
SENATE COMMITTEE ON PUBLIC SAFETY
Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No: SB 1110 **Hearing Date:** April 19, 2016
Author: Hancock
Version: February 17, 2016
Urgency: No **Fiscal:** Yes
Consultant: JM

Subject: *Law Enforcement Assisted Diversion*

HISTORY

Source: Author

Prior Legislation: None

Support: American Civil Liberties Union; California Attorneys for Criminal Justice;
California Public Defenders Association; Crime Victims United of California

Opposition: California District Attorneys Association

PURPOSE

The purpose of this bill is to authorize the establishment of three pilot projects for the Law Enforcement Assisted Diversion (LEAD) in which a law enforcement officer takes a low-level drug seller or possessor, or a prostitution offender, directly to treatment and services, bypassing the court system in that matter; as specified.

Existing law includes deferred entry of judgment (DEJ) and true diversion programs for rehabilitation and treatment of drug offenders. (Pen. Code §§ 1000 and 1000.5.)

- In DEJ, a defendant determined by the prosecutor to be eligible for DEJ must plead guilty to the underlying drug possession charge. The court then defers entry of judgment and places the defendant in a rehabilitation and education program. If he or she successfully completes the program, the guilty plea is withdrawn and the arrest is deemed to have not occurred. If the defendant fails in the program, the court immediately imposes judgment and sentences the defendant.
- In true diversion, the criminal charges against an eligible defendant are set aside and the defendant is placed in a rehabilitation and education program treatment. If the defendants successfully complete the program, the arrest is dismissed and deemed to not have occurred. If the defendant fails in the program, criminal charges are reinstated.

Existing law includes the Substance Abuse and Crime Prevention Act (SACPA – Proposition 36 of the 2000 General Election.) Defendants convicted of a non-violent drug possession offense must be offered treatment on probation without incarceration, if not disqualified by prior violent

or serious felony convictions, commission of a non-drug offense or a history establishing that he or she is no amenable to treatment. (Pen. Code § 1210 and 1210.1.)

Existing law includes a limited number of pre-trial diversion programs for non-drug offenses. In these programs, criminal charges are reinstated if the defendant fails in the program.

- Misdemeanor diversion, excluding driving under the influence, crimes requiring registration as a sex offender, crimes involving violence, as specified. (Pen. Code §§ 1001, 1001.50-1001.55.)
- Bad check diversion. (Pen. Code §1001.60.)

Existing law defines misdemeanor diversion thus: “[P]retrial diversion refers to the procedure of postponing prosecution of an offense filed as a misdemeanor either temporarily or permanently at any point in the judicial process from the point at which the accused is charged until adjudication.” (Pen. Code § 1001.1.)

Existing law excludes specified driving under the influence offenses from pretrial diversion eligibility. (Pen. Code § 1001.2, subd. (a).)

Existing law provides that the district attorney of each county shall review annually any diversion program adopted by the county. The district attorney must approve the program and each participant. (Pen. Code § 1001.2, subd. (b).)

This bill provides that the Board of State and Community Corrections shall approve three counties to establish a Law Enforcement Assisted Diversion (LEAD) pilot program.

This bill provides that an interested county shall apply to the board and state how the program would operate in that county.

This bill provides that a LEAD pilot program shall include the following:

- Authorization for designated peace officers to take persons subject to arrest for specified offenses to a drug treatment facility or program. The specified offenses include:
 - Sale or transfer, or possession for sale or transfer, of a controlled substances where the sale or transfer is intended to provide subsistence living or to allow the person to obtain drugs for his or her own consumption.
 - Possession of a controlled substance or other prohibited substance.
 - Being under the influence of a controlled substance, other prohibited drug or alcohol.
- Authorization for designated officers to take persons subject to arrest for prostitution to an agency or entity that will provide a broad range of services to the person in lieu of arrest. Examples of services include medical, psychological, drug or alcohol treatment, child care and employment-related services.

This bill includes legislative findings that a LEAD program has been demonstrated in Seattle, Washington to lower recidivism, increase cooperation of participants in treatment and related programs and has significantly reduced law enforcement and court costs.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state's ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its "ROCA" policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

In 2011, Law Enforcement Assisted Diversion (LEAD) was developed and launched in Seattle, Washington. The program was a new harm-reduction oriented process for responding to low-level offenses such as drug possession, sales and prostitution. It was the result of an unprecedented collaboration between police, prosecutors, civil rights advocates, public defenders, political leaders, mental health and drug treatment providers, housing providers, other service agencies and business and neighborhood leaders.

In a LEAD program, police officers exercise discretionary authority at point of contact to divert individuals to a community-based, harm-reduction intervention. When officers encounter individuals who have violated the law due to unmet behavioral health needs, the officers refer the individuals to a trauma-informed intensive case management program. In lieu of the normal criminal justice system cycle – booking, detention, prosecution, conviction and incarceration – the case management program provides a wide range of support services for the individual, often including transitional and permanent housing and/or drug treatment.

After three years of operation in Seattle, a 2015 independent, non-randomized controlled outcome study by the University of Washington found that LEAD participants were 58% less likely to be arrested after enrollment in the program compared to a control group that went through the usual criminal justice processing. With significant reductions in recidivism, LEAD functions as a public safety program that has the potential to decrease the number of those arrested as well as improve the health and well-being of people struggling at the intersection of poverty and drug and mental health problems.

This bill would approve three counties for the establishment of a LEAD pilot program. This bill would also require the LEAD pilot programs to authorize designated officers to take a person for whom the officer has probable cause for arrest for specified controlled substances offenses, including possession of a controlled substance or other prohibited substance, or prostitution to treatment programs and services in lieu of arrest.

2. General Background – LEAD Concept, Participants and Goals

Law enforcement assisted diversion (LEAD) is a program in which law enforcement officers who contact a low-level drug offender, or a person engaged in prostitution, and offer the person treatment and services without a criminal prosecution arising out of that contact. If the person agrees to engage in the program, prosecution is not deferred, it is never instigated.

In Seattle, the referral to services and participation can also be done through a social contact between an officer and a potential participant. In this context, “social” means the contact is not

initiated by or through the commission of a crime by the participant. An officer can interact with a person that the officer knows is drug dependent, involved in low-level drug sales, or involved in prostitution, without evidence of a particular offense, and offer LEAD assistance.

It is sometimes stated that LEAD referrals are made at the time of arrest. In an interaction that is not social, it appears that the officer would detain, not formally arrest, a potential participant. The person would then essentially have the option to either accept referral for LEAD or submit to arrest and prosecution. If the person refuses referral or does not qualify for LEAD after screening, the arrest would formally occur and the person would be booked and prosecuted.

The core of the LEAD program is case management. A LEAD officer brings the participant to a social services case manager. The case manager determines the best program for the participant. Social workers involved in the program can maintain direct contact with participants in the community or at appointments. The core goals of LEAD are harm reduction and housing stability. The participant can engage in treatment, but ongoing treatment is not a condition of participation. As noted above, once the participant is accepted into LEAD, there will be no prosecution of the underlying offense.

A more detailed description of how LEAD was created and implemented in Seattle can be found in the University of Washington evaluations. The description in the UW evaluations is particularly illuminating because it reflects the full scope of what the study considered. The link to the evaluations pages of the Seattle LEAD website is the following:
<http://leadkingcounty.org/lead-evaluation/>.

3. Seattle LEAD Memorandum of Understanding Participants

LEAD is governed by a Policy Coordinating Group that operates pursuant to a memorandum of understanding (MOU) among the following:

- Seattle Office of the Mayor
- King County Executive Office
- Seattle City Council
- King County Council
- Seattle City Attorney's Office
- King County Prosecuting Attorney's Office
- Seattle Police Department
- King County Sheriff's Office
- Washington Department of Corrections
- Belltown LEAD Community Advisory Board
- Skyway LEAD Community Advisory Board
- The Defender Association, Racial Disparity Project
- ACLU of Washington, Drug Policy Project

4. Executive Summary of the University of Washington LEAD *Participant Recidivism* Evaluation – Released March 27, 2015

This report describes findings from a *quantitative analysis* comparing outcomes for LEAD participants versus “system-as-usual” control participants on *shorter- and longer-term changes*

on recidivism outcomes, including arrests (i.e., being taken into custody by legal authority) and criminal charges (i.e., filing of a criminal case in court). Arrests and criminal charges were chosen as the recidivism outcomes because they likely reflect individual behavior more than convictions, which are more heavily impacted by criminal justice system variables external to the individual. Findings:

- Analyses indicated statistically significant recidivism improvement for the LEAD group compared to the control group on some shorter- and longer-term outcomes. o Shorter-term outcomes were assessed for the six months prior and subsequent to participants' entry into the evaluation.
 - o Compared to the control group, the LEAD group had 60% lower odds (likelihood) of arrest during the six months subsequent to evaluation entry. The effect of LEAD on getting arrested during the 6-month follow-up was statistically significant ($p = .03$).
 - o This finding reflected the fact that—comparing the six months prior and subsequent to entry into the evaluation—the proportion of control participants who were arrested increased by 51%, whereas the proportion of LEAD participants who were arrested plateaued (+6%).
 - o Inclusion of warrant-related arrests could either a) inflate apparent recidivism by reflecting nonappearance for prior violations or b) accurately represent new criminal activity that triggered prior warrants to be served even if there was no booking on a new crime. Thus, we examined the arrest data both with and without warrant arrests. Analyses of exclusively nonwarrant-related arrests indicated no significant LEAD effects.
 - o Further, there were no statistically significant LEAD effects on total charges or felony charges filed over this shorter-term period. LEAD Evaluation: Recidivism Report 3/27/15 UW LEAD Evaluation Team 3 o Longer-term outcomes were assessed during the entirety of the LEAD evaluation time frame, ranging from October 2009 through July 2014. Analyses took into account the fact that participants had been in the program for differing amounts of time by statistically controlling for this factor.
 - o Compared to the control group, the LEAD group had 58% lower odds of at least one arrest subsequent to evaluation entry. The LEAD effect on arrests over time was statistically significant ($p = .001$).
 - o This finding reflected the fact that the proportion of control participants who were arrested at least once subsequent to evaluation entry increased by 4%, whereas the proportion of LEAD participants who were arrested subsequent to evaluation entry decreased by 30%.
 - o Analyses indicated that, compared to control participants, LEAD participants had 34% lower odds of being arrested at least once when warrant-related arrests were removed. This effect was marginally significant ($p = .09$).
 - o Although there was no statistically significant effect for total charges, the LEAD group had 39% lower odds of being charged with a felony subsequent to

evaluation entry compared to the control group. This effect was statistically significant ($p = .03$).

- The proportion of LEAD participants charged with at least one felony decreased by 52% subsequent to evaluation entry. The proportion of control group participants receiving felony charges decreased by 18%.
- Interpretation of findings: These statistically significant reductions in arrests and felony charges for LEAD participants compared to control participants indicated positive effects of the LEAD program on recidivism.

5. Executive Summary of the University of Washington Lead Evaluation of Criminal Justice and Legal System Utilization and Associated Costs – Released June 24, 2015

The University of Washington evaluation released on sets out findings from a *quantitative analysis* comparing outcomes for LEAD participants versus “system-as-usual” control participants on criminal justice and *legal system utilization (i.e., jail, prison, prosecution, and defense) and associated costs*. Findings include:

- The cost of the LEAD program averaged \$899 per person per month. However, these costs included program start-up and decreased to \$532 per month towards the end of the evaluation.
- Across nearly all outcomes, we observed statistically significant reductions for the LEAD group compared to the control group on average yearly criminal justice and legal system utilization and associated costs.
 - Jail bookings: Compared to the control group, LEAD program participants had 1.4 fewer jail bookings on average per year subsequent to their evaluation entry.
 - Jail days: Compared to the control group, the LEAD group spent 39 fewer days in jail per year subsequent to their evaluation entry.
 - Prison incarceration: Compared to the control group, the LEAD group had 87% lower odds of at least one prison incarceration subsequent to evaluation entry.
 - Misdemeanor and felony cases: There were no statistically significant LEAD effects on the average yearly number of misdemeanor cases. Compared to control participants, however, LEAD participants showed significant reductions in felony cases.
 - Costs associated with criminal justice and legal system utilization: From pre- to post-evaluation entry, LEAD participants showed substantial cost reductions (-\$2100), whereas control participants showed cost increases (+\$5961).
- Interpretation of findings:
 - LEAD program costs were commensurate with another supportive program for homeless individuals in King County. It should be noted that LEAD program costs LEAD Evaluation: Utilization and Cost Report 6/24/15 UW LEAD Evaluation Team 3 will vary widely across communities depending on LEAD participant characteristics (e.g., prevalence of homelessness) and community factors (e.g., cost of living, Medicaid coverage).

- Compared to system-as-usual controls, LEAD participants evinced meaningful and statistically significant reductions in criminal justice and legal system utilization and associated costs.

6. Seattle LEAD Funding Sources, Processes and Recommendations

The Seattle LEAD program has garnered interest from around the country. To respond to inquiries about the program, LEAD opened a National Assistance Bureau. Kris Nyrop, the National Assistance Bureau Director explained the LEAD funding history.

- **Foundation Funding**

- LEAD received about 800,000 the first year and a little more than that the second. Those were the two years we operated without any public funds.
- LEAD was dependent on foundation money from the beginning of the program in October, 2011 through 2013
In 2014, 2015, and 2016 LEAD used a 50-50% mix of private and public funds.
- LEAD anticipates being entirely publicly funded by 2017.

- **Affordable Care Act and Medicaid Issues:**

- LEAD began prior to the passage of the Affordable Care Act (ACA). Washington State is a Medicaid expansion state. LEAD is now using Medicaid money to pay for many of the costs and services that were initially funded by foundation grants. These included health and dental care, drug treatment and mental health care.
- LEAD managers have discovered that Washington State's Medicaid expansion is not as broad as it could be. For example, New York Medicaid reimburses some case management costs.
- LEAD national assistance would recommend that other states or local entities implementing a LEAD program determine what can be funded through Medicaid.

7. PBS Frontline Documentary on LEAD in the Context of the Opioid Addiction Epidemic

On February 23, 2016, the PBS Frontline program broadcast and released on-line a detailed documentary about LEAD and the history of the prescription drug opioid addiction epidemic. The documentary explained how the prescription opioid abuse epidemic led to a great increase in the use of heroin, particularly by people who could no longer obtain prescription opioids. The documentary was released on with the title, "Chasing Heroin." The URL for the documentary on-line is: <http://www.pbs.org/wgbh/frontline/film/chasing-heroin/>

8. Drug Dependence as a Disease of Chronic Relapse; Effectiveness of Treatment and Punishment in the Court System

It has been widely emphasized by experts in drug abuse and treatment that drug dependence or addiction is a chronically relapsing condition, similar to obesity or diabetes in this respect.¹ It is

¹ <http://www.drugabuse.gov/publications/media-guide/science-drug-abuse-addiction-basics>

to be expected that a person in treatment for drug dependence will relapse and use the drug of dependence or another drug. Such relapses do not mean that the person is not benefiting from treatment. It appears that treatment is cumulative, such that what appear to be initial failures in treatment contribute to success or substantial progress over time. For example, a history of less frequent relapses with success or progress by the treatment participant in employment, training, education or family responsibilities and relations would indicate that treatment is beneficial. The likelihood of chronic relapse by LEAD participants in Seattle is expected. Relapse does not limit a LEAD participant's involvement in the program.

Recent research has considered the effectiveness of varying forms of court-based drug treatment with other forms or sources of treatment demand. UCLA studies of the effectiveness of SACPA – Proposition 36 of 2000 were released in 2003 and 2006.² SACPA requires drug treatment without incarceration for non-violent drug possession. UCLA found that the SACPA model was as effective as drug court or voluntary treatment models and produced \$2.50 in savings from every dollar spent. Improvements in funding allocations and programs would have produced better results.

An extensive 2007 study of 474 drug offenders in drug court in Maricopa County Arizona (the Phoenix area) compared the outcomes in drug court treatment for persons who were subject to jail sanctions against those who were not subject to sanctions. The study found that the threat of jail sanctions did not affect the participant's rate of retention in or completion of the program.

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² http://www.uclaisap.org/prop36/documents/sacpa_costanalysis.pdf