.** In active outreach deflection, law enforcement or other first responders proactively seek out an individual or group to initiate contact leading to a referral to treatment or other services. Known homeless encampments within a city provide opportunities for first responders to engage in this type of deflection. Examples of active outreach deflection programs include the Arlington Opioid Outreach Initiative in Massachusetts,⁵⁴ which focuses on individuals known to or suspected to suffer from substance use disorder, and the Homeless Outreach Team (HOT) in Houston,⁵⁵ which engages the chronically homeless to provide shelter, housing, medical care, and treatment, among other things.
- **Intervention deflection.** Intervention deflection requires a law enforcement presence. Law enforcement, alone or as a member of a co-responder team, engages with an individual they encounter in the community who could be subjected to criminal charges. When such an encounter happens, law enforcement either files charges (subject to delayed adjudication and dismissal, so long as certain conditions are met), or the individual is issued a citation with a treatment requirement. Intervention deflection differs from a “citation in lieu of arrest” because intervention deflection requires the individual, at the very least, to undergo an assessment for treatment. Examples of intervention deflection programs include the Law Enforcement Assisted Diversion (LEAD) program, originally founded in Washington but now nationwide,⁵⁶ and the Civil Citation Network, originally formed in Florida.⁵⁷
- **Prevention deflection.** In prevention deflection, law enforcement, alone or as a part of a co-responder team, engages with an individual they encounter while on patrol. Unlike with intervention deflection, in this situation, the individual faces no potential criminal charges and the encounter is not in response to a call for service. Examples of prevention deflection programs include LEAD and Stop, Triage, Engage, Educate, and Rehabilitate (STEER) in Maryland.⁵⁸
- **Post-overdose response (“Naloxone plus”) deflection.** In post-overdose response deflection, also known as “naloxone-plus” deflection, a responder attempts to engage an individual in treatment as part of an overdose response, preferably at the point of

⁵³ Charlier & Reichert, *supra* note 9, at 2-3 (Table 1).

⁵⁴ *The Arlington Outreach Initiative*, THE POLICE ASSISTED ADDICTION AND RECOVERY INITIATIVE, <https://paariusa.org/arlington/> (last visited Aug. 13, 2021); *Opioid Outreach Initiative*, ARLINGTON POLICE DEP’T, <https://arlingtonpdnews.com/opiate-outreach-initiative/> (last visited Aug. 13, 2021).

⁵⁵ *Homeless Outreach Team (HOT)*, HOUSTON POLICE DEP’T, <https://www.houstoncit.org/hot/> (last visited Aug. 13, 2021).

⁵⁶ LEAD NATIONL SUPPORT BUREAU, <https://www.leadbureau.org/> (last visited Aug. 13, 2021).

⁵⁷ *Leon County/Tallahassee Pre-Arrest Diversion - Adult Civil Citation Program: A Model Program with National Implications*, UNIV. OF PRETRIAL, <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4250408e-c6c7-766f-2aa8-419fd31d05ad&forceDialog=0> (last visited Aug. 13, 2021).

⁵⁸ Addiction Policy Forum, et al., *Spotlight: Montgomery County STEER (Stop, Triage, Engage, Educate and Rehabilitate)* (March 2017), https://f6f10dcd-f59d-42bc-bec9-c2b204cf568a.usrfiles.com/ugd/f6f10d_ecc81e495f95499886b3b148cb0df07d.pdf.

overdose or as close to the point of overdose as possible, such as at the emergency department or a home visit a few days later. Examples of post-overdose response deflection programs include the Drug Abuse Response Team (DART)⁵⁹ and the Quick Response Team (QRT),⁶⁰ both of which started in Ohio before expanding elsewhere, and the “5 Minutes to Help Program,” based in New Jersey,⁶¹ aimed at providing EMS with crucial tools post overdose to engage their patients and connect them with recovery resources even if they do not want to be transported to the hospital.

- **Self-referral deflection.** In self-referral deflection, an individual seeks out law enforcement or other first responders on their own initiative to receive a referral to treatment without fear of arrest.⁶² In these programs, the first responder may partner with peer recovery specialists and/or a ride-share or public transportation service to provide near-immediate assistance and transportation to treatment. In some cases, self-referral deflection is available through a mobile services unit (*i.e.*, van) that moves throughout the community. Examples of self-referral deflection programs include Bensalem Police Assisting in Recovery (BPAIR) in Pennsylvania,⁶³ the Straight to Treatment Program and Hope One Van in New Jersey,^{64, 65} and the Angel Program in Massachusetts (recently merged into the Gloucester Police Department’s new Community Impact Unit).⁶⁶

The commentary to Section II notes that stakeholders use various names to refer to specific types of deflection programs. The Model Act drafters added subsections (f) and (g), the definitions for “co-responder model” and “crisis intervention team,” respectively, which are two of the common alternative names for particular types of deflection programs, so that these definitions could be referenced within the definition of “deflection program.” The idea here is to

⁵⁹ *Lucas County Sherriff’s Office Drug Abuse Response Team*, CNTY. COMM’RS ASS’N OF OHIO, <http://www.ccao.org/wp-content/uploads/DART%20Trifold%20brochure%205-3-2016%20PROOF%20nd.pdf> (last visited Aug. 13, 2021).

⁶⁰ *Colerain Township Quick Response Team (QRT)*, COMPREHENSIVE OPIOID, STIMULANT, AND SUBSTANCE ABUSE PROGRAM, <https://www.cossapresources.org/Learning/PeerToPeer/Diversion/Sites/Cincinnati> (last visited Aug. 13, 2021); *Huntington Quick Response Team (QRT)*, COMPREHENSIVE OPIOID, STIMULANT, AND SUBSTANCE ABUSE PROGRAM, <https://www.cossapresources.org/Learning/PeerToPeer/Diversion/Sites/Huntington> (last visited Aug. 13, 2021).

⁶¹ *New Jersey Department of Health Continues Efforts to Combat Overdose Epidemic*, NEW JERSEY DEP’T OF HEALTH (Jan. 8, 2020), <https://www.nj.gov/health/news/2020/approved/20200108a.shtml>.

⁶² The “without fear of arrest” is for most, but not all, cases. Individuals with an active arrest warrant who approach law enforcement would likely be taken into custody.

⁶³ *BPAIR*, CRIMEWATCH BUCKS CNTY., <https://bucks.crimewatchpa.com/bensalempd/15488/content/bpair> (last visited Aug. 13, 2021).

⁶⁴ *Drug and Alcohol Treatment Resources*, OFF. OF THE BURLINGTON CNTY. PROSECUTOR, <https://burlpros.org/community-outreach/opioid-treatment/> (last visited Aug. 13, 2021).

⁶⁵ HOPE ONE, <http://hopeoneproject.org/#> (last visited Aug. 13, 2021).

⁶⁶ Taylor Ann Bradford, *Working for a Healthy Gloucester: New Police Unit Aims to Better Life for Those Struggling with All Addictions*, GLOUCESTER DAILY TIMES (March 24, 2020), https://www.gloucestertimes.com/news/local_news/working-for-a-healthy-gloucester-new-police-unit-aims-to-better-life-for-those-struggling/article_f3c0c854-fcf3-5ae6-82fb-6f0796957af2.html; Jennifer Kavanaugh, *Gloucester Hires ‘Navigator,’ Expands Services to Those Struggling with Dependency*, MASSACHUSETTS MUNICIPAL ASS’N (March 18, 2020), <https://www.mma.org/gloucester-hires-navigator-expands-services-to-those-struggling-with-dependency/>.

clearly express to persons who may have heard of co-responder programs or crisis intervention teams, but not heard of the term deflection, that such programs fall under the deflection umbrella.

Subsection (l) contains a definition for “evidence-based practice” that originates from a definition developed by drafters and subject matter experts in a previous model law.⁶⁷ One Working Group member suggested that this Act’s drafters highlight for legislators and practitioners the current debate both in criminology and the public health arenas about the difference in meaning between “evidence-based” and “science-based.”⁶⁸ In theory—and consistent with the definition in this Act—“evidence-based medicine (EBM) aims to apply the best available evidence gained from the scientific method to medical decision making. It seeks to assess the strength of evidence of the risks and benefits of treatments (including lack of treatment) and diagnostic tests.”⁶⁹ Science-based medicine, in turn, is the name given to a way to improve EBM, with “[t]he key idea of emphasizing *science in general* instead of *evidence in particular*.”⁷⁰ Stated differently, using “science” instead of “evidence” in the name “suggests that we take basic science (much) more seriously when we’re talking about health care. We need to place greater emphasis on the value of a *huge* body of scientific knowledge about how humans work.” Here, in this Act, the drafters intend for “evidence-based practice” to be interpreted broadly, rather than in a narrow fashion that would focus on evidence to the exclusion of all other scientific considerations.

SECTION IV. AUTHORITY TO ESTABLISH DEFLECTION PROGRAM.

(a) In general.—Law enforcement, other first responders, or community providers, under written agreement with law enforcement or other first responders, are authorized to establish a deflection program, which may include a partnership with one or more of the following:

- (1) Treatment provider;
- (2) Community member or organization;
- (3) Case management provider;
- (4) Recovery support services provider; or
- (5) Any other individual or entity deemed necessary to carry out the purposes of the deflection program, including individuals with lived experience with substance use disorder, mental health disorder, or co-occurring disorders.

⁶⁷ *Model Access to Medication for Addiction Treatment in Correctional Settings Act*, *supra* note 34, at 7.

⁶⁸ Paul Ingraham, *Why “Science”-Based Instead of “Evidence”-Based?*, PAINSCIENCE (Aug. 26, 2014), <https://www.painscience.com/articles/ebm-vs-sbm.php>.

⁶⁹ *Id* (citing to *Wikipedia* definition).

⁷⁰ *Id* (emphasis in original).

- (b) Eligibility for funding.—In order to be eligible for funding pursuant to this Act, a deflection program shall involve partnership or collaboration with one or more of the entities listed in subsection (a).
- (c) Program components.—A deflection program may involve one or more of the following deflection types:
- (1) Active outreach deflection;
 - (2) Intervention deflection;
 - (3) Prevention deflection;
 - (4) Post-overdose response or naloxone plus deflection;
 - (5) Self-referral deflection; or
 - (6) A unique program pursuant to subsection (d).
- (d) Unique program.—Notwithstanding any other provision of this Act, law enforcement, other first responders, or community providers, under written agreement with law enforcement or other first responders, may develop a deflection program that is unique and responsive to local substance use disorder or mental health disorder issues, needs, and partnerships, using sound and promising or evidence-based practices.
- (e) Case management.—Whenever appropriate and available, case management should be provided by a local and neutral treatment provider, case manager, or other appropriate provider that works with the deflection program participant from the point of the first encounter onward, without regard to the type of service received by the participant through the deflection program. Case management may include recovery support services.
- (f) Peer support.—Whenever appropriate and available, deflection programs should include provisions for peer support.
- (g) Family involvement.—Whenever appropriate and available, deflection programs should encourage the involvement of family members and significant others, with the consent of the program participant, as a part of a family-based approach to treatment or provide a warm hand-off to family recovery resources.
- (h) Evidence-based.—Deflection programs should refer to evidence-based practices and long-term outcome measures in the provision of substance use disorder and mental health

disorder treatment, which includes, where clinically appropriate, medications for persons living with a substance use disorder, mental health disorder, or co-occurring disorders.

- (i) Applicability of Act.—Deflection programs in [state] shall be created pursuant to, and shall abide by, the provisions of this Act.

Commentary

This section is modeled after Illinois' law discussing the authorization for deflection programs.⁷¹ In subsection (a), and throughout the Act, the drafters identify entities who develop deflection programs as “law enforcement, other first responders, or community providers, under written agreement with law enforcement or other first responders.” The inclusion of the “community providers under written agreement” language stems from input by the Working Group. Citing to an example of a successful program in Florida, one group member noted that a community provider (rather than law enforcement or other first responder) might be the entity who primarily initiates and operates the deflection program. Therefore, this language is included so as not to preclude this option.

The individuals or entities “deemed necessary” referenced in subsection (a)(5) will differ somewhat depending on both the type(s) of deflection program(s) being established, as well as the structure of and interrelationship between local agencies. For example, in a program involving intervention deflection (where criminal charges are present and could be applied but rather are held in abeyance), necessary partners include state and local prosecutors. Such individuals may also form partnerships between two or more law enforcement agencies or law enforcement and one or more other first responders. As a deflection program is defined and developed, the key stakeholders and funded activities become more evident.

The purpose of subsection (b) is to require law enforcement or other first responder-led deflection program to include a partnership with one of the listed entities to be eligible for funding. Given that the ultimate goal of a deflection program is to connect individuals in need with public health systems to create community-based pathways to treatment, recovery support services, housing, case management, or other services, setting up these connections within the program should be encouraged. In addition to this funding requirement, the Model Act contains other funding eligibility requirements, primarily for statistical data collection. Rather than discussing data collection in the authorization section, however, the Model Act's drafters placed those requirements in a separate section on data reporting.

Subsections (c) and (d) work together. The intent behind subsection (d) is to make clear that a jurisdiction may develop a deflection program with unique components if none of the five traditional deflection pathways are a good fit. Accordingly, subsection (c) does not require that a deflection program contain any particular type of deflection.

⁷¹ 5 ILL. COMP. STAT. ANN. 820/15 (West 2021).

Subsections (e) through (h) constitute legislative encouragement to incorporate “best practice” elements into deflection programs. Three of the subsections (all but (f)) are based on a similar provision within Illinois law. Working Group members further suggest for best practices that: (1) the civilian and behavioral health staff included in deflection programs should not be employed by the law enforcement agency; and (2) the organization(s) that provide case management services have a proven track record of providing effective service provision for the target population.

The purpose of subsection (i) is to preclude an argument that the permissive nature of the authorization in subsection (a) means that a deflection program can opt out, or could be deemed to have opted out, of the requirements of this Act. For example, Section V below applies to all deflection programs established in the state, regardless of receipt of funding from the state administering agency on criminal justice.

SECTION V. MEMORANDUM OF UNDERSTANDING AND CONFIDENTIALITY.

- (a) In general.—For each deflection program created pursuant to this Act, the entity or entities that establish the program shall create one or more memoranda of understanding in conjunction with, and agreed to by, all deflection program partners.
- (b) Contents of memorandum.—Each memorandum of understanding created pursuant to subsection (a) shall identify the rights and responsibilities of all deflection program partners, identify the partner or partners that will perform each aspect of the memorandum of understanding, and include policies and procedures associated with:
- (1) Information sharing between and among program partners and any third parties responsible for one or more program components, including procedures in cases where a program partner serves in multiple roles;
 - (2) Participant identification, eligibility, screening, and assessment;
 - (3) Facilitating participant access to treatment or other services, including linkage agreements and other necessary contracts with partners and third parties responsible for one or more program components;
 - (4) Ongoing monitoring of program participants;
 - (5) Strategies to promote equity and diversity, measure equitable outcomes, and ensure accountability;
 - (6) Collecting, preserving, and reporting data to the [state administering agency on criminal justice], as described in this Act; and
 - (7) Any other element agreed to by all deflection program partners.

- (c) Confidentiality.—All information in possession of a deflection program partner regarding a program participant is confidential and is:
- (1) Not subject to state or local open records or freedom of information act laws; and
 - (2) Not discoverable in civil or criminal litigation, absent both a valid subpoena or other compulsory process and an order of a court of competent jurisdiction.
- (d) Information sharing.—Subject to the provisions of subsection (e), notwithstanding any other provision of state or local law to the contrary related to the privacy, confidentiality, and disclosure of protected health information, all deflection program partners shall share with each other all information necessary for the performance of their duties pursuant to the memorandum of understanding.
- (e) Disclosure of substance use disorder records.—The disclosure or redisclosure of a medical record developed in connection with the provision of substance abuse treatment services, without the authorization of the person in interest, is subject to any limitations that exist under [state law or regulations], 42 U.S.C. § 290dd-2, or 42 C.F.R. Part 2.
- (f) Use of information.—Information in possession of a deflection program partner regarding a program participant may not be used for any law enforcement or investigatory purposes, and shall be used solely to facilitate connection to treatment, recovery support services, housing, case management, or other services.

Commentary

This section is the most critical aspect of the Model Act. If law enforcement or other first responders decide to implement a deflection program, the Model Act requires that there be one or more interagency agreements between program partners that addresses, at a minimum, each of the items in subsection (b)(1)-(6). Although any number of terms for these agreements could be used, the Model Act’s drafters chose to use the common term “memorandum of understanding.” The intent here is for “memorandum of understanding” to be interpreted broadly, covering any number of necessary agreements including data sharing, confidentiality, and business associate. Requiring memoranda of understanding to cover certain program aspects and details in all instances promotes thoroughness and consistency among deflection programs. Section X below requires the regulatory body tasked with implementing the law—assumed to be the state administering agency on criminal justice—to develop regulations regarding the memorandum of understanding.

As far as the Model Act drafters are aware, subsections (c) and (d) are not part of any currently enacted state deflection law. However, the drafters believe that explicitly addressing

the sharing of deflection program information among participating agencies and the confidentiality of the information is essential. The intent of subsection (c) is to exempt deflection program records pertaining to an individual participant from any state freedom of information law and discovery in litigation. Subsection (c)(2) is modeled after the restrictions on disclosure of substance use disorder treatment records contained in federal regulations.⁷² The intent of subsection (d), via use of the phrase “notwithstanding any other provision of state or local law to the contrary,” is to supersede any state or local law or ordinance that could conflict with the sharing information. While this language on its own is sufficient to do this, states may prefer to also amend their confidentiality laws when enacting the Model Act to further solidify this fact. Based upon the directive in subsection (d), many medical records can be disclosed between program members without the authorization of the participant without violating the Health Insurance Portability and Accountability Act (HIPAA), via the “required by law” provision.⁷³ Unlike protected health information under HIPAA, however, records pertaining to substance use disorder treatment information still require patient authorization, in most cases, prior to release. Thus, subsection (e) operates to limit subsection (d)’s applicability in this context.

The purpose of subsection (f) is to make clear that deflection programs are developed for the sole purpose of enhancing public health, and not to collect information for criminal prosecution.

SECTION VI. PUBLIC EDUCATION AND PROGRAM PARTNER TRAINING.

- (a) Education and awareness.—Deflection programs should include education, training, technical assistance, community forums, and other similar activities intended to:
 - (1) Increase awareness of the deflection program by the general public; and
 - (2) Solicit community feedback about existing deflection programs.
- (b) Training.—Deflection programs should include training courses for all partners involved in the deflection program that cover as many of the following areas as is reasonably possible:
 - (1) Science of substance use disorder, including how and why treatment works, the neuroscience of addiction, the stages of change and how to identify the stage of an individual, and reducing the stigma associated with substance use disorder through person-first language training;
 - (2) Understanding the criminogenic nature of drugs and how that relates to

⁷² 42 CFR § 2.61 (2021).

⁷³ See 45 C.F.R. § 164.512(a)(1) (2021) (“A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.”)

- criminogenic risk-need-responsivity;
- (3) Medication for addiction treatment;
 - (4) Identifying individuals with substance use disorder, mental health disorder, or co-occurring disorders and how to effectively engage such individuals in the program;
 - (5) Reducing the stigma associated with substance use disorder, mental health disorder, and co-occurring disorders by implementing a harm-reduction approach in deflection programming;
 - (6) Promoting racial and gender equity in deflection programs and avoiding bias based on race or gender;
 - (7) Understanding adverse childhood experience and trauma-informed care;
 - (8) Motivational interviewing for law enforcement and other first responders;⁷⁴
 - (9) HIV and hepatitis C testing and tracking for communities; and
 - (10) Any other topic or area potentially useful to program partners.
- (c) Guidelines.—The [state administering agency on criminal justice] shall adopt rules and regulations that set out the guidelines and requirements pertaining to the development of education and training efforts provided for in subsections (a) and (b).
- (d) Eligibility for funding.—A deflection program is not eligible to receive funding for education or awareness activities pursuant to this section unless the deflection program institutes a training course addressing [X] or more of the topics set out in subsection (b) above.

Commentary

The basis for Section VI is newly enacted Illinois law.⁷⁵ There are two types of instruction addressed in this section: (1) the education of the general public regarding the existence of deflection programs (subsection (a)); and (2) training deflection program partners, including law enforcement and other first responders, in key, emerging areas that would benefit deflection responses (subsection (b)).

⁷⁴ Motivational interviewing “is a counseling method that helps people resolve ambivalent feelings and insecurities to find the internal motivation they need to change their behavior. It is a practical, empathetic, and short-term process that takes into consideration how difficult it is to make life changes . . . Research has shown that this intervention works well with individuals who start off unmotivated or unprepared for change.” *Motivational Interviewing*, PSYCHOLOGY TODAY, <https://www.psychologytoday.com/us/therapy-types/motivational-interviewing> (last visited Sept. 10, 2021).

⁷⁵ 5 ILL. COMP. STAT. ANN. 820/21 (West 2021).

The Illinois Deflection Act contains nine very specific training topics which may be titles of already-established training courses within the state. For this Model Act, the drafters opted to focus on topical areas deserving of training rather than course names since states may not wish to place specific titles within the statutory language. Additionally, course titles may change over time, so focusing on a training area rather than course title precludes the need for later amendments to the Act. As drafted, subsection (b) encourages, but does not require, training to cover all listed topics. This is because there may be practical limitations, such as cost, program staffing, or trainer availability, that could make getting a large-scale training process together difficult, especially for start-up programs that focus on many areas of implementation. Pursuant to subsection (c), a state’s administering agency of criminal justice must develop state-level guidelines on training courses and educational materials.

Finally, the purpose of subsection (d) is to persuade agencies to develop deflection programs that engage in training. Pursuant to funding provisions in Section IX(b) below, up to 10 percent of funds appropriated by the legislature to the state administering agency on criminal justice for the purpose of funding deflection programs within the state may be spent on activities related to educational programs, training, technical assistance, or other similar activities intended to increase public awareness of deflection programs. In order for a deflection program to be eligible for this piece of funding, the program must institute training. For the same reasons discussed above with respect to subsection (b), the drafters leave it up to each state to determine how many training topics (of those listed in subsection (b)) must be covered to receive funding for education or awareness activities. One Working Group member recommended that, at a minimum, required training identified in subsection (d) include subsection (b)(1) (“brain science”) because health care workers and first responders do not typically receive any education on the science behind addiction.

SECTION VII. DATA REPORTING AND PERFORMANCE MANAGEMENT.

(a) In general.—The [state administering agency on criminal justice], in conjunction with the:

- (1) [Single state authority on drugs and alcohol];
- (2) [State mental health agency];
- (3) [State health department];
- (4) [An association representing state chiefs of police]; and
- (5) [Any other appropriate state department or agency],

Shall, within six (6) months of the effective date of this Act, develop a standardized set of data and performance measures to be reported quarterly by each deflection program that receives funding pursuant to this Act to the [state administering agency on criminal

justice].

- (b) Standardized data and performance measures.—The standardized set of data and performance measures developed pursuant to subsection (a) shall include, at a minimum:
- (1) [Number of encounters with individuals that resulted in persons accepting entry into a deflection program];
 - (2) [Number of encounters with individuals that resulted in persons declining entry into a deflection program];
 - (3) [Demographic information on deflection program participants];
 - (4) [Demographic information on the community in which the deflection program operates];
 - (5) [To the extent allowable by law, demographic information on individuals who declined to participate in a deflection program];
 - (6) [Number of encounters with individuals that resulted in the following, separately recorded for substance use disorder and mental health disorder:
 - (A) Referral to treatment;
 - (B) Engagement with treatment;
 - (C) Referral to case management; or
 - (D) Engagement with recovery support services];
 - (7) [Length of time from the initial encounter to:
 - (A) Engagement with treatment; and
 - (B) Engagement with recovery support services];
 - (8) [Rate of engagement with treatment or recovery support services at [certain specified periods of time] from the point of initial contact];
 - (9) [Rate of recidivism and re- or subsequent arrest];
 - (10) [Results of quality of life assessments from deflection program participants]; and
 - (11) Any other data point or performance measure provided for in regulations developed pursuant to Section X or agreed to by the entities identified in subsection (a).
- (c) Data availability.—The [state administering authority on criminal justice] shall make the statistical data collected quarterly pursuant to this section available to the [single state

authority on drugs and alcohol], [state mental health agency], state health department, and [any other appropriate state department or agency] for inclusion in planning efforts for services to persons with substance use disorder or mental health disorder.

- (d) Data publishing.—On an annual basis beginning one year after the effective date of this Act, the [state administering authority on criminal justice] shall publish to its website the aggregate, de-identified data and performance measures reported by deflection programs for the prior year.
- (e) Report.—On an annual basis beginning one year after the effective date of this Act, the [state administering authority on criminal justice] shall provide a report concerning the effectiveness of deflection programs to the Governor and [appropriate state legislative committee(s)].
- (f) Eligibility for funding.—A deflection program is not eligible to receive funding pursuant to this Act unless the deflection program reports the data required by this section.

Commentary

As described in the commentary to Section II, deflection programs are an emerging and relatively new concept. As a result, the entities developing and managing deflection programs do not yet have a large body of empirical research to rely upon when implementing new programs or striving to improve existing ones. Among other things, developing a body of research through data collection on ongoing programs should help: (1) build the developing entities' knowledge base; (2) demonstrate that deflection addresses substance use disorder and mental health disorder issues without sacrificing public safety; (3) demonstrate that deflection reduces demand on the justice system, EMS agencies, and other community resources; and (4) demonstrate that expanding access to services and treatment saves lives, reduces costs, and is a good public investment.⁷⁶

Accordingly, the Model Act contains a robust data collection provision. In particular, Section VII directs the agencies identified in subsection (a) to develop a standardized set of data and performance measures—listed in subsection (b)—to be reported regularly. Law enforcement, included in subsection (a) by name (as an association representing state chiefs of police), is a key component of any data collection effort, even if local police department(s) are not involved in a deflection initiative. Often, local law enforcement operates 911 emergency call centers and, thus control that data. Moreover, law enforcement may have access to data sources

⁷⁶ See Albert M. Kopak and Faye S. Taxman, *The Importance of Core Measures in Diversion*, PTACC NAT'L PRE-ARREST DIVERSION INAUGURAL CONF. (March 7, 2018), <https://ptaccollaborative.org/wp-content/uploads/2018/05/Learning-About-Critical-Issues-The-Importance-of-Core-Measures-in-Diversion-Taxman.pdf>.

that others, even fire departments or EMS providers, do not have. Therefore, in order to get the big picture of the impact of a deflection initiative, law enforcement will need to be involved.

The drafters understand that collecting the entire list of data points in subsection (b) may be burdensome, particularly for deflection programs just starting out. Indeed, Working Group members recommended that the entire list of data points not be made mandatory, for fear of making data collection a barrier to entry. As written, subsection (b) takes this concern into account. While the Act's language requires that there be a minimum level of data collection ("[t]he standardized set of data and performance measures developed pursuant to subsection (a) shall include . . .") the potential data points are listed in brackets, indicating suggested rather than required language. The effect of this format is that legislators may pick and choose which data points they wish to require programs to collect. As a result, the primary purpose of subsection (b)(1)-(11) is to give legislators and deflection programs ideas about the types of data that should be collected. As the number of required data elements in subsection (b) are reduced, the entities identified in subsection (a) will have greater control over establishing required data elements.

In terms of implementing this directive, the Police Training and Community Collaborative (PTACC)'s Core Measures of Deflection provide substantial guidance for standardized data and performance measures that can be used.⁷⁷ In addition to using data to develop a body of research, information gathered from performance measures can be used to improve individual programs, such as funneling funding to treatment facilities and increasing services in a particular area.

One Working Group member asked about the purpose behind subsection (b)(8)'s requirement to collect the rate of engagement with treatment or recovery support services information at several points in time. The purpose here is to measure both the initial rate of engagement (before engagement) and how long-lasting the engagement with treatment or recovery support services (after engagement) is.

The purpose of subsection (b)(10) is to suggest collecting "consumer satisfaction" information about deflection programs. Participants' self-reported quality of life reports may be as important (or more important) than agency reports.⁷⁸ Participants' expression of positive experiences with a deflection program, particularly as compared to the day of law enforcement/first responder encounter, certainly constitutes a measure of success.

⁷⁷ PTAC Recommended Core Measures for Five Pre-Arrest Diversion Frameworks, PTACC COLLABORATIVE (2018), https://ptaccollaborative.org/wp-content/uploads/2018/07/PTACC_CoreMeasures-3.pdf.

⁷⁸ In health care, health-related quality of life is an assessment of how the individual's well-being may be affected over time by a disease, disability or disorder. It is usually assessed using patient questionnaires. *Quality of Life (healthcare)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Quality_of_life_\(healthcare\)](https://en.wikipedia.org/wiki/Quality_of_life_(healthcare)) (last accessed Sept. 10, 2021). See also *Health-Related Quality of Life (HRQOL)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/hrqol/concept.htm> (last reviewed Oct. 31, 2018).

SECTION VIII. EXEMPTION FROM CIVIL LIABILITY.

Except as may otherwise be provided in this Act, and unless there is a finding of [gross negligence, malice, criminal intent, or lack of good faith], any law enforcement, other first responder, treatment provider, case management provider, case manager, or community member or organization shall not, as the result of acts or omissions in providing services under this Act, be subject to civil liability, administrative action, or other legal or equitable relief.

SECTION IX. FUNDING.

- (a) In general.—The [state legislature] shall appropriate funds to the [state administering agency on criminal justice] for the express purpose of the [state administering agency on criminal justice] funding new and established deflection programs, subject to the provisions of this Act.
- (b) Pursuit of funding.—The [state administering agency on criminal justice] may pursue all federal funding, matching funds, and foundation or other charitable funding for the initial start-up and ongoing activities required under this Act.
- (c) Acceptance of gifts.—The [state administering agency on criminal justice] may accept such gifts, grants, and endowments, from public or private sources, as may be made from time to time, in trust or otherwise, for the use and benefit of the purposes of this Act and expend the same or any income derived from it according to the term of the gift, grant, or endowment.
- (d) Education and public awareness.—Up to 10 percent of funds appropriated by [the legislature] may be disseminated by the [state administering agency on criminal justice] for activities related to educational programs, training, technical assistance, community forums, or other activities intended to increase public awareness of deflection programs.
- (e) Guidelines and requirements.—The [state administering agency on criminal justice]:
 - (1) Shall adopt rules and regulations that set out guidelines and requirements to direct the distribution of funds for expenses related to deflection programs; and
 - (2) Shall make funding available to support both new and existing deflection programs in a broad spectrum of geographic regions in [state], including urban, suburban, and rural communities.

- (f) Priority of funding.—Funding for deflection programs shall be prioritized for communities:
- (1) Disproportionately impacted by substance misuse; or
 - (2) With a disproportionate lack of access to treatment and treatment providers.
- (g) Eligibility for funding.—A deflection program is not eligible to receive funding pursuant to this section unless the deflection program:
- (1) Meets the requirements provided for in sections IV(b), VI(d), and VII(f); and
 - (2) Includes, as one of its program activities, harm reduction services, including providing naloxone and related supplies essential for carrying out overdose reversal for distribution to program participants or for use by law enforcement or other first responders.
- (h) Eligible activities.—For all appropriated funds not disseminated pursuant to subsection (d), the activities eligible for funding under this Act include, but are not limited to:
- (1) Program administration, coordination, or management, including, but not limited to, the development of collaborative partnerships with treatment providers and community members or organizations, collection of program data, or monitoring program partners' compliance with any memorandum of understanding developed pursuant to this Act;
 - (2) Case management, including hiring staff, and case management provided prior to assessment, diagnosis, and engagement in treatment, as well as assistance navigating and gaining access to various treatment modalities and recovery support services;
 - (3) Recovery support services;
 - (4) Procurement and upkeep of transitional housing [subject to a cap of ____ percent];
 - (5) Transportation to a treatment provider or other program partner location;
 - (6) Program performance measurement activities;
 - (7) Software, hardware, and other technology necessary to track and measure program performance metrics and outcomes;
 - (8) Treatment necessary to prevent gaps in service delivery; and
 - (9) Academic research.

Commentary

This section provides language to enable a state legislature to fund the appropriate entities to develop and implement a deflection program. If the Model Act omits the funding discussion, then the legislation gives the appearance of an “unfunded mandate.” The funding piece for deflection programs is more important than ever because many states now place funding restrictions on their harm reduction programs, through legislation or otherwise.

This section is primarily modeled after the Illinois Deflection Act, which has the most comprehensive funding provision of all state laws addressing deflection programs.⁷⁹ Under Illinois law, however, the legislature is *not required* to appropriate funds to deflection efforts. Here, the Model Act’s drafters chose to make the funding requirement mandatory to promote the best possible outcome for deflection programs.

Subsection (g) lays out the program elements that must be in place for a deflection program to be eligible for funding. Subsection (g)(1) refers to earlier provisions making certain deflection program partners, ongoing training, and data reporting mandatory. The inclusion of subsection (g)(2) is based on comments received during the drafting process; several Working Group members believe that providing harm reduction services should be a required expense for deflection programs, and not just an eligible activity listed in subsection (h).

The optional cap in subsection (h)(4) placed on funds used for procurement and upkeep of transitional housing is based on a Working Group member’s recommendation. The member observed that housing expenses can quickly use up available funds to the detriment of the remainder of the deflection program. Therefore, deflection providers should document work with local housing groups to secure housing before these funds are utilized for procurement of housing.

The Model Act does not expressly provide for an amount of funding from legislative or other sources. In fall 2018, after enactment of the Illinois Deflection Act, the Illinois state administering agency on criminal justice (Illinois Criminal Justice Information Authority or Authority) posted a grant solicitation for individual deflection program funding. According to the solicitation, the Authority made \$500,000 available to use over a six-month period, with individual grants awarded between \$20,000 and \$80,000. Based on these numbers, the \$500,000 supported 6-25 individual grants.⁸⁰ Subsequently, with the passage of the 2021 update to the

⁷⁹ See 5 ILL. COMP. STAT. ANN. 820/35 (West 2021).

⁸⁰ *SFY19 Community-Law Enforcement Partnership for Deflection & Substance Use Disorder Treatment Act*, ILLINOIS CRIM. JUST. INFO. AUTH. (Sept. 12, 2018), <https://legacy-grants.icjia.cloud/grants/20180911elep>.

Illinois Deflection Act, the Authority released a Notice of Funding Opportunity in June 2021 for \$1,000,000 to greatly expand deflection in Illinois.⁸¹

In terms of currently-in-force laws across the country, 19 states address the funding of deflection programs. Deflection programs are not specifically authorized by statute in five states—Colorado, Ohio, Oklahoma, Tennessee, and Wisconsin—but laws in each state do detail funding for such programs.⁸² Counting Illinois, 12 states have funding provisions in statute that specifically identify a dollar amount to go toward these programs.⁸³

SECTION X. RULES AND REGULATIONS.

Within twelve (12) months from the date of enactment of this Act, the [state administering agency on criminal justice] shall promulgate rules and regulations necessary to implement their responsibilities under this Act, including but not limited to, guidelines and requirements:

- (a) Regarding the memorandum of understanding provided for in Section V;
 - (b) For the development of education and training efforts, as provided in Section VI;
 - (c) For the standardized set of data and performance measures, as provided in Section VII;
- and
- (d) To direct the distribution of funds for expenses related to deflection programs, as provided in Section IX.

⁸¹ *Notice of Funding Opportunity: SY 22 Community-Law Enforcement and Other First Responder Partnership for Deflection & Substance Use Disorder Treatment*, ILLINOIS CRIM. JUST. INFO. AUTH. (June 22, 2021), <https://icjia.illinois.gov/gata/funding/2021-clepd>.

⁸² COLO. REV. STAT. ANN. § 25-20.5-1101 (West 2021) (“Harm reduction grant program--creation--application--permissible uses--department duties”); 2017 Ohio Laws File 14 §§ 221.10 and 221.20 (West) (establishing the Drug Abuse Response Team Grant Program); OKLA. STAT. ANN. tit. 74, §§ 30.3 to 30.8 (West 2021) (“Political Subdivisions Opioid Abatement Grants Act”); 2021 Tennessee Laws Pub. Ch. 454 (West) (appropriating funds to the Department of Mental Health and Substance Abuse Services for pre-arrest diversion programs); WIS. STAT. ANN. § 46.535 (West 2020) (“Crisis intervention training grants”) (Wisconsin Department of Health Services is to award \$250,000 in grants in each fiscal biennium for mental health crisis intervention team training for law enforcement).

⁸³ CAL. PENAL CODE §1001.88(d) (West 2021); 2021 Colo. Legis. Serv. Ch. 21-178, § 9 (West); 2021 Fla. Sess. Law. Serv. Ch. 2021-36 (West); MD. CODE ANN., PUB. SAFETY § 4-1001; 2021 Montana Laws Ch. 576 (West); 2021 Sess. Law News of N.Y. Ch. 53 (S. 2503C) (McKinney’s); 2017 Ohio Laws File 14 §§ 221.10 and 221.20 (West); 2021 Tennessee Laws Pub. Ch. 454 (West); 2021 Virginia Laws Ch. 552 (West); 2021 Wash. Legis. Serv. Ch. 334 (West); WIS. STAT. ANN. § 46.535 (West 2020); Notice of Funding Opportunity: SY 22 Community-Law Enforcement and Other First Responder Partnership for Deflection & Substance Use Disorder Treatment, posted June 22, 2021, <https://icjia.illinois.gov/gata/funding/2021-clepd>.

SECTION XI. SEVERABILITY.

If any provision of this Act or application thereof to any individual or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provisions or applications, and to this end, the provisions of this Act are severable.

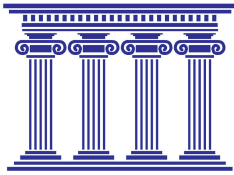
SECTION XII. EFFECTIVE DATE.

This Act shall be effective on [specific date or reference to standard state method of determination of the effect.]

ABOUT THE LEGISLATIVE ANALYSIS AND PUBLIC POLICY ASSOCIATION

Based in Washington D.C., and led by and comprised of experienced attorneys, the Legislative Analysis and Public Policy Association is a 501(c)(3) nonprofit organization whose mission is to conduct legal and legislative research and analysis and draft legislation on effective law and policy in the areas of public safety and health, substance use disorders, and the criminal justice system.

LAPPA produces timely model laws and policies that can be used by national, state, and local public health, public safety, and substance use disorder practitioners who want the latest comprehensive information on law and policy as well as up-to-the-minute comparative analyses, publications, educational brochures, and other tools ranging from podcasts to fact sheets. Examples of topics on which LAPPA has assisted stakeholders include naloxone laws, law enforcement/community engagement, alternatives to incarceration for those with substance use disorders, medication-assisted treatment in correctional settings, and the involuntary commitment and guardianship of individuals with alcohol or substance use disorders.



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