



128 Dorrance Street, Suite 400
Providence, RI 02903
Phone: (401) 831-7171
Fax: (401) 831-7175
www.riaclu.org
info@riaclu.org

**COMMENTS ON DEPARTMENT OF HEALTH
ADVANCE NOTICE OF PROPOSED RULEMAKING ON
HARM REDUCTION CENTERS
[216-RICR-40-10-25]
September 29, 2021**

As the first state in the country to enact legislation authorizing the establishment of harm reduction centers (HRC), Rhode Island is well-positioned to set a strong and positive model for the rest of the nation. Since the regulations implementing the legislation will be key in ensuring that the program works and protects the rights of those making use of these centers, the ACLU of Rhode Island appreciates the opportunity to provide some initial input at the ANPR stage.

In the next few weeks, we hope to touch base with colleagues elsewhere for additional suggestions on how the Department's regulations can provide robust civil liberties protections. In the meantime, we offer some preliminary comments below on a few basic issues.

• ***Confidentiality of Records.*** One of the most important components of a successful HRC will be codified assurances of confidentiality for the individuals making use of it. This is especially crucial in light of the potential violations of federal drug laws that are implicated by this program and, consequently, the potential interest by federal law enforcement agencies in information maintained by the centers. To address this issue, we believe the regulations can be strengthened in a few ways.

1. Section 25.4.7 declares, non-controversially, that the centers shall be subject to the privacy provisions of the state's Confidentiality of Health Care Communications and Information

Act, R.I.G.L. §5-37.3-1 et seq. However, it is important to remember that the CHCCIA contains several law enforcement-related exemptions that allow for the non-consensual release of information. Those exemptions would appear to apply to federal law enforcement agencies as much as state and municipal entities. More specifically, for example, the CHCCIA authorizes release of information without consent upon request of an officer “for the purpose of identifying or locating a suspect...” R.I.G.L. §5-37.3-4(b)(4)(ii). Since these statutory exemptions are discretionary, not mandatory, the DOH regulations can, and should, explicitly bar disclosure of information to law enforcement officials in these instances.

2. The centers must maintain a “clinical record for every client receiving clinical services.” §25.5.7(A). While the regulations specify that “drug consumption services” are provided anonymously, §25.5.7(B), we think it would be helpful, in order to avoid any confusion, if the regulations explicitly stated that “drug consumption services” are not considered “clinical services.”

3. It does not appear that HRCs would generally be involved in the dispensing of prescription medicine or controlled substances. However, the regulations authorize buprenorphine prescribing, §25.5.3, and various other health services, §25.5.4(B), and require the HRC to be able to respond to “life-threatening emergencies,” §25.5.9. In light of the authorization that state law, regrettably, gives federal authorities to obtain records from the state’s prescription drug monitoring database, R.I.G.L. §21-28-3.32(a)(5), there is a need to counteract in some way the confidentiality breaches that HRC prescribing actions could potentially allow.

4. Similar concerns arise, and should be addressed in the regulations, if any information from clients of an HRC will be submitted to the state’s health information exchange, as the HIE statute explicitly authorizes release of confidential information as permitted (not just required) by federal law. R.I.G.L. §5-37.7-7(d).

- ***Center Confidentiality.*** Just as important as the confidentiality of medical records is the physical privacy afforded individuals making use of the HRC. We assume that HRCs will have some process for determining entry into their centers. At a minimum, we believe that the regulations should bar HRCs from authorizing the entry of any law enforcement agent in the absence of a warrant or exigent circumstances.

On issues related to both physical and informational confidentiality, we believe it would be useful to determine if there are any additional protections contained in 42 CFR Part 2 – which provides for confidentiality of substance use disorder patient records – that should be incorporated into these regulations.

- ***Criminal record checks.*** The draft regulations require HRCs to conduct a national criminal background check for any personnel whose employment involves “routine contact with a client.” The regulation goes on to clarify that any person with a conviction may be considered for employment “at the discretion of the employer.” Section 25.4.2(C).

For a variety of reasons, the ACLU of RI has long questioned criminal record check (CRC) requirements in employment. But if the regulations are going to require such a check, we urge that it be limited to a statewide check, a limit contained in a number of other occupations regulated under Rhode Island law. Such a limit should be considered because national checks are much more expensive (\$35 or more) and time-consuming, and the NCIC database is known to be replete with inaccurate and incomplete records.

In addition, if the Department is going to allow employers to review a person’s criminal record, the record that is received should be limited to actual convictions, not arrests. Further, we would encourage the use of the process in existence for many other CRCs in state law, whereby the employer is initially told only whether the applicant has a criminal record with convictions,

not the nature of the convictions, and if so, the employer can only then request the applicant to provide the conviction records. In considering criminal records, the regulations might also require employers to follow applicable procedural requirements contained in the state's "fair chance licensing" law, R.I.G.L. §28-5.1-14, to prevent denial of employment on the basis of irrelevant criminal convictions.

Finally, if an HRC job applicant is already subject to a CRC as a state-licensed professional, the regulations should make clear that another check is not required to be employed by a center.

- ***Rights of Clients.*** Section 25.4.6(A) of the draft regulations requires HRCs to develop a Code of Client Rights and Responsibilities, which we support. We urge that the regulations additionally specify that the description of rights include information about clients' rights in encounters with the police. In that regard, the regulations should require HRCs to offer users and clients "know your rights" information as well as a centralized phone number and electronic complaint process they can use to lodge any complaints against police for harassment or misconduct that is related in any way to their use of a center.

The ACLU of RI appreciates your consideration of these preliminary views. We hope that they are helpful and will be incorporated in any revisions to the draft regulations that will be submitted for a public hearing in the next round.

Submitted by: Steven Brown, Executive Director