

# MINUTES

## Offenses Regarding Controlled Substances Interim Study



Representative Steven Haugaard, Chair  
Senator Craig Kennedy, Vice Chair

Third meeting, 2019 Interim  
Tuesday  
October 22, 2019

Room 362  
State Capitol  
Pierre, South Dakota

The third meeting of the Offenses Regarding Controlled Substances Interim Study Committee was called to order by Representative Steven Haugaard (Chair), at 10:04 a.m. CDT, on October 22, 2019, in Room 362 at the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members answering the roll call: Representatives Linda Duba, Dayle Hammock, and Steven Haugaard (Chair); Senators Craig Kennedy (Vice Chair), Jeff Partridge, and Jim Stalzer; and public members Mr. Gary Drewes, Mr. Mike Leidholt, Mr. Aaron McGowan, Mr. Jason Ravensborg, Ms. Patricia Riepel, and Mr. Kevin Thom. Ms. Laurie Gill, Mr. Gary Jaeger, and Mr. Greg Sattizahn were excused. Staff members present were David Ortbahn, Chief Research and Legal Analyst, and Kelly Thompson, Senior Legislative Secretary.

*All material distributed at the meeting is attached to the original minutes on file at the Legislative Research Council (LRC). For continuity, these minutes are not necessarily in chronological order. This meeting was recorded by South Dakota Public Broadcasting. The archived recording is available at the LRC website at <http://sdlegislature.gov> under "Interim."*

### Approval of Minutes

***Senator Stalzer moved, seconded by Representative Duba, that the September 23, 2019, meeting minutes be approved. Motion prevailed on a unanimous roll call vote.***

### Remarks by Chair and Vice Chair

Representative Haugaard thanked committee members for providing the input needed to shape clear and feasible recommendations for legislative consideration. He said although they all have different perspectives, the group has developed common objectives. Progress is being made with existing programs in Sioux Falls and Rapid City as well as with Native American initiatives. While funding continues to be a hurdle, the goals are to ensure law enforcement and the legal system have the tools they need, to expand and develop effective treatment programs, and to reduce recidivism rates.

Senator Kennedy said he was pleased with the discussion between members and the respect they have shown for everyone's experiences and interests.

### **Response to Committee Questions from September 23, 2019 Meeting**

**Mr. Matt Frame, Research Analyst, LRC**, reported on federal drug cases in South Dakota and the drug treatment services offered by the federal system ([Document 1](#)). The number of federal cases involving narcotics and dangerous drugs in South Dakota increased from 113 in 2017 to 145 in 2018.

Three treatment programs are provided through the federal prison system: the Residential Drug Abuse Program (RDAP), the Non-Residential Drug Abuse Program (NRDAP), and the Drug Education Course (DEC). DEC is offered at all BOP institutions at the beginning of an offender's sentence and takes 12 to 15 hours to complete. For those inmates required to take it, refusal, withdrawal, or expulsion from the program will impact their work assignments and prison wages. NRDAP is a 12 to 24 week program designed for inmates awaiting openings in RDAP or those who require drug treatment services but do not meet RDAP requirements. Offenders who successfully complete the program receive a \$30 award and are eligible for the maximum pre-release time in a halfway house.

RDAP is the most comprehensive of the three programs and is offered in South Dakota only at the Yankton Federal Prison Camp. It is a voluntary nine-month, 500-hour program focused on substance abuse, addiction, criminal thinking patterns, and coping skills. Offenders who finish the program can receive six to 12 months off of their sentence. Thousands of inmates are on the waiting list for entry into RDAP.

Senator Kennedy asked how many offenders are in RDAP at the Yankton facility at any given time. Mr. Frame replied no such statistics were available.

Representative Haugaard inquired about tribal statistics for federal drug crimes. Mr. Frame replied he could provide the committee with specific numbers, if needed. Mr. Thom noted that statistics provided by the U.S. Attorney's Office do not reflect what happens in tribal courts and each tribe individually reports such figures.

Representative Haugaard asked if only low-end offenses are prosecuted in tribal courts. **Mr. Mark Vargo, State's Attorney, Pennington County**, said tribal courts are largely limited to misdemeanor offenses with maximum sentences of one year in jail. The majority of drug cases tried in these courts are for possession although offenders charged with selling controlled substances are sometimes prosecuted as well. Prosecutions vary widely between tribes. Mr. Ravensborg added that the Attorney General's Office has had good discussions with both the Rosebud and Sisseton tribes but no agreements have been finalized.

Representative Hammock asked Mr. McGowan if violent crime in his jurisdiction has risen to felony levels and whether organized crime may be involved. Mr. McGowan replied that his office works closely with the U.S. Attorney on drug and child porn cases but not violent crimes. Although many of the people involved in the drug trade in South Dakota know each other, their association is not to the level of organized crime. He said weapons charges and shootings related to drugs have increased.

Ms. Riepel said the methamphetamine cases she sees in Drug Court are seldom attached to violent crimes and she advised the committee that there are ways to distinguish a drug addict from a violent offender. Representative Haugaard noted that in his law practice, he has worked with clients who started with marijuana at a young age and have progressed to drugs like methamphetamine as they become adults.

Addicts can be non-violent people who do not want to be in the situation they are in but are forced into doing things they do not want to do because of their addiction.

Senator Kennedy asked if the Yankton Federal Prison Camp has dedicated staff to administer the RDAP program. Mr. Frame said yes.

**Ms. Amy Iversen-Pollreisz, Deputy Secretary, Department of Social Services (DSS)**, provided follow-up information on salaries for substance use disorder counselors; age ranges and ethnicity statistics for clients receiving Criminal Justice Initiative (CJI) funded services; number of clients served by county; and explanations of the survey questions asked to clients following receipt of services ([Document 2](#)).

The majority of clients receiving CJI services are between the ages of 25 and 34, with 56 percent being Caucasian and 35 percent Native American. Representative Haugaard asked if those percentages align with the demographics of cases being prosecuted. Mr. Thom said the jail population in Pennington County is about 50 percent Native American with 84 percent of participants in the Care Campus program being of that ethnicity. Mr. McGowan reported the numbers are fairly close to those seen in Minnehaha County while Mr. Leidholt said Native Americans are overrepresented in South Dakota's criminal justice system, for both men and women.

Mr. McGowan asked if recidivism data was available on those receiving Cognitive Behavioral Intervention for Substance Abuse (CBISA) services. Ms. Iversen-Pollreisz replied a link had been provided to the Department of Corrections Criminal Justice Services report that contains that information. The recidivism rate is 23 percent overall for people who have completed drug treatment programs. Statistics were provided ([Document 3](#)) showing 48 percent of people participating in substance abuse treatment in South Dakota successfully completed the program, compared to 43 percent nationally.

Ms. Riepel inquired if any gender specific treatment programs are available. Ms. Iversen-Pollreisz said the Seeking Safety program is offered in the Women's Prison and discussions are held regularly with providers to determine if other programs need to be added.

Mr. Leidholt explained to members that the recidivism rate shown is for the one-year mark and that the rates increase the longer a person is out. Representative Haugaard asked if the numbers do not include individuals who have relapsed but do not get violated. Mr. Leidholt said yes and that the numbers show there has been success with these drug treatment programs and South Dakota should continue to look for other evidence-based programs that could be implemented.

Ms. Iversen-Pollreisz provided background information on the White Bison program, a Native American non-profit organization based in Colorado, which offers sobriety, recovery, addiction prevention, and wellness programs to Native Americans. Ms. Riepel and Representative Haugaard requested information be provided on any other similar programs nationwide. Ms. Iversen-Pollreisz said she would do further research on the issue.

Senator Kennedy asked if DSS pays for inpatient drug treatment. Ms. Iversen-Pollreisz said such treatment is available with about 500 people served in Fiscal Year 2018. Individuals qualify based on their income and an assessment by a treatment counselor indicating the person needs that level of care.

Representative Hammock inquired about who initiates the request for treatment and the flow of funding. Ms. Iversen-Pollreisz responded the client could seek the treatment on their own or be sent to a facility for services based on the results of an assessment. Providers are paid on a fee for service basis.

Ms. Riepel said 30 day programs are not effective and wondered if there is a way to track the continuum of services offered. Ms. Iversen-Pollreisz said flexibility exists to meet the needs of the person and the individual can stay longer than 30 days if necessary. The expectation is that they will step down into other levels of care after that initial term if they have the necessary support.

Ms. Riepel noted South Dakota does not have many residential treatment programs and asked if more beds are needed. Ms. Iversen-Pollreisz said challenges include services not being available in the geographic area where the person lives and housing issues.

Representative Duba asked if each person gets a case manager and whether there are enough case managers available to handle the workload. Ms. Iversen-Pollreisz said cases are managed by probation officers and treatment providers.

### **Recommendations and Comments from Committee Members**

Representative Haugaard proposed enlisting community assistance to fill gaps in the system. Senator Kennedy said members should keep in mind that community-based programs work well in communities with the resources to provide them but those resources do not exist everywhere in the state. Mr. Thom said adding capacity is a challenge for entities when funding is only guaranteed one year at a time. He asked if a model could be created with the state that offers continued funding to communities to incentivize them to expand programs. Mr. McGowan said community partnerships should be considered.

Mr. Drewes said while funding needs to be increased, another option could be to develop educational programs for young people about the dangers of drug use with the goal of preventing future addiction. Mr. Thom agreed that prevention is important and is cheaper than treatment or arrests. He said the group should consider incentivizing diversion programs in communities.

Representative Haugaard asked for input on adding treatment options to each level of misdemeanor for ingestion charges. Mr. Thom, Mr. Ravnsborg, and Mr. McGowan were not in support of the idea. Such action would push more costs to the counties, increase legal costs overall, and make prosecutions more difficult. Representative Haugaard inquired about loosening expungement opportunities. Mr. McGowan noted opportunities to expunge felonies from a person's record already exist in the current system.

Senator Kennedy presented Department of Corrections' data showing the population of inmates in the prison system for whom ingestion was the highest offense charged ([Document 4](#)).

Senator Partridge asked Attorney General Ravnsborg if his office was open to solutions or wanted to leave the system as it is now. Mr. Ravnsborg replied that a combination of solutions are needed that will address prevention and treatment, and give law enforcement and the court system the necessary tools to do their job.

Representative Haugaard said promises were made by previous legislation that were not followed through on regarding prevention and treatment. Commitment is necessary to ensure that does not happen again with future recommendations.

### **Committee Discussion of Possible Recommendations**

Senator Partridge discussed the Unified Judicial System (UJS) budget requests for Fiscal Years 2020 and 2021. For the current budget year, UJS requested one-time funds of \$551,710 for Drug and DUI courts. For Fiscal Year 2021, they requested an ongoing increase of \$645,866 for Drug and DUI courts, treatment programs, and 11 full time employees (FTE). The FTE request represents seven court services officers, two deputy clerks of courts, one court reporter, and one computer support person. As UJS is currently down 20 court services officers but only requested seven, Representative Haugaard said he was unsure their requests are actually meeting their need.

Regarding whether funding exists to fulfill the promises made by Senate Bill 70, Senator Partridge said a review of the budgets for DSS and the Department of Labor and Regulation show monies may be available to start a pilot program for diversion treatment and improve workforce development.

Representative Haugaard said differences exist between judges and prosecutions from one area of the state to another. While it is important for judges to maintain their discretion, policy recommendations could help establish more uniformity statewide.

Senator Kennedy asked if state's attorneys in jurisdictions other than Minnehaha and Pennington counties use diversion programs. Mr. McGowan was unsure but said he would ask other jurisdictions.

Mr. Ravensborg said he is open to requiring an assessment depending on the charges, similar to the practice used for DUI cases. Representative Haugaard said depending on the type of drug involved, an assessment should be required. He commented that young drug users do not make the connection between the drugs they are using and the drugs coming into South Dakota from cartels, often downplaying in their minds that these substances are the same.

Senator Kennedy asked where assessments would be conducted and who would pay for them. Ms. Riepel replied that different agencies that receive state funding offer evaluations and many have sliding scales for payment. In rural areas where such services are not readily available, it may be necessary to get more creative using telemedicine or telephonic means.

Mr. Ravensborg presented two proposed bill drafts to the committee: House Bill Draft 167 ([Document 5](#)) and House Bill Draft 168 ([Document 6](#)).

### **Public Testimony on Possible Recommendations**

**Mr. Justin Bell** and **Mr. Doug Abraham, South Dakota Criminal Defense Lawyers Association**, said a proposal had been submitted to the Legislative Research Council that would decrease levels of possession of trace amounts of a controlled substance and ingestion charges to misdemeanors and require an evaluation, similar to DUIs. South Dakota is the only state that charges ingestion as a felony. Mr. Bell said

their organization is in favor of street level diversion programs, believing treatment is the key to managing the drug addiction issues in the state. Mr. Abraham added that if drug evaluations were increased, a graduated system similar to that used for DUIs would be needed. A copy of their recommendations was provided to committee members ([Document 7](#)).

**Mr. Paul Bachand, Executive Director, South Dakota State's Attorneys Association**, said the question to answer is how to change drug users' behavior. The treatment component is missing and pilot programs at the county and/or local level could help to provide it. Some of the programming aspects used in federal court could be adapted at the state level. Staffing issues should also be addressed.

Mr. Vargo presented information on Pennington County's Drug Diversion Program ([Document 8](#)). He said 30 days is not a long enough term of treatment to be effective for the drug user and while the legal mechanisms are in place to reward people who succeed and complete the treatment, what the system does not provide them is what they need to succeed. Mr. Vargo said counties are tapped for funding and resources.

Senator Kennedy asked how many diversions occur annually. Mr. Vargo said about 300 to 400 a year for the youth program, which has been in operation for three years. The drug diversion program, which just began, has 12.

Ms. Riepel asked what happens if the person relapses. Mr. Vargo said similar to how Drug Court operates, relapses do not result in an automatic dismissal from the program. Ms. Riepel inquired if the same model could be used if the charges were misdemeanors instead of felonies. Mr. Vargo said yes, in theory, but as diversion is an intrusive process, a misdemeanor offender is unlikely to sign up for it.

Mr. Thom asked if there is a need for new diversion programs, if a funding mechanism was available. Mr. Vargo said yes. Other counties have utilized Pennington County's youth diversion program.

Concerning House Bill Drafts 167 and 168, Mr. Vargo supported the debriefing clause and proposed mirroring federal language regarding aggravated drug dealing laws.

#### **Further Committee Discussion of Possible Recommendations**

Mr. Ravensborg noted House Bill Drafts 167 and 168 do not represent the only changes the Attorney General's Office would like to make. He is also open to treatment options and stair-step repeal of presumptive probation. Senator Kennedy said he did not think the Attorney General's bills fall under the scope of the committee. Mr. Ravensborg responded he was told by Senator Partridge that they would have wide discretion in how to improve the system.

Representative Haugaard said the bills run parallel to the concerns of the committee but they do not have to be brought forward as committee ideas. It is appropriate to discuss all options but discussion does not constitute support or opposition.

Senator Kennedy asked why South Dakota feels it is necessary to stand out alone from all other states in making use of a controlled substance a felony. The current system tells drug addicts to get treatment but does not support them in getting it.

Mr. Leidholt, in response to a question from Representative Haugaard, said the daily cost for an inmate at the highest level is \$80, with annual costs for one inmate averaging \$15,000 to \$20,000. Removing an inmate from prison does not represent an even across-the-board savings of that amount; some costs will remain whether the inmate is there or not.

Senator Stalzer and Representative Duba reminded the committee that the drug user is not the only one impacted by their addiction. Drug use also affects the person's friends and family, as well as victims of crimes committed by drug users. Representative Hammock said it is also important to consider the safety of law enforcement personnel who deal with drug-related offenders. Mr. McGowan noted that judges and the court system should be given the latitude to go outside of the county jail for punishment.

### **Staff Directives and Next Steps**

Representative Haugaard requested DSS provide data on whether Native Americans are being provided treatment services and the Department of Corrections clarify whether those imprisoned for ingestion charges were incarcerated due to multiple failures.

Senator Kennedy said incentive programs created by statute for juvenile diversion should be reviewed as a pilot program for other counties for adults.

Mr. Ravnsborg supported making Drug Court and evaluations available to rural counties through Interactive Television (ITV). Senator Kennedy said it should be remembered that some individuals lack the resources to pay for things like electronic monitoring, testing, and video chats.

Representative Haugaard asked if the committee agreed that an evaluation for treatment should be required at the incidence of a person's first arrest. They agreed. It was also proposed that drug treatment needs to be more expansive, with more supervision, and preferably located in the offender's community.

Mr. Leidholt requested an Inventory versus Needs list that indicates how many treatment beds are currently available, what are the needs for those services, and what areas of the state are currently unable to meet those needs. Representative Duba requested an estimate on the number of staff that will be needed if the number of beds are increased.

The next meeting of the Offenses Regarding Controlled Substances Interim Study Committee will be Friday, November 1, 2019, at 10:00 a.m. in Room 414 of the State Capitol.

### **Adjournment**

***Mr. Ravensborg moved, seconded by Senator Partridge, that the meeting be adjourned. Motion prevailed on a unanimous voice vote.***

Chair Haugaard adjourned the meeting at 3:19 p.m.