
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair

2015 - 2016 Regular

Bill No: SB 202 **Hearing Date:** January 12, 2016
Author: Hernandez
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Urgency: No **Fiscal:** Yes
Consultant: JM

Subject: *Controlled Substances: Synthetic Cannabinoids*

HISTORY

Source: Author

Prior Legislation: SB 139 (Galgiani) Currently held at the Assembly Desk
AB 486 (Hueso) - Ch. 656, Stats. 2011
SB 420 (Hernandez) - Ch. 420, Stats. 2011
AB 2420 (Hueso) - Died in Assembly Public Safety, 2012
AB 1141 (Anderson) - Ch. 292, Stats 2007

Support: Unknown

Opposition: None Known

PURPOSE

The purpose of this bill is to grant the Board of Pharmacy (the “board”) the discretionary authority to find a chemical compound to be a prohibited synthetic cannabinoid upon adoption of a regulation; and direct the board, in taking such action, to consider the following factors about the compound: similarity to currently prohibited compounds, potential for abuse, “scientific evidence of ... pharmacological effect, if known,” current state of scientific knowledge, risk to public health, history and pattern of abuse, scope, duration and significance of abuse, and tendency to produce dependence.

Existing federal law classifies drugs into five schedules. (21 U.S.C. § 812.)

Existing California law generally follows federal law as to the assigned schedule, but does not set out the criteria for the schedules that are included in federal law. (Health and Safety Code Section 11054 et seq.)

Existing law prohibits possession of or commerce in specified drugs by individual statutes, not by reference to or inclusion in the controlled substance schedules. Such drugs include synthetic cannabinoids and nitrous oxide. (Health & Saf. § 11357.5; Pen. Code § 381b and 381c.)

Existing law provides that any person who possesses for sale, sells or furnishes any synthetic cannabinoid compound shall be punished by imprisonment in the county jail for up to six months, a fine of up to \$1,000, or both. (Health & Saf. Code § 11357, subd. (a.)

Existing law provides that, a person who “uses or possesses” a specified synthetic cannabinoid or specified synthetic stimulant is guilty of an infraction. (Health and Saf. Code § 11357.5.)

Existing constitutional provisions vest the legislative power of this State in the California Legislature which consists of the Senate and Assembly, and in the people, as specified. (Cal.Const. Art.IV § 1.)

Existing constitutional provisions vest California judicial power in the Supreme Court, courts of appeal and superior courts. (Cal. Const. Art.VI.)

Existing constitutional provisions create and define the Judicial Council and give the council the duty and authority to *adopt rules for court administration, practice and procedure*. (Cal. Const. Art.VI.)

Existing case law generally provides that the Legislature may make "reasonable grants of power to an administrative agency, when suitable safeguards are established to guide the power's use and to protect against misuse. The Legislature must make the fundamental policy determinations, but after declaring the legislative goals and establishing a yardstick guiding the administrator, it may authorize the administrator to adopt rules and regulations to promote the purposes of the legislation and to carry it into effect." (*People v. Wright* (1982) 30 Cal.3d 705, 712-713, citations omitted.)

Existing law requires the Board of Pharmacy (the “board”) to license and regulate the practice of pharmacy, including through mandated continuing education. (Bus. & Prof. Code § 4000-4440, 4231-4234.)

Existing law permits the board to adopt rules and regulations as may be necessary for the protection of the public. (Bus. & Prof. Code § 4005, subd. (a).)

Existing law grants the board extensive and comprehensive authority to regulate and discipline pharmacists and related licensees. (Bus. & Prof. Code § 4300-4382.)

Existing law specifies certain requirements regarding the dispensing and furnishing of dangerous drugs and devices, and prohibits a person from furnishing any dangerous drug or device except upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian or naturopathic doctor. (Bus. & Prof. Code (§ 4059)

Existing law contains the Penal Code of California, enacted in 1872. (Penal Code § 1.)

Existing law includes the Health and Safety Code, Division 10, which concerns crimes and penalties concerning controlled substances, enacted in 1972. (Health & Saf. Code §§ 11000-11651.)

This bill provides that the California Board of Pharmacy may add by regulation any chemical compound to the list of prohibited synthetic cannabinoids.

This bill provides that the board shall consider the following factors about a compound in determining whether or not to include the compound as a prohibited synthetic cannabinoid:

- Actual or relative potential for abuse;
- Scientific evidence of the substance’s pharmacological effect, if known;
- Current scientific knowledge regarding the substance;
- History and current pattern of abuse;
- Scope, duration, and significance of abuse;
- Risk to public health;
- Potential to produce psychological or physiological dependence; and,
- Whether the substance is an immediate precursor of, or similar to, a prohibited substance.

This bill authorizes the board to adopt emergency regulations in exercising its authority to declare a compound to be a prohibited synthetic cannabinoid so as to preserve the public peace, health, safety and welfare.

This bill exempts emergency regulations on synthetic cannabinoids from review by the Office of Administrative Law. Emergency regulations shall remain in effect for no more than 180 days.

This bill provides that the board’s activities in determining whether chemical compounds should be defined as prohibited synthetic cannabinoids shall be funded by moneys appropriated by the Legislature.

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:

SB 202 will allow California law to move at a quicker pace than the traditional legislative process, while keeping this product off the shelves. According to the National Institutes of Health, spice is “sold under many names, including K2, fake weed, Yucatan Fire, Skunk, Moon Rocks, and others — and labeled ‘not for human consumption’ — these products contain dried, shredded plant material and chemical additives that are responsible for their psychoactive (mind-altering) effects.”

In 2011, Senator Hernandez initially took action against spice by banning its sale, if it contained certain compounds (Health & Saf. Code §11357.5). Unfortunately, the manufacturers of synthetic marijuana stay one step ahead of the law by changing up the active ingredients, thereby keeping their product legal. Due to the severity of adverse reactions to spice (including death in many cases), and the ability of manufacturers to skirt California law, a more rapid regulatory response is required. SB 202 will allow the California State Board of Pharmacy to adopt emergency regulations identifying substances as synthetic marijuana, and thereby illegal. These regulations expire after 180 days, at which time it is anticipated the Legislature will be able to pass legislation outlawing the new iterations of the drug.

2. Issues of Delegation of Legislative Power

This bill grants the Board of Pharmacy the authority to add chemicals to the statutory list of prohibited synthetic cannabinoids, thus raising an issue of the proper delegation of legislative power to an executive agency. The California Constitution vests legislative power in the Legislature, reserving to the people the rights of initiative and referendum. Some of the important decisions by the California Supreme Court on delegation of legislative powers include the following:

- Delegated power must be accompanied by suitable safeguards to guide its use and to protect against its misuse. (*Blumenthal v. Board of Medical Examiners* (1962) 57 Cal.2d 228.)
- The Legislature must make the fundamental policy determinations, but after declaring the legislative goals and establishing a yardstick guiding the administrator, it may authorize the administrator to adopt rules and regulations to promote the purposes of the legislation and to carry it into effect. (*People v. Wright*, 30 Cal.3d 705 (1982).)
- The Legislature cannot authorize an executive body to declare what shall be a misdemeanor or to impose a penalty; and the fact that it fixes a maximum of penalty, which it authorizes the body to impose, is of no avail. *Board of Harbor Commissioners v. Excelsior Redwood Co.*(1891) 88 Cal. 491.)

The court in *People v. Wright, supra*, 30 Cal.3d 705, 712-713, specifically considered the Judicial Council's duty to draft rules for imposing criminal sentences. The council was created by the constitution and the constitutional provision relevant to this bill states:

To improve the administration of justice the council shall ... make recommendations... to the Governor and Legislature, *adopt rules for court administration, practice and procedure*, and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute. (Cal. Const. Art.VI, § 6 (d).)

There is no equivalent provision in the section granting and defining legislative power. There is no equivalent provision in the section granting and defining executive power.

The court in *Board of Harbor Commissioners v. Excelsior Redwood Co., supra*, 88 Cal. 491, 491-495, specifically considered a section of the former "Political Code" that delegated to the harbor board in Eureka "the power take such action, as may be necessary for the protection of navigation in Humboldt Bay" and authorized the board to impose penalties for rule and regulations the board enacted. The court found the statute – in allowing the board to both make rules and define penalties - to be an unconstitutional delegation of legislative power. The court quoted a Pennsylvania case holding that "the legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government." (*Id*, at p. 494.) It is not clear what constitutes the making of a law, as opposed to the determination of some fact upon which application of the law depends.

This bill does not give the Board of Pharmacy direct authority to define an entirely new crime. Rather, the bill gives the board authority to expand an existing crime by adding chemicals to a statutory list of prohibited synthetic cannabinoid. It may be of some significance that the *Board of Harbor Commissioners* decision concerned a limited and highly-regulated activity – shipping at the port in Eureka. That raises an issue as to whether the legislature to delegate to the Board of Pharmacy the power to declare that possession of a chemical is illegal by any person under any circumstances, as opposed to regulation of the profession of pharmacy. Arguably, the board could exercise more discretion in making rules regulating the profession than amending statutes that apply to the public generally.

3. Notice to the Public that Board of Pharmacy has listed a Chemical as a Prohibited Synthetic Cannabinoid

Both the United States and California Constitutions guarantee that no person shall be deprived of life, liberty, or property without due process of law. Due process requires “a reasonable degree of certainty in legislation, especially in the criminal law ...” (*In re Newbern* (1960) 53 Cal.2d 786, 792.) “[A] penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” (*Kolender v. Lawson* (1983) 461 U.S. 352, 357.)

It is not clear how a defendant charged with the crime defined by this bill would have known, or should have known, that the Board of Pharmacy has determined that a particular chemical is a prohibited synthetic cannabinoid and published that in regulations. There is nothing in the bill that provides when the board could or would promulgate a regulation deeming a chemical to be illegal. A criminal statute become effective on January 1st on the year after the bill is passed by the legislature, unless the statute is an urgency measure. The regulations promulgated by this bill would be much less accessible to the general public.

This is, however, a relatively novel issue, as most vagueness and certainty issues arise in the context of a criminal statute that is attacked as being vague or overly broad such that an ordinary person cannot determine what is forbidden or required by the. A person prosecuted for a crime involving a drug that has been deemed by the board to be a synthetic cannabinoid would likely argue that the average person could not know that he or she is committing a crime if the basis for the crime is in a regulation promulgated by the board.

4. Review of Controlled Substances or other Prohibited Drugs in California

California law does not provide a functioning process for reviewing drugs currently on the controlled substance schedules or proposed for placement on the schedules. Review is largely done through the legislative process. A Research Advisory Panel consisting of state agency representatives, physicians and academics is authorized by statute to review and approved research projects concerning marijuana and hallucinogenic drugs. The panel may approve research into programs for treatment of controlled substance abuse.

This bill would give authority to the Board of Pharmacy to determine whether possession or distribution of additional chemicals in one class of drugs should be criminalized. No equivalent or similar process exists for any other drug or class of drugs. Assuming that the bill does not constitute an improper delegation of legislative power, this bill would add complexity to California’s nearly impenetrable drug laws.

Federal law and regulations, in contrast with California law, provide comprehensive procedures for reviewing drugs proposed for inclusion in the controlled substance schedules. The DEA, the Department of Health and Human Services or an individual by petition can instigate investigation of a drug for inclusion in or deletion from the controlled substance schedules. The DEA does an initial investigation and the DEA then requests a scientific and medical examination of the drug through health and drug regulatory agencies. The Administrator of the DEA then makes a final determination after following specified procedures. The Administrator can also place a drug on the schedules on an emergency basis for up to three years. Congress can also directly add to or delete a drug from the schedules. Federal law thus delegates substantial authority to the DEA. However, the legal basis for such delegation under federal law is beyond the scope of this analysis.

5. Background – Synthetic Cannabinoids

Synthetic cannabinoids come in two basic forms. CB1 cannabinoids bind to CB1 cannabinoid receptors in the brain. CB2 cannabinoid receptors bind to cells throughout the body that are largely involved in regulating the immune system. THC binds to CB1 and CB2 receptors. CB1 cannabinoids have psychoactive properties.¹ Typically statutes, news reports and academic works concern CB1 synthetic cannabinoids.

The European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) is a European Union agency that “exists to provide the EU ... with a factual overview of European drug problems and a solid evidence base to support the drugs debate.”

The EMCDDA website includes the Following Information about Synthetic Cannabinoids:

Synthetic cannabinoids bind to the same cannabinoid receptors in the brain [as THC] ... More correctly designated as cannabinoid receptor agonists, they were developed over the past 40 years as therapeutic agents. ... However, it proved difficult to separate the desired properties from unwanted psychoactive effects. ...[M]any of the substances are not structurally related to the so-called “classical” cannabinoids like THC...[L]ittle is known about the detailed pharmacology and toxicology of the synthetic cannabinoids and few formal human studies have been published. It is possible that, apart from high potency, some cannabinoids could have... long half-lives...leading to a prolonged psychoactive effect. ... [T]here could [also] be considerable ... batch variability...

Recent EMCDD reports and data on synthetic cannabinoids include:

- A synthetic cannabinoid, JWH-018, was first detected in “Spice” products in 2008.
- 29 synthetic cannabinoids were reported to EMCDD in 2013.
- 105 synthetic cannabinoids were monitored by EU warning system in January of 2014.
- 14 recognizable chemical families of synthetic cannabinoids are known.

¹ <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3567606/>

The EMCDD reports that most synthetic cannabinoids are manufactured in China and shipped through legitimate distribution networks.² The White House Office of National Drug Control Policy³ states that most synthetic cannabinoids originate overseas.

The EMCDD reported⁴ on adverse consequences of synthetic cannabinoid use:

The adverse health effects associated with synthetic cannabinoids are linked to both the intrinsic nature of the substances and to the way the products are produced. There have been numerous reports of non-fatal intoxications and a small number of deaths associated with their use. As noted above, some of these compounds are very potent; therefore the potential for toxic effects is high. Harm may result from uneven distribution of the substances within the herbal material, result[ing] in products containing doses that are higher than intended. The reported adverse effects of synthetic cannabinoid products include agitation, seizures, hypertension, emesis (vomiting) and hypokalemia (low potassium levels). ...There is some evidence...that synthetic cannabinoids can be associated with psychiatric symptoms, including psychosis. There are also investigations underway in the US regarding links between the use of synthetic cannabinoids... and acute kidney injury and recently, a case report associated the use of the cannabinoid JWH-018 with...strokes in two otherwise healthy males.

6. Emergency Room Visits Related to Synthetic Cannabinoids

From 2010 through 2011, reported emergency room (ER) visits linked to synthetic cannabinoids increased from 11,406 to 28,531. The vast majority of patients were young males, ages 12 through 20.⁵ This is a relatively small number of ER visits, as total drug-related ER visits numbered 2,460,000 in 2011. Of the 2,300,000 ER visits in 2010, approximately 460,000 concerned marijuana and approximately 11,000 concerned synthetic cannabinoids. However, the reported number of synthetic cannabinoid ER visits likely understates actual visits, as testing availability is limited and some medical personnel might not be familiar with the drugs. The ER studies reported that very few patients engaged in follow-up treatment. It is not clear whether ER doctors did not make referrals for additional care, or if patients chose not to seek it.

Very recently, ER visits for synthetic cannabinoids have spiked. As use of these drugs appears to be dropping, the surge in ER visits is likely the result of a dangerous change in chemical

² <http://www.emcdda.europa.eu/topics/pods/synthetic-cannabinoids>

³ <https://www.whitehouse.gov/ondcp/ondcp-fact-sheets/synthetic-drugs-k2-spice-bath-salts>

⁴ The adverse health effects associated with synthetic cannabinoids are linked to both the intrinsic nature of the substances and to the way the products are produced. There have been numerous reports of non-fatal intoxications and a small number of deaths associated with their use. As noted above, some of these compounds are very potent, therefore the potential for toxic effects is high. In this respect some of the harms may result from uneven distribution of the substances within the herbal material, which may result in some products containing doses that are higher than intended. The reported adverse effects of synthetic cannabinoid products include agitation, seizures, hypertension, emesis (vomiting) and hypokalemia (low potassium levels). Although some of these are similar to symptoms observed after a high dose of cannabis, researchers have concluded that 'legal highs' containing synthetic cannabinoids are potentially more harmful than cannabis. In addition, there is some evidence to suggest that synthetic cannabinoids can be associated with psychiatric symptoms, including psychosis. There are also investigations underway in the US regarding links between the use of synthetic cannabinoid products and acute kidney injury and recently, a case report associated the use of the cannabinoid JWH-018 with acute ischemic strokes in two otherwise healthy males.

⁵ <http://www.samhsa.gov/data/sites/default/files/SR-1378/SR-1378.pdf>

composition of the drugs. One who obtains a synthetic cannabinoid can only guess as to its composition and effects.⁶

The New York Times explained in an April 24, 2015 article: “[Synthetic cannabinoids ... typically imported from China by American distributors, come in hundreds of varieties; new formulations appear monthly, with molecules subtly tweaked to try to skirt the DEA's list of illegal drugs as well as drug-detecting urine tests. ... [E]ach new variety can present distinct health risks caused by its underlying chemistry or contaminants in renegade manufacturing facilities.”

7. Synthetic Cannabinoid and Synthetic Stimulant Use is Falling Rapidly Among Young People – Growing Problems with use of Spice by the Homeless

The University of Michigan Monitoring the Future survey first asked 8th and 10th graders about their use of synthetic [cannabinoids] in 2011. The survey found that in 2012 annual prevalence rates were 4.4% and 8.8%, respectively. Use in all grades dropped in 2013, and the decline was sharp and significant among 12th graders. The declines continued into 2014 and were significant for both 10th and 12th graders; use for all grades declined 40% in 2014 from peak use in 2011. Awareness of the dangers of synthetic cannabinoid was up sharply among 12 graders.⁷

The use of synthetic stimulants among 8, 10th and 12 graders was first reported in the survey in 2012, with approximately 1% of students having tried the drug. Use of synthetic stimulants has also declined significantly – down approximately 20% from 2012 to 2014.⁸

The decline in the use of synthetic cannabinoids and synthetic stimulants was preceded by a precipitous drop in the use of the psychedelic salvia divinorum – another drug that gained popularity and some infamy around 2008. Since peak use (of 3.6%) by students in 2011 and 2012, use of salvia declined 61%. Sale or distribution of salvia was made a misdemeanor in 2008, but no penalties exist for possession or use.⁹ The decline in use appears to result from negative experiences by users, such as a frightening sensation of falling through space, not criminal penalties.¹⁰

Numerous recent reports have documented growing use of synthetic cannabinoids by homeless person in cities such as New York and Los Angeles. The drugs are cheap, powerful and often long-lasting, attracting persons with few resources and very harsh and difficult living conditions. Newer versions of the drugs may be particularly dangerous and the drugs are often adulterated.¹¹

8. Related Bill – SB 139 (Galgiani) adds 14 Chemical Families and Hundreds of Individual Chemicals to the List of Prohibited Synthetic Cannabinoids

SB 139 (Galgiani) would add 14 chemical families of synthetic cannabinoids and hundreds of individual chemicals to the list of prohibited synthetic cannabinoids. SB 139 appears to be consistent with the current state of knowledge about the range of existing synthetic cannabinoids.

⁶ <http://www.nytimes.com/2015/04/25/health/surge-in-hospital-visits-linked-to-a-drug-called-spice-alarms-health-officials.html>

⁷ <http://monitoringthefuture.org/pubs/monographs/mtf-overview2014.pdf>

⁸ <http://www.monitoringthefuture.org/pubs/monographs/mtf-overview2014.pdf>

⁹ <http://www.monitoringthefuture.org/pubs/monographs/mtf-overview2014.pdf>

¹⁰ http://www.drugpolicy.org/sites/default/files/FactSheet_Salvia.pdf

¹¹ <http://www.vice.com/read/policing-synthetic-marijuana-on-las-skid-row-731>

The background provided in connection with SB 139 includes model statutes for prohibiting synthetic cannabinoids and synthetic stimulants. The model statute was drafted by the National Alliance for Model State Drug Laws.¹² The chemicals SB 139 appear to be copied from the model statute. The purpose of describing synthetic cannabinoids by class or family is to include any new chemical in each class as a prohibited substance. That is, if a new drug is developed in any of the 14 classes, the chemical is prohibited, regardless of whether the individual chemical is included in the statute. It is not known whether many new synthetic cannabinoid classes can or will be developed. Synthesis of a new class or family of cannabinoids would not be included in the list of prohibited chemicals.

Including chemical families in the list of prohibited chemicals is similar to the use of an analog statute in prosecuting drug crimes. The analog statute provides that a drug that is structurally or functionally similar to an illegal drug illegal to the same extent as the specifically prohibited drug. Structural differences among various synthetic cannabinoids and substantial differences in effects produced by synthetic cannabinoids have hindered use of analog statutes or generic definitions of synthetic cannabinoids, as the only commonality many of these drugs may have is that they are all cannabinoid agonists, meaning the chemicals bind to cannabinoid receptors in the brain. It is concerning that researchers have begun to find evidence that illicit drug makers are developing chemicals that bind to multiple receptors in the brain, likely making testing and prohibition more difficult. Further, once a synthetic cannabinoid is discovered, it has been difficult to produce pure samples of the drug that are necessary for testing drugs that have been seized from potential criminal defendants.

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¹² <http://www.namsdl.org/about.cfm>. According to its website, NAMS DL is funded by Congress and coordinates policy initiatives with the Office of National Drug Control Policy.