

HARM REDUCTION AND OVERDOSE PREVENTION Fact Sheet

Legality of Drug Checking Equipment in Illinois


Background

Overdose claimed the lives of nearly 108,000 people in the United States in 2021.¹ Nearly two-thirds of these deaths involved a synthetic opioid, most commonly fentanyl or other fentanyl analogs.² Because fentanyl is more potent than many other opioids, fentanyl adulteration creates a heightened risk for overdose among people who use illicitly obtained opioids.³ Fentanyl has also been associated with increased overdose rates among people who use stimulants such as cocaine and methamphetamine, suggesting that it may have infiltrated the illicit stimulant supply in many places as well.⁴

Because no safe supply of many drugs is readily available, helping people who use drugs determine what is in those drugs can reduce overdose morbidity and mortality.⁵ Particularly in areas in which fentanyl infiltration is relatively low, the easiest way to accomplish this is through use of fentanyl test strips (FTS). FTS are small, disposable, relatively inexpensive devices that identify the presence of fentanyl in a sample of drugs. Several studies, including some with young adults, have shown that use of FTS is associated with reductions in risky drug use such as using a smaller amount of drugs or using more slowly.⁶ Based in part on these promising initial results, governmental and non-governmental organizations in many states now provide FTS as part of a broader harm reduction strategy, and the Centers for Disease Control and Prevention and the Substance Abuse and Mental Health Services Administration permit federal funding to be used to purchase them.⁷

There are many reasons a young person may wish to obtain FTS. Substance use disorders often develop in adolescence, and around 10% of overdoses nationally occur in youth and young adults below 26 years old.⁸ In 2020, 215 overdose deaths in Illinois occurred in individuals under age 25.⁹ Additionally, minors may be offered, or seek out, pills that appear to be a commercial medication but are actually counterfeit. It is likely that, among people who do not generally use drugs (such as a student considering taking a pill they believe to be a stimulant that will help with studying), a positive result on a FTS might serve as inducement to forgo using that drug altogether.¹⁰

To test for adulterants other than fentanyl and determine the concentration of adulterants in a sample, some organizations now utilize more advanced equipment that provides a detailed analysis of the substances present in a drug sample.¹¹ This equipment has the advantage of providing more extensive information than



FTS, but is much more expensive and often requires a trained operator.¹² This fact sheet refers to these technologies collectively as drug checking equipment (DCE).

As described in more detail below, it is not illegal to give away drug checking equipment in Illinois. We also think it is unlikely that the possession of such equipment is illegal. Finally, we believe that the distribution of fentanyl test strips to minors is likely permissible even without the consent of the minor's parent or guardian.

Summary of Illinois law related to drug checking equipment

Because most state paraphernalia laws are based on a model act created in the late 1970s by the Drug Enforcement Administration, most classify nearly every object used in conjunction with illicit drugs—including those used for “testing” or “analyzing” those drugs—as drug paraphernalia and prohibit the possession and distribution of those objects.¹³ While these laws are rarely enforced in the context of DCE, they can cause confusion and may discourage some agencies and organizations – particularly those that mostly serve students and other minors - from distributing FTS and other DCE.


Many states have recently modified their laws to permit the possession and distribution of FTS and other DCE, including at least six in the past year.¹⁴ Illinois, however, has not yet done so. Under current Illinois law, drug paraphernalia includes “all equipment, products and materials of any kind, other than [certain methamphetamine manufacturing materials and cannabis paraphernalia], which are intended to be used unlawfully in... testing, analyzing... a controlled substance in violation of [Illinois drug laws].”¹⁵

Although FTS and other testing equipment likely fall under the definition of “drug paraphernalia,” it is not illegal to distribute drug paraphernalia in Illinois, so long as such distribution is done without charge. While the state does criminalize the sale of drug paraphernalia or its delivery “for commercial consideration,” giving it away is not prohibited.¹⁶

It *is* a misdemeanor for a person to knowingly possess drug paraphernalia “with the intent to use it in ingesting, inhaling, or otherwise introducing a controlled substance into the human body, or in preparing a controlled substance for that use.”¹⁷ However, it is unlikely that the possession of FTS and other DCE is illegal under this statute, as DCE is not intended to be used for ingesting, inhaling, or otherwise introducing a controlled substance into the body. It also seems unlikely that it would be found to be used for “preparing” a controlled substance, although there are no relevant cases on the topic.

The 2018 case *People v. Fiumetto* is instructive.¹⁸ In that case, an individual was charged with possession of drug paraphernalia in the form of an ordinary spoon.¹⁹ The appellate court found that the spoon was not “drug paraphernalia” under Illinois law, for several reasons.²⁰ First, the court, deferring to the statute, held that in determining whether an item is drug paraphernalia, it must consider “the general, usual, customary, and historical use of the item.”²¹ Further, the paraphernalia statute is intended to apply only to items that are “clearly and beyond a reasonable doubt intended for the illegal and unlawful use of controlled substances.”²² Just as an ordinary spoon is not “intended” to be used to inject or prepare a controlled substance, FTS are not intended for these purposes. Rather, they are produced and marketed to determine whether fentanyl is present in urine. Under the decision in *Fiumetto*, the intent of the person actually using the item is immaterial.

Additionally, Illinois law provides an exception to the paraphernalia law for any programs created pursuant to the state Overdose Prevention and Harm Reduction Act. Under this exception, no volunteer, staff member, or participant in any approved program may be charged or prosecuted for possession of “testing supplies such as reagents, test strips, or quantification instruments obtained from or returned, directly or indirectly, to a program



established” pursuant to the Act.²³ Such programs are required to provide “[n]eedles, hypodermic syringes, and other safer drug consumption supplies,” among other items and information, although there is no requirement that any individual participant receive those items in addition to testing supplies.²⁴

A pending bill, HB 4556, would expand that protection to drug checking supplies obtained from pharmacies, hospitals, clinics, and other health care facilities and medical offices.²⁵ Under this bill, which was transmitted to the Governor for action on April 20, 2022, a pharmacist, physician, advanced practice registered nurse, physician assistant, or the designee of any of those professionals, may dispense drug checking equipment to “any person.”

The supplies dispensed under this proposed law must be stored at a pharmacy, hospital, clinic or health care facility or at the “medical office” of one of the above-mentioned professionals. These terms are not defined, and it is possible that this bill would permit the distribution of FTS by school nurses and other officials, so long as they are a designee of a physician or other health professional and the FTS are stored in the school’s health clinic.²⁶ The governor has sixty days from April 20, 2022 to take action on the bill.


Distribution of drug checking equipment to minors

Under Illinois law, a minor is a person who has not attained the age of 18 years.²⁷ Generally, minors cannot consent to medical treatment.²⁸ There are, however, numerous exceptions to this general rule. For example, a minor who is married, pregnant, or a parent is considered to have the same legal capacity to act as a person of legal age and may consent to their own medical treatment.²⁹ Additionally, individuals 14 to 17 years old who are “living separate and apart” from their parents or legal guardian, or who are “unable or unwilling to return to the residence of a parent, and managing his or her own personal affairs” may consent to primary care services in some circumstances.³⁰

In addition, any minor 12 years or older who “may be determined to be an intoxicated person or a person with a substance use disorder... or who may have a family member who abuses drugs or alcohol” may consent to “health care services or counseling related to the prevention, diagnosis, or treatment of... drug use or alcohol consumption by the minor or the effects on the minor of drug or alcohol abuse by a member of the minor’s family.”³¹

While many minors seeking FTS may fall under one or more of these exceptions, the specific contours of laws regarding minor consent are likely immaterial to the distribution of FTS, as such distribution is likely not the type of action for which medical informed consent is required. Fentanyl test strips do not require a prescription, and the recipient does not undergo any sort of treatment. As minor medical consent laws are designed to ensure that an individual is aware of the risks and benefits of medical treatment, it is unlikely that the distribution of FTS would trigger consent requirements.³² Indeed, fentanyl test strips appear to be legally akin to pregnancy tests and diabetes test strips, which can be legally purchased over the counter by individuals of any age.

In the school setting, the provision of FTS is similar to the distribution of condoms. While there are no Illinois cases on the question of whether condom distribution constitutes medical treatment requiring parental consent, a federal circuit court found that condom distribution in Philadelphia high schools did not.³³ The court there reasoned that condom distribution cannot be considered medical treatment because “[c]ondoms ... are prophylactic ... non-invasive, are not used to diagnose or cure disease, and do not require medical training or supervision for their use.”³⁴ Thus, schools “no more need parents’ consent to dispense condoms to a student than a pharmacist would need that consent to sell the minor students condoms in a drug store.”³⁵ While this



decision is not binding on Illinois, the same reasoning would appear to apply to FTS, rendering parental consent requirements inapplicable to the distribution of FTS to minors.

Conclusion

It is not illegal for any person to distribute drug checking equipment for free in Illinois. Further, the distribution of drug checking equipment from a program approved pursuant to the Overdose Prevention and Harm Reduction Act is explicitly permitted, as is the receipt of DCE from such a program.³⁶ If HB 4556 becomes law, it will be clearly permissible for a pharmacy, hospital, clinic or health care facility to distribute drug checking equipment as well. Equipment from those locations would be permitted to be dispensed to “any person,” presumably including minors. We believe it is unlikely that the possession of DCE is illegal in the state, although there is no caselaw directly on point.

The distribution of fentanyl test strips to minors likely does not require parental consent. Even if the distribution of FTS was found to be the type of transaction that requires consent, many minors who seek them would likely fall under an exemption to Illinois’s Consent by Minors to Health Care Services Act that permits minors who have a substance use disorder or who have a family member who uses drugs to receive health care services related to drug use.³⁷

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¹ National Center for Health Statistics. Vital Statistics Rapid Release: Provisional Drug Overdose Death Counts. 2022; <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm>. Accessed May 12, 2022.

² *Id.*

³ Bryce Pardo et al., *The Future of Fentanyl and Other Synthetic Opioids*, RAND Corporation, (2019), https://www.rand.org/pubs/research_reports/RR3117.html/.

⁴ Brooke Hoots et al., *The rise in non-fatal and fatal overdoses involving stimulants with and without opioids in the United States*, 115 ADDICTION 946-958 (2020), <https://pubmed.ncbi.nlm.nih.gov/31912625/>; C. M. Jones, et al., *The Evolving Overdose Epidemic: Synthetic Opioids and Rising Stimulant-Related Harms*, 42 EPIDEMIOLOGICAL REVIEWS (2020).

⁵ Susan G. Sherman, et al., *Acceptability of implementing community-based drug checking services for people who use drugs in three United States cities: Baltimore, Boston and Providence*, 68 INT'L. J. DRUG POLICY 46-53 (2019).

⁶ Peiper NC, Clarke SD, Vincent LB, Ciccarone D, Kral AH, Zibbell JE. *Fentanyl test strips as an opioid overdose prevention strategy: Findings from a syringe services program in the Southeastern United States*. INT J DRUG POLICY. 2019;63:122-128; Goldman JE, Wayne KM, Periera KA, Krieger MS, Yedinak JL, Marshall BDL. *Perspectives on rapid fentanyl test strips as a harm reduction practice among young adults who use drugs: a qualitative study*. HARM REDUCT J. 2019;16(1):3.

⁷ Centers for Disease Control and Prevention & Substance Abuse and Mental Health Services Administration, *Federal Grantees May Now Use Funds to Purchase Fentanyl Test Strips* (2021), <https://www.cdc.gov/media/releases/2021/p0407-Fentanyl-Test-Strips.html>. See also Regina LaBelle, et al., *Unlocking Federal Funding for Fentanyl Test Strips Will Save Lives*, Stat News (May 4, 2021), <https://www.statnews.com/2021/05/04/fentanyl-test-strips-unlocking-federal-funding-save-lives/> ("Making it easier to access fentanyl test strips is another essential step to save lives, foster engagement, and build trust with underserved and at-risk populations.").

⁸ Nicholas Chadi & Scott E. Hadland, *Youth Access to Naloxone: The Next Frontier?*, 65 J. ADOLESCENT HEALTH 571, 571 (2019).

⁹ Ngozi O. Ezike, *Statewide Semiannual Opioid Report* (2021), <https://dph.illinois.gov/content/dam/soi/en/web/idph/publications/idph/topics-and-services/opioids/idphdata/idph-semiannual-opioid-report-august-2021.pdf> (last visited Mar 3, 2022).

¹⁰ For example, two students died at Ohio State University in May 2022 after taking pills they believed to be Adderall. Sundaram, A. *Officials warn of fake Adderall pills after two college students die*. New York Times (May 7, 2022), <https://www.nytimes.com/2022/05/07/us/adderall-fentanyl-osu-deaths.html>.

¹¹ Green TC, Park JN, Gilbert M, et al. *An assessment of the limits of detection, sensitivity and specificity of three devices for public health-based drug checking of fentanyl in street-acquired samples*. INT J DRUG POLICY. 2020;77:102661.

¹² Wallace B, Hills R, Rothwell J, et al. *Implementing an integrated multi-technology platform for drug checking: Social, scientific, and technological considerations*. DRUG TEST ANAL. 2021;13(4):734-746.

¹³ Guinan M. *Constitutionality of Anti-Drug Paraphernalia Laws-The Smoke Clears*. NOTRE DAME LAW REVIEW. 1983;58(833); Veal G. *The Model Drug Paraphernalia Act - Can we outlaw head shops - and should we?* GEORGIA LAW REVIEW. 1981;16.

¹⁴ Davis CS, Lieberman AJ, O'Kelley-Bangsberg M. *Legality of drug checking equipment in the United States: A systematic legal analysis*. DRUG ALCOHOL DEPEND. 2022;234:109425.

¹⁵ 720 Ill. Comp. Stat. 600/2(d).

¹⁶ See 720 Ill. Comp. Stat. 600/3(a) (prohibiting several activities related to the sale and offering for sale of drug paraphernalia).

¹⁷ 720 Ill. Comp. Stat. 600/3.5(a).

¹⁸ *People v. Fiumetto*, 2018 IL App (2d) 170230, 109 N.E.3d 756 (Ill. App. Ct. 2d Dist. 2018).

¹⁹ *Id.* at 758.

²⁰ *Id.* at 762–763.

²¹ *Id.* at 762.

²² *Id.* (quoting 720 Ill. Comp. Stat. 600/6).

²³ “Notwithstanding any provision of the Illinois Controlled Substances Act, the Drug Paraphernalia Control Act, or any other law, no employee or volunteer of or participant in a program established under this Act [Overdose Prevention and Harm Reduction Act] shall be charged with or prosecuted for possession of any of the following... [d]rug adulterant testing supplies such as reagents, test strips, or quantification instruments obtained from or returned, directly or indirectly, to a program established under this Act.” 410 Ill. Comp. Stat. 710/5(c)(3).

²⁴ 410 Ill. Comp. Stat. 710/5(b)(2).

²⁵ Ill. H.B. 4556,

<https://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=110&GA=102&DocTypeId=HB&DocNum=4556&GAID=16&LegID=&SpecSess=&Session=>

²⁶ See 105 Ill. Comp. Stat. Ann. 129/1 *et seq.*

²⁷ 755 Ill. Comp. Stat. Ann. 5/11-1.

²⁸ 410 Ill. Comp. Stat. Ann. 210/2. (“Any parent, including a parent who is a minor, *may* consent to the performance upon his or her child of a health care service by a physician licensed to practice medicine in all its branches, a chiropractic physician, a licensed optometrist, a licensed advanced practice registered nurse, or a licensed physician assistant or a dental procedure by a licensed dentist.” (emphasis added)). The statute spells out specific instances where minors may consent for themselves, but these exceptions are not exhaustive. For example, “if the evidence is clear and convincing that the minor is mature enough to appreciate the consequences of her actions, and that the minor is mature enough to exercise the judgment of an adult, then the mature minor doctrine affords her the common law right to consent to or refuse medical treatment.” *In re E.G.*, 549 N.E.2d 322; 327–28. (Ill. 1989) (holding that minor whom court has determined to possess requisite degree of maturity has limited right to refuse life-sustaining medical treatment). “[T]he legislature did not intend that there be an absolute 18–year–old age barrier prohibiting minors from consenting to medical treatment.” *In re E.G.*, 549 N.E.2d 322, 325–26 (Ill. 1989).

²⁹ 410 Ill. Comp. Stat. Ann. 210/1.

³⁰ Certain conditions must be met for this exception to apply: (1) the health care professional must reasonably believe that the minor seeking care understands the benefits and risks of any proposed primary care or services; and (2) the minor seeking care must be identified in writing as a “minor seeking care” as defined in 410 Ill. Comp. Stat. Ann. 210/1.5(e) by an adult relative, a representative of a homeless service agency, an Illinois licensed attorney, a public school homeless liaison or school social worker, a social service agency, or a representative of a religious organization. 410 Ill. Comp. Stat. Ann. 210/1.5. “Primary care services” are defined as “health care services that include screening, counseling, immunizations, medication, and treatment of illness and conditions customarily provided by licensed health care professionals in an out-patient setting, eye care services, excluding advanced optometric procedures, provided by optometrists, and services provided by chiropractic physicians according to the scope of practice of chiropractic physicians under the Medical Practice Act of 1987.” 410 Ill. Comp. Stat. Ann. 210/1.5(e).

³¹ 410 Ill. Comp. Stat. Ann. 210/4. Similar provisions apply to minors 12 years or older who may have come into contact with any sexually transmitted disease. *Id.* Additionally, for any minor who is a victim of certain sex crimes, parent or legal guardian consent is not required to “authorize a hospital, physician, chiropractic physician, optometrist, advanced practice registered nurse, physician assistant, or other medical personnel to furnish health care services or counseling related to the diagnosis or treatment of any disease or injury arising from such offense.” 410 Ill. Comp. Stat. Ann. 210/3(b).

³² “[t]he gravamen in an informed consent case requires the plaintiff to ‘point to significant undisclosed information relating to the treatment which would have altered her decision to undergo it.’” *Davis v. Kraff*, 937 N.E.2d 306, 315 (Ill. App. Ct. 2010) (quoting *Coryell v. Smith*, 653 N.E.2d 1317, 1319 (Ill. App. Ct. 1995)).

³³ *Parents United for Better Schools, Inc. v. School District of Philadelphia Board of Education*, 148 F.3d 260 (3d Cir. 1998).

³⁴ *Id.* at 268 (quoting *Parents United for Better Schools, Inc. v. School District of Philadelphia Board of Education*, 978 F. Supp. 197, 207 (E.D. Pa. 1997), *aff’d*, 148 F.3d 260 (3d Cir. 1998)).

³⁵ *Id.*

³⁶ “Notwithstanding any provision of the Illinois Controlled Substances Act, the Drug Paraphernalia Control Act, or any other law, no employee or volunteer of or participant in a program established under this Act [Overdose Prevention and



Harm Reduction Act] shall be charged with or prosecuted for possession of any of the following... [d]rug adulterant testing supplies such as reagents, test strips, or quantification instruments obtained from or returned, directly or indirectly, to a program established under this Act.” 410 Ill. Comp. Stat. 710/5(c)(3).

³⁷ See 410 Ill. Comp. Stat. Ann. 210/4.