

## **SIF Legal Challenges and Status of SIF Legislation in Key States**

### **Federal Law**

- The federal Controlled Substances Act is a barrier to establishing a SIF:
  - 21 U.S.C. § 856 provides that it is unlawful to “(1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance; (2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.” Violating this law can result in up to 20 years in prison.
  - 21 U.S.C. § 844 prohibits drug possession (controlled substances without a prescription). Violating this law can result in up to one year in jail.
- US Deputy AG Rosenstein has described SIFs as “very dangerous” locations that “create serious public safety risks.” In an August 27 NYT op-ed, Rosenstein stated: “Because federal law clearly prohibits injection sites, cities and counties should expect the DOJ to meet the opening of any injection site with swift and aggressive action.”
- Given current administration’s stated opposition to SIF, unlikely the DOJ would (a) allow law enforcement to exercise prosecutorial discretion, or (b) instruct federal law enforcement personnel to ignore SIF because AG interprets the Controlled Substances Act to allow SIFs.
- Other potential issues include conspiracy/aiding and abetting, civil forfeiture, loss of license (including DEA license) for professionals involved, as well as issues with insurance.

### **State Actions Related to SIF**

- Despite federal stance, many states have proposed legislation before the state legislature as part of a broader strategy to reduce overdose deaths.

#### **California**

- In January 2017, legislation introduced creating a four-year pilot program in San Francisco aimed at reducing opioid overdoses by creating a SIF. The bill also granted immunity from state prosecution to the SIF, which included property owners, managers, employees, volunteers, and clients or participants.
- In April 2017, San Francisco Board of Supervisors enacted a resolution charging the DPH with convening a Safe Injection Services Task Force whose goal is to develop recommendations on the operation of safe injection services (SIS).
- In August 2018, the State Senate passed the bill (AB186), which was publicly opposed by the US Attorney’s Office for the Northern District of California.
- On October 2, 2018, Gov. Brown vetoed the bill, stating that “enabling illegal and destructive drug use will never work” and expressing concerns for exposure of local officials and health care professionals to potential federal criminal charges. Governor-elect Newsom has publicly endorsed piloting SIFs in San Francisco.

#### **Colorado**

- In October 2017, final report from Colorado state Opioid and Other Substance Use Disorders Interim Study Committee proposed establishment of a SIF in Denver.
- In January 2018, Senate Bill 40 was introduced to allow the creation of a site where drug users could inject with clean needles under the supervision of staff with medical training who can

administer naloxone. The bill provided civil and criminal immunity from state prosecution for the SIF, which included employees, volunteers, and participants.

- In February 2018, the Senate State Affairs Committee voted 3-2 to indefinitely postpone consideration of the bill.
- On November 7, 2018, staff from the Harm Reduction Action Center worked with Denver City Councilman Albus Brooks to introduce a bill creating a two-year SIF pilot program in Denver provided that the Colorado legislature votes to legalize it in 2019. The bill was passed unanimously.
- On November 26, 2018, the Denver City Council voted to approve Councilman Brooks's bill by a 12-1 vote. The bill would create a two-year pilot SIF program within city limits, which would be operated by a nonprofit or government entity that works with addicts. The bill notes that no public funds would be used for the site. Before anything can move forward, the Colorado General Assembly will have to pass a measure allowing for such sites.
- On December 4, 2018, the U.S. Attorney's office and the Denver field office of the DEA released a joint letter warning the City of Denver against moving forward with its proposal to pilot SIFs. The letter notes a lack of evidence that SIFs reduce drug-related deaths or increase recovery and care-seeking behavior. In addition, the letter states that SIFs increase public safety risks, attracting "drug dealers, sexual predators, and other criminals, ultimately destroying the surrounding community." In response, Councilman Brooks noted he plans to continue forward with plans to pilot SIFs in Denver.

#### Massachusetts

- In June 2017, State Senator Will Brownsberger sponsored bill (S. 1081), which authorized DPH to approve SIFs, provided that they were also authorized by the city or town local board of health. Versions of the bill had previously been introduced. The bill did not contain an immunity provision. The bill was sent to study.
- Section 100 of chapter 208 of Acts of 2018 established a commission to review harm reduction opportunities to address substance use disorder, including the potential public health benefits and risks, feasibility, and potential federal, state, and local legal issues involved with establishing SIFs.

#### Maryland

- In January 2017, Maryland Delegate Dan Morhaim proposed a bill permitting SIFs ("Overdose and Infectious Disease Prevention" facilities) throughout Baltimore. The proposed legislation passed Senate Finance committee, but was voted down soon after.
- The City of Baltimore has considered SIFs as part of comprehensive approach to address its opioid crisis; an independently-funded report suggested that the city stands to generate substantial public health and fiscal benefits from the establishment of SIFs.

#### New York

- New York City houses the largest number of people who inject drugs worldwide.
- In November 2016, New York City Council allocated \$100k for the Department of Health and Mental Hygiene (DOHMH) to conduct feasibility and impact studies of establishing a SIF in NYC.
- In May 2018, DOHMH issued its report, which recommended establishing a pilot program for four SIFs located in NYC, citing substantial public health and fiscal benefits to the City. The facilities would be known as "overdose prevention centers" and would be operated by community non-profits currently running SEPs in coordination with the city.
- Mayor de Blasio endorsed the report's findings and put forth a plan to establish the pilot program in Gowanus, Midtown West, Washington Heights, and Longwood. A number of bureaucratic and logistical hurdles remain, including approval from City Council members, three DAs that preside over the four neighborhoods where SIF would be located, and the New York State Department of Health.

- State and municipal legislation has been introduced to address aspects of the opioid crisis, including one explicitly allowing the establishment of SIFs in New York State, but have not been approved.

#### Pennsylvania

- In 2016, there were 2,235 overdose deaths in Pennsylvania, 907 of which occurred in Philadelphia.
- In 2017, overdose deaths in Philadelphia increased 34% to 1,217.
- Fentanyl or fentanyl analogs were found in 846 deaths in 2017, a 95% increase from 2016.
- In May 2017, Philadelphia’s opioid task force released a report recommending SIFs as a strategy to reduce opioid overdose, citing public health and fiscal benefits to the City. The report has been endorsed by the mayor, district attorney, and city health commissioners.
- The proposal outlined plan for one to two SIFs, known as *comprehensive user engagement sites* (CUES) to operate with private funds. At sites, participants interested in treatment would have access to recovery specialists, social workers, and case managers, as well as MAT onsite.
- Governor Tom Wolf and Pennsylvania Attorney Josh Shapiro have not endorsed SIFs, citing existing federal laws, although the governor has stated he will not oppose the opening of a SIF.
- October 2, 2018, public health advocates in Philadelphia, including former Pennsylvania Governor and former Philadelphia Mayor Ed Rendell, launched *Safehouse*, a nonprofit created to operate the CUES.
- No timeframe has been announced for CUES opening, but Safehouse’s advisory board has begun meeting with community members to discuss potential locations, as well as the possibility of a mobile site.
- While Philadelphia Police Commissioner Richard Ross has expressed skepticism on SIFs, Philadelphia District Attorney Larry Krasner has stated that he will decline to prosecute workers or volunteer medical students who set up “a responsibly run harm reduction center,” saying there is a justification he could see under the doctrine of self-defense.
- In August 2018, US Deputy AG Rosenstein reconfirmed DOJ stance on SIFs, stating that his office would view operation of SIF in Philadelphia as facilitating drug use and the city should expect immediate legal action.

#### Washington

- In March 2016, mayors from Greater Seattle and King County convened a 30-member task force to develop short- and long-term action plans to confront heroin and opiate prescription addiction.
- In September 2016, the task force released their report, illustrating public health and fiscal benefits to the County. In addition to recommendations for additional public awareness campaigns, increased accessibility of buprenorphine, and trainings and distribution of naloxone kits, the task force recommended a three-year pilot project to create at least two SIF, which would be called *community health engagement locations* (CHEL).
- In January 2017, the King County Board of Health endorsed the task force’s report to establish two CHELs, one in Seattle and one located in the surrounding county.
- In November 2017, the Seattle city council allocated \$1.3 million in the city’s FY2018 budget to fund an initial feasibility study on siting the proposed facility.
- While King County Prosecutor and Sheriff have endorsed the establishment of CHELs, Senator Mark Miloscia has introduced bills in January 2017 (SB 5223) and January 2018 (SB 6254) to effectively ban SIFs in Washington by requiring local health boards to certify on an annual basis that no SIFs, whether privately or publicly funded, are operating within their jurisdiction. Neither bill has advanced out of committee.
- On December 6, 2018, the Washington State Supreme Court ruled that a proposed ballot initiative (I-27) regarding the funding of CHELs was invalid, noting that local voters could not override a county’s authority to set its budget. The measure would have allowed voters to ban publicly-funded

CHELs and made it illegal for any entity to operate a site that provides space for supervised drug consumption.

#### Legal Arguments to Federal Enforcement

- Despite federal opposition, legal scholars have proposed a limited number of avenues through which SIFs could be established:
  - State rights/commerce clause (under *Gonzales*)
  - Immunity provision within federal “crack house” statute <sup>1</sup>
  - Necessity defense – legal basis cited during initial court challenges of syringe exchange programs <sup>2</sup>

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<sup>1</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3254495](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3254495)

<sup>2</sup> [https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.86.8\\_Pt\\_1.1161](https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.86.8_Pt_1.1161)