

STATE OF NEW YORK

2881

2021-2022 Regular Sessions

IN SENATE

January 26, 2021

Introduced by Sens. RAMOS, SEPULVEDA -- read twice and ordered printed,
and when printed to be committed to the Committee on Alcoholism and
Substance Abuse

AN ACT to amend the criminal procedure law, in relation to judicial
diversion programs; and to repeal certain provisions of such law
relating thereto

The People of the State of New York, represented in Senate and Assem-
bly, do enact as follows:

1 Section 1. The article heading of article 216 of the criminal proce-
2 dure law, as added by section 4 of part AAA of chapter 56 of the laws of
3 2009, is amended to read as follows:

4 JUDICIAL DIVERSION [~~PROGRAM FOR CERTAIN FELONY OFFENDERS~~]
5 PROGRAMS

6 § 2. The opening paragraph of subdivision 1 of section 216.00 of the
7 criminal procedure law, as amended by chapter 90 of the laws of 2014, is
8 amended to read as follows:

9 "Eligible defendant" means any person who stands charged in an indict-
10 ment [~~or a~~], superior court information [~~with a class B, C, D or E felo-~~
11 ~~ny offense defined in article one hundred seventy nine, two hundred~~
12 ~~twenty or two hundred twenty one of the penal law or any other specified~~
13 ~~offense as defined in subdivision four of section 410.91 of this chap-~~
14 ~~ter, provided, however, a defendant is not an "eligible defendant" if he~~
15 ~~or she~~], misdemeanor complaint or felony complaint with any offense and
16 has a functional impairment.

17 § 3. The opening paragraph of subdivision 1 of section 216.00 of the
18 criminal procedure law, as added by section 4 of part AAA of chapter 56
19 of the laws of 2009, is amended to read as follows:

20 "Eligible defendant" means any person who stands charged in an indict-
21 ment [~~or a~~], superior court information [~~with a class B, C, D or E felo-~~
22 ~~ny offense defined in article two hundred twenty or two hundred twenty-~~
23 ~~one of the penal law or any other specified offense as defined in~~

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD06635-01-1

~~subdivision four of section 410.01 of this chapter, provided, however, a defendant is not an "eligible defendant" if he or she:], misdemeanor complaint or felony complaint with any offense and has a functional impairment.~~

§ 4. Paragraphs (a) and (b) and the closing paragraph of subdivision 1 of section 216.00 of the criminal procedure law are REPEALED.

§ 5. Subdivision 2 of section 216.00 of the criminal procedure law, as added by section 4 of part AAA of chapter 56 of the laws of 2009, is amended to read as follows:

2. ~~["Alcohol and substance abuse"]~~ "Functional impairment" means a condition determined by a licensed health care professional to impair the defendant's functioning. A functional impairment may include, but is not limited to, substance abuse or alcohol dependence, mental illness, developmental disability, intellectual disability, traumatic brain injury or other neurological disease, personality disorder, cognitive dysfunction, dementia or emotional disturbance. The court shall defer to licensed health care professionals and the broader medical community consensus in determining what a functional impairment is in recognition that such standards may change quickly within the medical field based on new research. A person may have more than one functional impairment.

3. "Clinical evaluation" means a written assessment and report by a court-approved entity or licensed health care professional experienced in the treatment of [alcohol and substance abuse, or] functional impairments as defined in subdivision two of this section or an evaluation conducted by an addiction and substance abuse counselor credentialed by the office of [alcoholism and substance abuse services] addiction services and supports pursuant to section 19.07 of the mental hygiene law, which shall include:

(a) an evaluation as to whether the defendant currently has a ~~[history of alcohol or substance abuse or alcohol or substance dependence]~~ functional impairment including but not limited to a mental disorder, as ~~[such terms are]~~ defined in the diagnostic and statistical manual of mental disorders, ~~[fourth]~~ fifth edition, and a co-occurring ~~[mental disorder or mental illness and the relationship between such abuse or dependence and mental disorder or mental illness]~~ functional impairment, if any;

(b) a recommendation as to whether the defendant's ~~[alcohol or substance abuse or dependence]~~ functional impairments, if any, could be effectively addressed by judicial diversion in accordance with this article;

(c) a recommendation as to the treatment modality, level of care and length of any proposed treatment to effectively address the defendant's ~~[alcohol or substance abuse or dependence and any co-occurring mental disorder or illness]~~ functional impairments; and

(d) any other information, factor, circumstance, or recommendation deemed relevant by the assessing entity or specifically requested by the court.

§ 6. Section 216.05 of the criminal procedure law, as added by section 4 of part AAA of chapter 56 of the laws of 2009, subdivision 5 as amended by chapter 67 of the laws of 2016, subdivision 8 as amended by chapter 315 of the laws of 2016 and paragraph (a) of subdivision 9 as amended by section 21 of part JJJ of chapter 59 of the laws of 2019, is amended to read as follows:

§ 216.05 Judicial diversion program; court procedures.

1. At any time after the arraignment of an eligible defendant, but prior to the entry of a plea of guilty or the commencement of trial, the

1 court at the request of the eligible defendant, ~~[may]~~ shall order ~~[an~~
2 ~~alcohol and substance abuse]~~ a clinical evaluation. An eligible defend-
3 ant may decline to participate in such an evaluation at any time. The
4 defendant shall provide a written authorization, in compliance with the
5 requirements of any applicable state or federal laws, rules or regu-
6 lations authorizing disclosure of the results of the assessment to the
7 defendant's attorney, the prosecutor, the local probation department,
8 the court, authorized court personnel and other individuals specified in
9 such authorization for the sole purpose of determining whether the
10 defendant should be offered judicial diversion for treatment for
11 ~~[substance abuse or dependence, alcohol abuse or dependence and any~~
12 ~~co-occurring mental disorder or mental illness]~~ functional impairment or
13 mental disorder.

14 2. Upon receipt of the completed ~~[alcohol and substance abuse]~~ clin-
15 ical evaluation report, the court shall provide a copy of the report to
16 the eligible defendant and the ~~[prosecutor]~~ defendant's counsel. Any
17 finding in the report or assessment that the defendant has a mental
18 disorder as defined in the diagnostic and statistical manual of mental
19 disorders, fifth edition, or a clinical diagnosis of another serious
20 functional impairment shall be viewed as presumptive evidence that the
21 case should be diverted and the defendant should receive treatment.

22 3. (a) Upon receipt of the evaluation report ~~[either party]~~ the
23 defendant may request a hearing on the issue of whether the eligible
24 defendant should be offered ~~[alcohol or substance abuse]~~ treatment
25 pursuant to this article. At such time, the defendant shall turn over a
26 complete copy of the evaluation report to the prosecutor and the court.
27 At such a proceeding, which shall be held as soon as practicable so as
28 to facilitate early intervention in the event that the defendant is
29 found to need ~~[alcohol or substance abuse]~~ treatment, the court may
30 consider oral and written arguments, may take testimony from witnesses
31 offered by either party, and may consider any relevant evidence includ-
32 ing, but not limited to, evidence that:

33 (i) the defendant had within the preceding ten years (excluding any
34 time during which the offender was incarcerated for any reason between
35 the time of the acts that led to the youthful offender adjudication and
36 the time of commission of the present offense) been adjudicated a youth-
37 ful offender for: (A) a violent felony offense as defined in section
38 70.02 of the penal law; or (B) any offense for which a merit time allow-
39 ance is not available pursuant to subparagraph (ii) of paragraph (d) of
40 subdivision one of section eight hundred three of the correction law;
41 and

42 (ii) in the case of a felony offense defined in subdivision four of
43 section 410.91 of this chapter, any statement of or submitted by the
44 victim, as defined in paragraph (a) of subdivision two of section 380.50
45 of this chapter; and

46 (iii) the defendant has a functional impairment; and
47 (iv) the defendant's functional impairment contributed to their crimi-
48 nal legal system involvement.

49 (b) Upon completion of such a proceeding, the court shall consider and
50 make findings of fact with respect to whether:

51 (i) the defendant is an eligible defendant as defined in subdivision
52 one of section 216.00 of this article;

53 (ii) the defendant has a ~~[history of alcohol or substance abuse or~~
54 ~~dependence]~~ functional impairment as defined in subdivision two of
55 section 216.00 of this article;

(iii) such [~~alcohol or substance abuse or dependence~~] functional impairment is or may be a contributing factor to the defendant's [~~criminal behavior~~] involvement in the criminal legal system;

(iv) the defendant's participation in judicial diversion could effectively address such [~~abuse or dependence~~] functional impairment; and

(v) institutional confinement [~~of~~] or outpatient treatment for the defendant [~~is or may not be necessary for the protection of the public~~] would benefit the public or the defendant.

4. (a) When an authorized court determines, pursuant to paragraph (b) of subdivision three of this section, that an eligible defendant should be offered [~~alcohol or substance abuse~~] treatment, or when the parties and the court agree to an eligible defendant's participation in [~~alcohol or substance abuse~~] treatment, an eligible defendant [~~may~~] shall be allowed to participate in the judicial diversion program offered by this article. [~~Prior to the court's issuing an order granting judicial diversion, the eligible defendant shall be required to enter a plea of guilty to the charge or charges; provided, however, that no such guilty plea shall be required when:~~

~~(a) the people and the court consent to the entry of such an order without a plea of guilty; or~~

~~(b) based on a finding of exceptional circumstances, the court determines that a plea of guilty shall not be required. For purposes of this subdivision, exceptional circumstances exist when, regardless of the ultimate disposition of the case, the entry of a plea of guilty is likely to result in severe collateral consequences.]~~

(b) There shall be a presumption in favor of allowing eligible defendants to participate in the judicial diversion program without a prior plea of guilt. This presumption recognizes the presumption of innocence in all cases before the prosecutor obtains a conviction. This presumption also protects defendants from the severe collateral consequences associated with a criminal conviction, particularly consequences relating to immigration status, licensing for employment, and housing. Under no circumstances shall the prosecutor serve as a gatekeeper to diversion.

(c) In the rare circumstance that a court determines that a plea of guilty prior to treatment is necessary, such as when the defendant has previously failed to complete judicial diversion under this article on more than two occasions, the defendant shall not be required to waive their trial rights or submit an affidavit conceding their guilt. Under no circumstance shall a court require a plea of guilty prior to disclosure of the discovery material in the case pursuant to section 245.25 of this chapter.

5. The defendant shall agree on the record or in writing to abide by the release conditions set by the court, which, shall include[+] participation in a specified period of [~~alcohol or substance abuse~~] treatment at a specified program or programs identified by the court[~~, which may include~~]. The court shall take into account the views of the health care professional who conducted the clinical evaluation and any health care professionals responsible for providing such treatment or monitoring the defendant's progress in such treatment. Additional release conditions may include:

(a) adhering to a doctor's prescribed medication,

(b) periods of detoxification,

(c) residential or outpatient treatment, or both, as determined after taking into account the views of the health care professional who conducted the mental health assessment or alcohol and substance abuse

1 evaluation and any health care professionals responsible for providing
2 such treatment or monitoring the defendant's progress in such treatment;
3 and may include:

4 ~~[(i)]~~ (d) periodic court appearances, which may include periodic
5 urinalysis;

6 ~~[(ii)]~~ (e) a requirement that the defendant refrain from engaging in
7 criminal behaviors;

8 ~~[(iii)]~~ (f) if the defendant needs treatment for opioid abuse or
9 dependence or has another condition requiring prescription medication,
10 that he or she may participate in and receive medically prescribed drug
11 treatments under the care of a health care professional licensed or
12 certified under title eight of the education law, acting within his or
13 her lawful scope of practice~~[, provided that no]~~. No court shall require
14 the use of any specified type or brand of drug during the course of
15 medically prescribed drug treatments.

16 6. Upon an eligible defendant's agreement to abide by the conditions
17 set by the court, the court shall issue a securing order providing for
18 bail or release on the defendant's own recognizance and conditioning any
19 release upon the agreed upon conditions pursuant to article five hundred
20 ten of this chapter. The period of alcohol or substance abuse treatment
21 shall begin as specified by the court and as soon as practicable after
22 the defendant's release, taking into account the availability of treat-
23 ment, so as to facilitate early intervention with respect to the defend-
24 ant's abuse or condition and the effectiveness of the treatment program.
25 In the event that a treatment program is not immediately available or
26 becomes unavailable during the course of the defendant's participation
27 in the judicial diversion program, the court may release the defendant
28 pursuant to the securing order.

29 7. When participating in judicial diversion treatment pursuant to this
30 article, any resident of this state who is covered under a private
31 health insurance policy or contract issued for delivery in this state
32 pursuant to article thirty-two, forty-three or forty-seven of the insur-
33 ance law or article forty-four of the public health law, or who is
34 covered by a self-funded plan which provides coverage for the diagnosis
35 and treatment of mental illness, chemical abuse and chemical dependence,
36 or any other functional impairment however defined in such policy; shall
37 first seek reimbursement for such treatment in accordance with the
38 provisions of such policy or contract. The court in its discretion may
39 order the defendant to obtain public insurance such as Medicaid or Medi-
40 care if they so qualify. However, the defendant shall not be required to
41 pay for any part of the cost of treatment required by the court that is
42 not covered by private or public health insurance.

43 8. During the period of a defendant's participation in the judicial
44 diversion program, the court shall retain jurisdiction of the defendant,
45 provided, however, that the court may allow such defendant to (i) reside
46 in another jurisdiction, or (ii) participate in mental health and/or
47 alcohol and substance abuse treatment and other programs in the juris-
48 diction where the defendant resides or in any other jurisdiction, while
49 participating in a judicial diversion program under conditions set by
50 the court and agreed to by the defendant pursuant to subdivisions five
51 and six of this section. The court may require the defendant to appear
52 in court at any time to enable the court to monitor the defendant's
53 progress in alcohol or substance abuse treatment. The court shall
54 provide notice, reasonable under the circumstances, to the people, the
55 treatment provider, the defendant and the defendant's counsel whenever
56 it orders or otherwise requires the appearance of the defendant in

1 court. Failure to appear as required without reasonable cause therefor
2 shall constitute a violation of the conditions of the court's agreement
3 with the defendant.

4 9. (a) If at any time during the defendant's participation in the
5 judicial diversion program, the court has reasonable grounds to believe
6 that the defendant has violated a release condition in an important
7 respect or has willfully failed to appear before the court as requested,
8 the court except as provided in subdivision two of section 510.50 of
9 this chapter regarding a failure to appear, shall [~~direct the defendant~~
10 ~~to appear or issue a bench warrant to a police officer or an appropriate~~
11 ~~peace officer directing him or her to take the defendant into custody~~
12 ~~and bring the defendant before the court without unnecessary delay]~~
13 order a hearing to determine whether it is appropriate to issue a bench
14 warrant; provided, however, that under no circumstances shall a defend-
15 ant who requires treatment for mental health issues and/or opioid abuse
16 or dependence be deemed to have violated a release condition on the
17 basis of his or her participation in medically prescribed drug treat-
18 ments under the care of a health care professional licensed or certified
19 under title eight of the education law, acting within his or her lawful
20 scope of practice. The relevant provisions of section 530.60 of this
21 chapter relating to issuance of securing orders shall apply to such
22 proceedings under this subdivision.

23 (b) In determining whether a defendant violated a condition of his or
24 her release under the judicial diversion program, the court [~~may~~] shall
25 conduct a summary hearing consistent with due process and sufficient to
26 satisfy the court that the defendant has, in fact, violated the condi-
27 tion.

28 (c) If the court determines that the defendant has violated a condi-
29 tion of his or her release under the judicial diversion program, the
30 court may modify the conditions thereof, reconsider the order of recog-
31 nizance or bail pursuant to subdivision two of section 510.30 of this
32 chapter, or terminate the defendant's participation in the judicial
33 diversion program; and when applicable proceed with the defendant's
34 sentencing in accordance with the agreement. Notwithstanding any
35 provision of law to the contrary, the court may impose any sentence
36 authorized for the crime of conviction in accordance with the plea
37 agreement, or any lesser sentence authorized to be imposed [~~on a felony~~
38 ~~drug offender pursuant to paragraph (b) or (c) of subdivision two of~~
39 ~~section 70.70 of the penal law taking]~~. The court shall take into
40 account the length of time the defendant spent in residential treatment
41 and how best to continue treatment while the defendant is serving that
42 sentence. In determining what action to take for a violation of a
43 release condition, the court shall consider all relevant circumstances,
44 including the views of the prosecutor, the defense and the mental health
45 and/or alcohol or substance abuse treatment provider, and the extent to
46 which persons who ultimately successfully complete a drug treatment
47 regimen sometimes relapse by not abstaining from alcohol or substance
48 abuse or by failing to comply fully with all requirements imposed by a
49 treatment program. The court shall also consider using a system of grad-
50 uated and appropriate responses or sanctions designed to address such
51 inappropriate behaviors, protect public safety and facilitate, where
52 possible, successful completion of the mental health and/or alcohol or
53 substance abuse treatment program.

54 (d) Nothing in this subdivision shall be construed as preventing a
55 court from terminating a defendant's participation in the judicial
56 diversion program for violating a release condition when such a termi-

1 nation is necessary to preserve public safety. Nor shall anything in
2 this subdivision be construed as precluding the prosecution of a defend-
3 ant for the commission of a different offense while participating in the
4 judicial diversion program. Prior to such termination, the defendant
5 shall be entitled to a hearing at which clear and convincing evidence
6 shall be offered to support that there exists a substantial risk to an
7 identifiable person. In the absence of such a hearing and such a find-
8 ing, there can be no termination.

9 (e) A defendant may at any time advise the court that he or she wishes
10 to terminate participation in the judicial diversion program, at which
11 time the court shall proceed with the case and, where applicable, shall
12 impose sentence in accordance with the plea agreement. Notwithstanding
13 any provision of law to the contrary, the court may impose any sentence
14 authorized for the crime of conviction in accordance with the plea
15 agreement, or any lesser sentence authorized to be imposed on a felony
16 drug offender pursuant to paragraph (b) or (c) of subdivision two of
17 section 70.70 of the penal law taking into account the length of time
18 the defendant spent in residential treatment and how best to continue
19 treatment while the defendant is serving that sentence.

20 10. Upon the court's determination that the defendant has successfully
21 completed the required period of alcohol or substance abuse treatment
22 and has otherwise satisfied the conditions required for successful
23 completion of the judicial diversion program, the court shall comply
24 with the terms and conditions it set for final disposition when it
25 accepted the defendant's agreement to participate in the judicial diver-
26 sion program. Such disposition may include, but is not limited to:

27 (a) requiring the defendant to undergo a period of interim probation
28 supervision and, upon the defendant's successful completion of the
29 interim probation supervision term, notwithstanding the provision of any
30 other law, permitting the defendant to withdraw his or her guilty plea
31 and dismissing the indictment or information; or

32 (b) requiring the defendant to undergo a period of interim probation
33 supervision and, upon successful completion of the interim probation
34 supervision term, notwithstanding the provision of any other law,
35 permitting the defendant to withdraw his or her guilty plea, enter a
36 guilty plea to a misdemeanor or violation offense if the original charge
37 was a felony, or enter a guilty plea to a violation if the original
38 charge was a misdemeanor, and sentencing the defendant as promised in
39 the plea agreement, which may include a period of probation supervision
40 pursuant to section 65.00 of the penal law; or

41 (c) allowing the defendant to withdraw his or her guilty plea and
42 dismissing the indictment or information; or

43 (d) sentencing the defendant to less than the statutory minimum
44 required by article seventy of the penal law where the judge finds that
45 the defendant took steps to substantially comply with the treatment and
46 such a reduced sentence is in the interests of justice.

47 11. Nothing in this article shall be construed as restricting or
48 prohibiting courts or district attorneys from using other lawful proce-
49 dures or models for placing appropriate persons into [~~alcohol or~~
50 ~~substance abuse~~] treatment.

51 12. No agreement entered into pursuant to this article shall contain a
52 provision waiving defendant's right to sealing pursuant to section
53 160.50 of this chapter.

54 § 7. The criminal procedure law is amended by adding a new section
55 216.10 to read as follows:

56 § 216.10 Diversion part established.

1 1. The chief administrator of the courts is hereby directed to estab-
2 lish, in each county of the state, a part of the court to be known as
3 the diversion part for the county in which such court presides. To aid
4 in their work, such judges shall receive annual training in specialized
5 areas, including, but not limited to mental health and substance abuse
6 needs, including co-occurring disorders, evidence based-practices, and
7 trauma-informed care, as well as training in procedural justice and
8 cultural competency. The chief administrator of the courts shall ensure
9 that all employees who staff the diversion parts receive specialized
10 training in procedural justice and working with people with complex
11 needs.

12 2. Each chief administrator of the courts shall at the end of each
13 year prepare and file an annual report, which the office shall compile,
14 publish on its website and make available upon request to members of the
15 public. Such reports shall not include any personal identifying informa-
16 tion for any individual defendants. Each such report, in addition to
17 other relevant information, shall set forth, disaggregated by each coun-
18 ty served:

19 (a) the number of defendants with cases in the diversion part;
20 (b) the length of time, in months, each case remained in the diversion
21 part prior to acquittal, dismissal, release on recognizance, revocation
22 of release on conditions, and sentencing;
23 (c) the race, ethnicity, age and sex of each defendant in the diver-
24 sion part;
25 (d) the crimes with which each defendant was charged;
26 (e) whether the treatment obtained was for substance use, mental
27 health, co-occurring or other;
28 (f) the court disposition in each supervised case, including sentenc-
29 ing information;
30 (g) the costs saved to the county by avoiding pre-trial or post-con-
31 viction detention in a county jail or state prison; and
32 (h) a list of service providers, including contact information, that
33 the diversion part in the superior court of the county partners with to
34 serve defendants.

35 § 8. This act shall take effect immediately; provided, however that
36 the amendments to the opening paragraph of subdivision 1 of section
37 216.00 of the criminal procedure law made by section two of this act
38 shall be subject to the expiration and reversion of such paragraph
39 pursuant to section 12 of chapter 90 of the laws of 2014, as amended,
40 when upon such date the provisions of section three of this act shall
41 take effect.