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**CITY OF BALTIMORE**

**BERNARD C. “JACK” YOUNG**  
Mayor



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November 20, 2020

The Honorable President and Members  
of the Baltimore City Council  
Attn: Karen Randle, Executive Secretary  
Room 409, City Hall  
100 N. Holliday Street  
Baltimore, Maryland 21202

Re: City Council Bill 20-189R – Informational Hearing – Overdose Prevention Sites

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 20-189R for form and legal sufficiency. This resolution is for the purpose of inviting representatives from the Health Department, the Baltimore Police Department, the Fire Department, the Mayor’s Office of Criminal Justice and the Law Department to provide information about overdose prevention sites and how they could be established in Baltimore City.

Overdose Prevention Sites (OPS’s), also called Safe Consumption Spaces or Safe Injection Facilities, are facilities where people are permitted to use illicit drugs while under the supervision of either medical professionals or trained staff who can provide care in the event of an overdose. As noted in the recent federal case discussed herein, there is “vibrant debate” over the benefits, risks and costs of these sites. Although some cities have the preliminary workings in place for these sites, there are currently no OPS’s operating in the United States. To date, no state medical board has authorized or issued standards for OPS operation. State legislation to legalize OPS’s has been introduced multiple times in Maryland since 2016, but each attempt failed. The bills authorized a process for community-based organizations to apply and establish the sites where drug users consume drugs obtained elsewhere (not provided by the program) and receive services, referrals and education. Notably, the bills introduced required that applications be vetted by the Maryland Department of Health (MDH) in consultation with local health departments, reflecting the pervasiveness with which the state regulates overdose programs where medical treatment is administered and sought. The bill introduced last legislative session also limited the number of sites to a total of six in the state, with no more than two sites in any one area.

In October of 2019, a federal case held that a proposed OPS in Philadelphia would not violate a provision in the Federal Controlled Substances Act, commonly referred to as “The crack house statute” because the judge posited that Congress could not have contemplated OPS’s when

the law was enacted in 1986 and that the purpose of the OPS was to reduce drug use, not facilitate it, as required for a violation of the federal statute. *United States v. Safehouse*, 408 F. Supp.3d 583, 618 (E.D. Pa. 2019). The case arose when a nonprofit called “Safehouse” in Philadelphia corresponded with the federal government regarding plans to open an OPS and the government filed suit for a declaratory judgment that the OPS would violate the statute (declining to criminally prosecute). *Id.* at 587. Other legal issues were raised in the case, including those outside of the jurisdiction of the court, such as the appropriate location for the site, which was raised amidst the concerns of the residents in the neighborhood of the proposed site. Safehouse raised a counterclaim that the enforcement of the federal statute against the establishment and use of the OPS would violate the Religious Freedom Restoration Act. The issue was rendered moot and not decided when the court held that the OPS would not violate the “crack house” statute. *Id.* at 618.

In June of 2020, the same federal judge who granted the declaratory judgment that the site would not violate the federal statute, granted the government’s emergency stay of the judgment, keeping the site from opening in Philadelphia. The Judge explained that “The combination of the pandemic and the momentous protests following the killing of Mr. George Floyd make this the wrong moment for another change in the status quo.” *U.S. v. Safehouse*, 2020 WL 3447775 \*1.

While advocates of OPS’s were inspired by the outcome of the 2019 case, the Department of Justice vowed to appeal the result and had previously stated that any attempt to open an OPS would be met by the Department with “swift and aggressive action.” Former Deputy Attorney General Rod Rosenstein, as quoted by the New York Times in an op-ed published August 27, 2018.

The Safehouse case would only have persuasive, nonbinding effect on a court deciding the legality of an OPS in Baltimore, as it was decided outside of our federal circuit.

In addition to the threat of federal prosecution, state preemption is another legal hurdle for local legislation authorizing the establishment of OPS’s in Baltimore. The pervasiveness with which the State has legislated in the area of overdose prevention, requiring, for example, overdose prevention programs administered at the local level to receive prior approval from MDH (discussed herein), suggests an intent to occupy the field. Further, the General Assembly has considered the establishment of OPS’s and has declined to do so. Failed legislative attempts at the state level also manifest an intent to occupy the field. *See, e.g. Allied Vending, Inc. v. City of Bowie*, 332 Md. 279, 303-4 (1993) (“If the General Assembly intended to change existing law governing the sale of cigarettes through vending machines, it certainly has had the opportunities to do so. The failure to enact such measures ‘strongly suggests that there was no intent to allow local governments to enact different ... requirements.’” quoting *Skipper*, 329 Md. at 493.).

Therefore, the establishment of OPS’s in Baltimore City without state or federal authorization would almost certainly result in extensive litigation for the City, with the outcome being questionable at best. Should the General Assembly enact authorizing legislation, the legality of OPS’s would be bolstered, but the threat of federal prosecution would remain, making the program vulnerable to challenge.

Under current law, community-based organizations and local health departments can establish outreach programs for those addicted to drugs. Maryland Code, Health Gen. §§ 24-901-909. Each program must receive prior approval from both MDH and a local health department. § 24-902. The programs authorized allow participants to obtain and exchange hypodermic needles, connect the users with trained staff who can link them to other services like counseling, treatment and recovery services, testing for diseases, wound care and overdose response program services. § 24-903. All program procedures, protocols and plans must be approved by MDH and the authorized local health official. § 24-902 (c)(2)(ii). The programs operate with the assistance of an advisory committee appointed by MDH and collect and report data to MDH at least annually. Staff, volunteers and participants are immune from certain state laws prohibiting the possession or distribution of controlled or drug *paraphernalia* if the possession or distribution is a direct result of the person's activities in connection with an authorized program. § 24-908. Notably, the law expressly states that except for laws arising from residue attached to needles exchanged as part of the program, "nothing in this subtitle provides immunity to a Program staff member, Program volunteer or Program participant from criminal prosecution for a violation of any law prohibiting or regulating the use, possession, dispensing, distribution or promotion of controlled dangerous substances, dangerous drugs ...or any conspiracy or attempt to commit any of those offenses." § 24-909.

Maryland law, as administered by MDH, also provides for an overdose response program, launched in 2014, which includes education and training on recognition of overdose and response including the administration of naloxone. Maryland Code, Health Gen., §§ 13- 3101-3109. The law also immunizes from certain liability good Samaritans, licensed healthcare providers and pharmacists who in good faith, attempt to prescribe, provide or administer naloxone to a person believed to be overdosing.

A statewide standing order, updated by MDH in June, 2019, allows pharmacists to dispense naloxone to anyone believed to be at risk for an overdose or in a position to assist someone who may be overdosing. This removes the requirement that a prescription first be obtained by the person receiving the treatment.

This report is meant as a general overview of the legal issues surrounding the topic. Any specific legislation providing for overdose prevention sites in the City will be reviewed and reported on as received.

A resolution is an appropriate way for the City Council of Baltimore to conduct an investigative hearing. *See, e.g., Inlet Assocs. v. Assateague House Condominium*, 313 Md. 413, 428 (1988). Therefore, the Law Department approves this Resolution for form and legal sufficiency.

Sincerely,



Ashlea Brown  
Assistant Solicitor

cc: Dana Moore, Acting City Solicitor  
Matt Stegman, Mayor's Legislative Liaison  
Caylin Young, President's Legislative Director  
Elena DiPietro, Chief Solicitor, General Counsel Division  
Hilary Ruley, Chief Solicitor  
Victor Tervalva, Chief Solicitor