
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: AB 890 **Hearing Date:** June 27, 2023
Author: Joe Patterson
Version: June 14, 2023
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Controlled substances: probation*

HISTORY

Source: Placer County District Attorney's Office

Prior Legislation: SB 904 (Bates), held in Assembly Appropriations in 2022
AB 1750 (Davies), held in Assembly Appropriations in 2022
AB 1928 (McCarty), held in Assembly Appropriations in 2022
AB 1542 (McCarty), vetoed in 2021

Support: Be the Solution Commission; California District Attorneys Association; Initiate Justice; Peace Officers Research Association of California

Opposition: California Attorneys for Criminal Justice; (unless amended) California Public Defenders Association; Ella Baker Center for Human Rights

Assembly Floor Vote: 78 - 0

PURPOSE

The purpose of this bill is to require a court to order a defendant who is granted probation for specified drug offenses involving fentanyl and other synthetic opiates to complete a fentanyl and synthetic opiate education program, and require the California Department of Public Health (CDPH) to approve, oversee, and develop statewide standards for the education program.

Existing law makes it unlawful for a person to possess fentanyl without a written prescription from a licensed physician, dentist, podiatrist, or veterinarian. Provides that the punishment is imprisonment in a county jail for not more than one year. (Health & Saf. Code, § 11350, subd. (a).)

Existing law provides that a court may not deny a defendant probation due to their inability to pay the fine for specified controlled substance offenses. (Health & Saf. Code, § 11350, subd. (b).)

Existing law prohibits the use of a controlled substance by a person other than the prescription holder or permit the distribution or sale of a controlled substance that is otherwise inconsistent with the prescription. (Health & Saf. Code, § 11350, subd. (e).)

Existing law requires a person convicted of a nonviolent drug possession offense to receive probation. Requires the court to order participation in and completion of an appropriate drug treatment program as a condition of probation. (Pen. Code, § 1210.1, subd. (a).)

Existing law makes it unlawful for a person to possess for sale or purchase for purpose of sale fentanyl and specified opiates and opioid derivatives. Provides that the punishment is imprisonment in county jail for two, three, or four years. (Health & Saf. Code, § 11351.)

Existing law makes it unlawful for a person to transport, import, sell, furnish, administer, or give away, or offer or attempt to transport, import, sell, furnish, administer, or give away fentanyl and specified opiates and opioid derivatives. Provides that the punishment is imprisonment in county jail for three, four, or five years. Provides that that the punishment for transporting fentanyl and other specified controlled substances within this state from one county to another noncontiguous county is imprisonment in county jail for three, six, or nine years. (Health & Saf. Code, § 11352.)

Existing law requires, whenever any person who is otherwise eligible for probation is granted probation by the trial court after conviction for a violation of any controlled substance offense, the trial court, as a condition of probation, to order that person to secure education or treatment from a local community agency designated by the court, if the service is available and the person is likely to benefit from the service. (Health & Saf. Code, § 11373, subd. (a).)

Existing law requires the willful failure to complete a court ordered education or treatment program to be a circumstance in aggravation for purposes of sentencing for any subsequent prosecution for a violation of specified drug offenses. Provides that the failure to complete an education or treatment program because of the person's inability to pay the costs of the program or because of the unavailability to the defendant of appropriate programs is not a willful failure to complete the program. (Health & Saf. Code, § 11373, subd. (b).)

Existing law authorizes the court, if it determines that there are circumstances in mitigation of the punishment prescribed by law or that the ends of justice would be served by granting probation to the person, to place a person convicted of a felony on probation if that person is not otherwise precluded by law from being placed on probation. (Pen. Code, § 1203, subd. (b)(3).)

Existing law defines "probation" as the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of a probation officer. (Pen. Code, § 1203, subd. (a).)

Existing law provides that the following individuals do not have to pay court fees and costs as a result of their financial condition:

- An applicant who is receiving public benefits under one or more of the following programs: Supplemental Security Income and State Supplementary Payment; California Work Opportunity and Responsibility to Kids Act or a federal Tribal Temporary Assistance for Needy Families grant programs; Supplemental Nutrition Assistance Program or the California Food Assistance Program; County Relief, General Relief, or General Assistance; Cash Assistance Program for Aged, Blind, and Disabled Legal Immigrants; In-Home Supportive Services; Medi-Cal; California Special Supplemental Nutrition Program for Women, Infants, and Children; Unemployment compensation.

- A person whose monthly income is 200 percent or less of the current poverty guidelines updated periodically in the Federal Register by the U.S. Department of Health and Human Services.
- A person who, as individually determined by the court, cannot pay court fees without using funds that normally would pay for the common necessities of life for the person and the person's family.
- A person who files a petition for appointment of a fiduciary in a guardianship or conservatorship, or files pleadings as the appointed fiduciary of a conservatee or ward, when the financial condition of the conservatee or ward meets the standards for a fee waiver.
(Gov. Code, § 68632.)

This bill requires the trial court to order a person to successfully complete a fentanyl and synthetic opiate education program, if one is available, whenever a defendant is granted probation by the trial court after conviction for a violation of possessing, possessing for sale, transporting, importing, selling, furnishing, administering, giving away, or offering or attempting to sell, transport, import, sell, furnish, administer, or give away a controlled substance involving any amount of fentanyl, carfentanil, benzimidazole opiate, or an analog of one of those substances.

This bill requires the court to determine the defendant's ability to pay. Provides that if the court finds that the defendant is financially unable to pay, the court may develop a sliding fee schedule for the program based on the defendant's ability to pay. Provides that a person who meets the specified criteria is not be responsible for any costs.

This bill requires the court to refer a defendant who was granted probation following a conviction for specified drug offenses involving fentanyl or another synthetic substance, as specified, and who is subject to court-ordered drug education or treatment only to a fentanyl and synthetic opiate education program that has been approved by CDPH.

This bill requires CDPH to oversee the fentanyl and synthetic opiate education program. Requires CDPH to be responsible for all of the following:

- Receiving input from, and collaborating with, relevant stakeholders, including, but not limited to, probation departments, to set education provider standards.
- Approving, monitoring, and renewing approvals of program providers to ensure compliance with this section.
- Developing comprehensive, statewide standards through regulations, including, but not limited to, standards for program provider curricula and the training of program staff.
- Identifying and developing requirements to determine whether a defendant has satisfactorily completed the requirements of the program.
- Analyzing the effectiveness of programs, including, but not limited to, thorough tracking of relevant participant and program data.

This bill requires the fentanyl and synthetic opiate education program to include education on the dangers of fentanyl and other synthetic opiates, including, but not limited to, information on all of the following:

- How the use of fentanyl and synthetic opiates affects the body and brain.

- The dangers of fentanyl and other synthetic opiates to a person’s life and health.
- Factors that contribute to physical dependence.
- The physical and mental health risks associated with substance use disorders.
- How to recognize and respond to the signs of a drug overdose, including information regarding access to, and the administration of, opiate antagonists and immunity for reporting a drug-related overdose.
- The legality of drug testing equipment.

This bill provides that the education may also include the criminal penalties for controlled substance offenses regarding fentanyl and other synthetic opiates.

This bill requires the education to be culturally and linguistically appropriate.

This bill provides that the court may allow a defendant to participate in a fentanyl and synthetic opiate education program via remote technology, if one is available.

This bill requires the program provider to report to the probation department and the court an unexcused absence by a defendant from a fentanyl and synthetic opiate education program within two business days.

This bill requires a defendant who is absent from a session of the fentanyl and synthetic opiate education program to complete any and all components of the fentanyl and synthetic opiate education program that the defendant did not attend.

This bill provides that CDPH must only approve programs that follow the fee structure set forth in other provisions of this bill.

This bill specifies that “opiate” includes “opioid” drugs.

This bill includes uncodified legislative findings and declarations.

COMMENTS

1. Need For This Bill

According to the author:

We must do more to educate those selling and trafficking fentanyl about the dangers it poses to their community. This bill will hold any person in possession of any amount of fentanyl, carfentanil, benzimidazole opiate that was granted probation accountable by requiring them to take an educational program on fentanyl and synthetic opiates. I hope that this will be a tool to enforce and educate the seriousness behind these drugs and crimes.

2. Fentanyl in California

The number of deaths involving fentanyl in California has increased dramatically in recent years. Between 2012 and 2018, fentanyl overdose deaths increased by more than 800%—from 82 to

786. (CDPH, Overdose Prevention Initiative

<<https://www.cdph.ca.gov/Programs/CCDPHP/DCDIC/SACB/Pages/PrescriptionDrugOverdoseProgram.aspx?msclid=99f1af92b9e411ec97e3e1fe58cde884>> [as of Jun. 20, 2023].) In 2021, there were 5,961 deaths related to fentanyl overdoses. (CDPH, California Overdose Surveillance Dashboard <<https://skylab.cdph.ca.gov/ODdash/?tab=Home>> [as of Jun. 20, 2023]).

3. Probation for Drug Offenses

Current law requires a trial court to order a person granted probation subsequent to a conviction for any controlled substance offense to secure education or treatment in a local community agency. (Health & Saf. Code, § 11373, subd. (a).) Under Proposition 36, any person convicted of a nonviolent drug possession offense must be granted probation, unless otherwise precluded by law. (Pen. Code, § 1210.1, subd. (a).) A person convicted of drug trafficking may be granted probation if the trial court determines that there are circumstances in mitigation of the punishment prescribed by law or that the ends of justice would be served by granting probation to the person, and that person is not otherwise precluded by law from receiving probation. (Pen. Code, § 1203, subd. (b)(3).)

This bill creates a separate drug education program requirement for individuals convicted of drug offenses involving fentanyl or another synthetic opiate. Specifically, this bill requires the trial court to order a person to successfully complete a fentanyl and synthetic opiate education program, if one is available, whenever a defendant is granted probation after conviction for a violation of possessing, possessing for sale, transporting, importing, selling, furnishing, administering, giving away, or offering or attempting to do any of those things when the controlled substance contains any amount of fentanyl, carfentanil, benzimidazole opiate, or an analog of one of those substances.

This bill requires the court to determine the defendant's ability to pay when referring the person to a fentanyl and synthetic opiate education program and provides that the court may develop a sliding fee schedule for the program based on the defendant's ability to pay. Under the provisions of this bill, a person who meets certain criteria such as being a recipient of specified public benefits programs, or who has a monthly income that is 200 percent or less of the current poverty guidelines, or who the court otherwise finds cannot pay court fees is not be responsible for any costs associated with program participation.

This bill additionally requires CDPH to oversee the fentanyl and synthetic opiate education program, including approving, monitoring, and renewing approvals of program providers to ensure compliance; developing comprehensive, statewide standards through regulations regarding standards for program curricula and program staff training;, including, but not limited to, standards for program provider curricula and the training of program staff; and analyzing the effectiveness of programs thorough tracking participant and program data. This bill specifies the type of information that must be included in fentanyl and synthetic opiate education programs, and outlines other program requirements. This bill also requires the program provider to report to the probation department and the court an unexcused absence by a defendant from a fentanyl and synthetic opiate education program within two business days, and requires a program participate to attend any missed sessions.

4. Argument in Support

The Placer County District Attorney, the bill's sponsor writes:

Assembly Bill 890 will require a defendant granted probation for the possession, sale, or transportation of a controlled substance involving any amount of fentanyl, carfentanil, benzimidazole opiate, or an analog thereof to complete a fentanyl and synthetic opiate education program. The program will contain information about the addictive properties of fentanyl and other opiates as well as related dangers and the administration of opiate antagonists, among other information. This bill will also require the State Department of Public Health to develop guidelines for the development of the classes, while allowing local probation departments to design and implement their own programs within those guidelines.

The fentanyl epidemic continues to devastate communities and claim lives. Many counties, including Placer, have been working tirelessly to partner with local public health, grieving families, local schools, community leaders, and law enforcement to spread awareness of the dangers of fentanyl. We launched the 1 Pill Can Kill Placer campaign to educate our residents in hopes of preventing overdoses and poisonings and reduce the destruction of this crisis.

AB 890 is a continuation of these collaborative, education-based effort we have been implementing in Placer County. The lethality of fentanyl has changed the criminal justice landscape and increased the need for education to those convicted of possession, selling, or transporting this dangerous drug. A local educational program inspired from this legislation may just be the tool that saves lives.

5. Argument in Opposition

According to the California Public Defenders Association:

In an attempt to prevent fentanyl overdoses, AB 890 would require anyone convicted of a fentanyl-related offense to pay for and attend a drug class as a condition of probation. Aside from technical problems with the bill (e.g., see § 11356.6(d)'s arbitrary time limits and impractical paperwork requirements), AB 890's unfunded 'one size fits all' approach ignores the realities on the ground and will inevitably lead to the incarceration of indigent Californians who are unable to comply with its provisions.

The vast majority of defendants in California are indigent, and drug users are no exception. In its current iteration, AB 890 nonetheless proposes that these mentally disordered, barely functional, often homeless men and women be ordered to attend and pay for classes *even when* a court has determined that such a requirement is undesirable or impractical.

Because our clients cannot afford to pay for classes and are already struggling to meet basic life requirements, they will either fail to complete these classes or fail to return to court, leading to their incarceration for 'violating' probation.

Instead of such an unworkable mandate, we would propose the following:

- Authorize the creation of a fentanyl education program as described in proposed § 11356.6(b).
- Require local county jails to offer that program to incarcerated defendants and incentivize attendance by offering participating defendants an additional day of credit towards any sentence.
- Authorize a court to, in its discretion, order attendance at such a program as a condition of probation for a qualifying offense, provided the local County Board of Supervisors has approved funding for that program.
- Prohibit the court from ordering the defendant to pay for that program.
- Prohibit a jail sentence of more than one day for the defendant's failure to attend such a program.

...[I]n its current form AB 890, while well-intentioned, will jail instead of educate non-violent drug offenders...

-- END --