COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

BARNSTABLE, SS **NO. SJC-12224**

AIDS SUPPORT GROUP OF CAPE COD, INC.,
Plaintiff-Appellant,

v.

TOWN OF BARNSTABLE, BOARD OF HEALTH OF THE TOWN OF BARNSTABLE, and THOMAS MCKEAN, in his official Capacity as Director of Public Health of the Town of Barnstable,
Defendants-Appellees.

BRIEF OF THE APPELLANT AIDS SUPPORT GROUP OF CAPE COD, INC.

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Does Massachusetts law permit the non-sale distribution of hypodermic needles and syringes by any private individual or entity or do the provisions set forth in G. L. c. 94C, §§ 27, 27A and/or G. L. c. 111, § 215 constrain such non-sale distribution to locally approved programs implemented by the Department of Public Health?

STATEMENT OF THE CASE

This is an action for declaratory judgment and injunctive relief that arose when the Town of Barnstable, its Board of Health, and the Director of Public Health (collectively, the "Town"), issued cease and desist orders dated September 22, 2015 and September 23, 2015 prohibiting AIDS Support Group of Cape Cod ("ASGCC") from distributing free clean needles and syringes to clients at its Hyannis, Massachusetts location (collectively, the "Order"). The Order asserted that ASGCC's conduct violated G. L. c. 111, § 215 and G. L. c. 94C, § 27 on the ground that Massachusetts law restricts the distribution of needles to either sales by pharmacists or programs that are officially implemented by the Department of

Public Health and also receive local approval. See Record Appendix ("RA") 25-26.

On November 10, 2015 ASGCC filed suit against the Town in Barnstable Superior Court. RA 6. Its Complaint sought a declaration pursuant to G. L. c. 231, § 1 that the Order contravenes Massachusetts law because there is no language in either G. L. c. 111, § 215 or G. L. c. 94C, § 27 that prohibits any private person or entity in Massachusetts from distributing hypodermic needles and syringes. RA 14, ¶ 6. In addition, ASGCC sought preliminary and permanent injunctive relief enjoining enforcement of the Order. RA 13-14, ¶¶ 3-4.

The trial judge (Veary, J.) issued a temporary restraining order and, after hearings at which the court heard testimony from ten witnesses, entered a preliminary injunction. RA 7. See also Memorandum of Decision and Order on Plaintiff's Motion for a Preliminary Injunction dated December 1, 2015 (the "Decision"). Addendum ("Add.") 6-18. The court concluded that the text of G. L. c. 94C, § 27 "sets forth various requisites by which hypodermic needles and syringes may be lawfully 'sold,'" and agreed that it does not limit "possessing such items and

dispensing them without sale." Add. 9. Turning to G. L. c. 111, § 215, the court noted that it applies on its face to programs operated by the Department of Public Health and determined that there is "nothing in [its] language ... which would fairly support" a prohibition on ASGCC's needle distribution program, nor is there any basis to "infer" one, "particularly in light of the decriminalization of the possession and delivery of needles and syringes established by G. L. c. 94C, § 27" as amended through St. 2006, c. 172. Add. 10.

On August 15, 2016 the trial court (Ruffo, J.) granted the parties' Joint Request to Report the Case for Determination by the Appeals Court pursuant to Rule 64(a) (the "Report"). RA 7, 19-26.[1]

STATEMENT OF FACTS

The parties, pursuant to Mass. R. Civ. P. 64 (a), agreed to the following facts and that these are the

[1] The trial court did not report the preliminary injunction order, but rather reported the case under the following provision of Mass. R. Civ. P. 64 (a): "The court, upon request of the parties, in any case where the parties agree in writing as to all the material facts, may report the case to the appeals court for determination without making any decision thereon." The trial court's Decision is presented for any guidance it may offer to this Court as the only judicial analysis of the statutory question here.

only facts necessary for a determination of this case. The numbered paragraphs below correspond to the statement of facts in the Report. RA 22-23.

1. ASGCC is a Massachusetts nonprofit corporation with a principal place of business at 96-98 Bradford Street, Provincetown, MA. ASGCC also operates program sites at 336 Commercial Street, Provincetown, MA, 428 South Street, Hyannis, MA and in Falmouth, MA.

2. The town of Barnstable is a municipal corporation with its principal place of business at 367 Main Street, Hyannis, MA.

3. ASGCC distributes hypodermic needles and syringes at 428 South Street, Hyannis.

4. ASGCC does not sell, and has never sold, hypodermic needles or syringes.

5. The number of syringes ASGCC provides to clients at any one time is based on its assessment of client needs in order to fulfill the goal that a client use a clean needle every time he or she injects. ASGCC provides a collection receptacle for the return of used needles at its Hyannis site.

6. ASGCC also operates a locally approved “needle exchange” program in Provincetown implemented by the

Department of Public Health pursuant to G. L. c. 111, § 215.

7. The Department of Public Health does not require a "one-for-one" exchange of needles in order for a participant to qualify to receive hypodermic needles and syringes at a locally approved "needle exchange" program implemented under G. L. c. 111, § 215.

8. At its Provincetown site, ASGCC does not require a "one-for-one" exchange of needles in order for a participant to qualify to receive hypodermic needles and syringes.

9. With respect to its Hyannis program site, ASGCC has neither sought at any time nor received "local approval" from the town of Barnstable to operate as a program implemented by the Department of Public Health pursuant to G. L. c. 111, § 215.

10. On September 22, 2015 the town of Barnstable served ASGCC with an order that it cease distributing syringes at its Hyannis program site. Under "Offense," the order stated: "MGL 111 Sect 215 and Chapter 94 C, Section 27 [sic]." Under "Facts," the order stated: "Syringes were being distributed to persons without local approval." A true and accurate copy of the

September 22, 2015 order is attached as Exhibit A to the Report. RA 25.

11. The town of Barnstable sent a follow-up order to ASGCC dated September 23, 2015 with the heading: "Order to Cease and Desist Distribution of Needles/Syringes." A true and accurate copy of the September 23, 2015 letter is attached as Exhibit B to the Report. RA 26.

SUMMARY OF THE ARGUMENT

1. Massachusetts law permits the free distribution of hypodermic needles and syringes because there is no statute, including those cited in the Order, which prohibits such activity. G. L. c. 94C, § 27 provides that only pharmacists may sell hypodermic needles and limits such sale to people over 18. G. L. c. 111, § 215 applies only to those programs operated by the Department of Public Health. It does not restrict, limit, or speak to in any way the distribution of hypodermic needles and syringes by anyone else. An activity not prohibited or restricted by law is lawful. This Court may not add provisions to either of these statutes that the Legislature did not put there. See pp. 10-18, infra.

2. There are no restrictions on the free distribution of hypodermic needles and syringes by private individuals and entities because the Legislature repealed all of them in 2006 in order to ensure the wide availability of clean needles to combat the devastating epidemics of HIV and Hepatitis C Virus transmission in the Commonwealth. See St. 2006, c. 172. See pp. 18-24, infra.

ARGUMENT

I. THIS COURT SHOULD DECLARE THAT MASSACHUSETTS LAW PERMITS THE FREE DISTRIBUTION OF HYPODERMIC NEEDLES AND SYRINGES BY ANY PRIVATE INDIVIDUAL OR ENTITY BECAUSE THERE IS NO LANGUAGE IN ANY STATUTE THAT PROHIBITS OR LIMITS SUCH ACTIVITY AND THE LEGISLATURE REPEALED ALL RESTRICTIONS IN 2006.

At stake in this appeal is an issue of enormous importance to public health in the Commonwealth. As the trial court observed, and the Town does not contest, "we today face a 'crisis' from the combined epidemics of opiate overdose and HIV/HCV transmission[,]" particularly because "many younger drug users have transitioned to intravenous abuse from oral oxycodone abuse[.]" Decision, Add. 13, 17. The resolution of this case will determine our ability to fight these epidemics.

Even before this current crisis, the Legislature adopted a simple, clear and effective approach to combat the transmission of life-threatening diseases through the sharing of dirty needles. It decriminalized the distribution of hypodermic needles and syringes. An Act Relative to HIV and Hepatitis C Prevention, St. 2006, c. 172 (the "2006 Act"). It thus "lawfully permitted the previously proscribed acts of possessing and delivering hypodermic needles and syringes." Decision, Add. 6; id. at 9 (noting the "breadth of the proscriptions eliminated by" the amendment). As is evident from the Act's title, the Legislature understood that clean needles save lives.

As a result of the 2006 Act, there is no language in any statute that restricts the free distribution of hypodermic needles and syringes by ASGCC, or any other private individual or entity. The Legislature chose to retain only two conditions on access to hypodermic needles and syringes: that pharmacy sales be limited to persons over the age of 18 (G. L. c. 94C, § 27), and that the Commonwealth obtain local board of health approval when it implements its own public health needle exchange programs (G. L. c. 111, § 215).

The absence of any prohibition in the law that applies to ASGCC is conclusive that its activities are lawful. This Court does not "infer" or "add an additional requirement" not found in a statute's plain and unambiguous requirements. See Comm'r of Revenue v. Cargill, Inc., 429 Mass. 79, 82 (1999), and cases cited in Argument § I (b) (2). A ruling that the free distribution of clean needles is constrained by statutes that, by their plain and unambiguous language, do not apply to private individuals and entities would undermine the public health purposes of the 2006 Act and, as the trial judge observed, "quite clearly place lives in jeopardy." See Decision, Add. 17.

A. Standard of Review.

This is a report of a case for determination by this Court on an agreed upon statement of material facts pursuant to Mass. R. Civ. P. 64 (a). There is no trial court ruling on review. As commentators have observed, "[n]o significant distinction appears to exist between an agreed statement of facts on which the trial court entered judgment, as opposed to a Rule 64 agreement which the trial judge then reports to the Appeals Court for determination." J.W. Smith & H.B.

Zobel, Rules Practice (2d ed. 2007) § 64.4, 436-437. Accordingly, the court "may draw only such inferences as the agreed facts will permit." Id. at 436.

B. The Relevant Statutes, G. L. c. 111, § 215 and G. L. c. 94C, § 27, are Clear and Unambiguous and Allow Private Needle Distribution Programs Such as That Operated by ASGCC.

1. The Statutes Cited in the Order on Their Face Do Not Restrict ASGCC.

The Town cited two statutes in the Order as the grounds for its decision to shut down ASGCC's distribution of free needles to its clients. Neither statute on its face operates to impact ASGCC's program.

First, G. L. c. 94C, § 27 provides:

> Hypodermic syringes or hypodermic needles for the administration of controlled substances by injection may be sold in the commonwealth, but only to persons who have attained the age of 18 years and only by a pharmacist or wholesale druggist licensed under the provisions of chapter 112, a manufacturer of or dealer in surgical supplies or a manufacturer of or dealer in embalming supplies. When selling hypodermic syringes or hypodermic needles without a prescription, a pharmacist or wholesale druggist must require proof of identification that validates the individual's age.

G. L. c. 94C, § 27. This sole paragraph was added by the Legislature at the time it repealed the

entirety of the pre-existing G. L. c. 94C, § 27 that had prohibited the possession, delivery, exchange, or sale of hypodermic needles and syringes without a prescription. See St. 2006, c. 172, § 3 and Argument § I (B) (3), infra.[2]

Second, G. L. c. 111, § 215 read as follows at the time of the Order:

> The department of public health is hereby authorized to promulgate rules and regulations for the implementation of not more than ten pilot programs for the exchange of needles in cities and towns within the commonwealth upon nomination by the department. Local approval shall be obtained prior to implementation of each pilot program in any city or town.
>
> Not later than one year after the implementation of each pilot program said department shall report the results of said program and any recommendations by filing the same with the joint legislative committees on health care and public safety.

Add. 5.[3]

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[2] St. 2006, c. 172, § 3 also added a new provision, G. L. c. 94C, § 27A, which is referenced in the question of law in the Report (RA 22). Section 27A requires that the Department of Environmental Protection and the Department of Public Health establish programs for the safe collection and disposal of hypodermic needles and lancets. G. L. c. 94C, § 27A.

[3] This statute was originally passed in 1993 and at that time authorized "a pilot program." St. 1993, c. 110, § 148. It was amended in 1995 to add the

This statute pertaining to needle exchange programs implemented by the Department of Public Health was amended after the date of the Order and the preliminary injunction proceedings in this case.[4] The amendment eliminated the cap on ten "pilot programs" and substituted a requirement of approval from a board of health in a hosting city or town for the prior undefined requirement of "local approval" from a city or town. G. L. c. 111, § 215 currently provides:

> The department of public health may implement needle exchange programs for the exchange of needles in cities and towns. Prior to implementation of a needle exchange program, approval shall be obtained from the board of health in the hosting city or town. The city or town shall, in a manner determined by the department, provide notice of such approval to the department.
>
> Not later than 1 year after the implementation of a needle exchange program, the department shall report the results of the program and any recommendation by filing the same with the senate and house chairs of the joint committee on health care financing and the house and senate chairs of the joint committee on public safety and homeland security.

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language "not more than ten pilot programs[.]" St. 1995, c. 38, § 128.

[4] See Massachusetts 2017 Fiscal Year Budget, Outside Sections, § 65 (July 8, 2016).

G. L. c. 111, § 215. Neither statute speaks in any way to the free distribution of needles by a private, non-state entity.

2. This Court Must Apply G. L. c. 94C, § 27 and G. L. c. 111, § 215 as Written and Not Add Terms or Requirements that the Legislature Did Not Provide.

The answer to the question reported to this Court is found in a simple, but foundational principle of our legal system: An activity not prohibited or restricted by law is lawful. See 2 W. Blackstone, Commentaries *45:

> Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it.

This tenet underlies our most vital principles of due process.[5]

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[5] See, e.g., Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)(“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort”); Sparf v. United States, 156 U.S. 51, 88 (1895) (“Unless there be a violation of law preannounced, and this by a constant and responsible tribunal, there is no crime, and can be no punishment.”); Commonwealth v. Jasmin, 396 Mass. 653, 655 (1986) (“A law is unconstitutionally vague and denies due process of law if it fails to provide a reasonable opportunity for a person of ordinary intelligence to know what is prohibited or if it does

The principle that a law must be stated in order to effectuate a prohibition is also manifest in the Supreme Judicial Court's articulation of well-established canons of statutory interpretation. A court's "'primary duty in interpreting a statute is to effectuate the intent of the Legislature in enacting it.'" MacLaurin v. Holyoke, 475 Mass. 231, 239 (2016) (quoting Wheatley v. Massachusetts Insurers Insolvency Fund, 456 Mass. 594, 601 (2010)) (internal quotations omitted). The court "begin[s] with the plain language" of the statute. MacLaurin, 475 Mass. at 238. The statutory language is "'the principal source of insight into legislative purpose.'" Id. at 239 (quoting Bronstein v. Prudential Ins. Co. of Am., 390 Mass. 701, 704 (1989)). If the "words in a statute are 'clear and unambiguous,' [the court must] give them effect as 'the Legislature's expressed intent.'" Kain v. Dept. of Environmental Protection, 474 Mass. 278, 286 (2016) (quoting Providence & Worcester R.R. v. Energy Facilities Siting Board, 453 Mass. 135, 141 (2009).

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not provide explicit standards for those who apply it.").

G. L. c. 94C, § 27 was enacted to permit the "sale" of hypodermic needles without a prescription. It is undisputed that ASGCC does not sell needles or syringes. RA 22, ¶ 4. The statute does not contain any restriction on the possession or free distribution of hypodermic needles and syringes. This statute does not apply to ASGCC's activities.

Similarly, the unambiguous language of G. L. c. 111, § 215 pertains only to programs of the Department of Public Health. The plain language of § 215 demonstrates that the Legislature wanted to impose a single condition -– board of health approval –- solely on programs implemented, and presumably funded, by the Department of Public Health. No other type of entity is mentioned in the statute. There is no ambiguous term. Nor is it possible to glean from the clear language of § 215 any prohibition, restriction or limitation on non-Department of Public Health entities.

There is no basis to expand G. L. c. 111, § 215 beyond its plain terms and restrict those not mentioned in it. See, e.g., King v. Viscoloid, Co., 219 Mass. 420, 423, 425 (1914) (declining to "take[] away the right of a third person not mentioned in the

act" and refusing to "read into the statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose."). This Court "assume[s] that the Legislature 'understands and intends all consequences' of its acts." Commonwealth v. Russ R., 433 Mass. 515, 523 (2001) (quoting Charland v. Muzi Motors, 417 Mass. 580, 583 (1994)). The prerogative to determine whom to regulate and how is for the Legislature and "not for the court to second-guess[.]" Kain, 474 Mass. at 293. See also M. H. Gordon & Son, Inc. v. Alcoholic Beverages Control Com., 371 Mass. 584, 589 (1976) ("courts must … diligently respect the policy limits set by the Legislature"; Russ R., 433 Mass at 523 (it is not the Court's "function 'to judge the wisdom of legislation or to seek to rewrite the clear intention expressed by the statute.'")(quoting Commonwealth v. Leno, 415 Mass. 835, 841 (1993)). Nor can this Court put additional parties under a requirement (here, requiring non-Department of Public Health programs to obtain board of health approval) simply because the Legislature did not make known its reason for requiring board of health approval for the Department of Public Health's own programs. See General Elec. Co.

v. Dep't of Envtl. Protection, 429 Mass. 798, 800, 803 (1999) (declining to find "implied exemption" from requirements of public records law for materials covered by work product doctrine notwithstanding that "the legislative history does not explain why the Legislature rejected an express exemption for work product.").

A ruling that ASGCC or other private entities or individuals must obtain board of health approval for the distribution of hypodermic needles and syringes would require the court to add words and provisions to G. L. c. 111, § 215 that the Legislature did not put there. The Court, for example, would need to add a provision that "anyone," "any entity," an "individual," or a "corporation," are subject to the condition set forth in G. L. c. 111, § 215. The Supreme Judicial Court has repeatedly stated that it will not "'read into [an act] a provision which the Legislature did not see fit to put there, nor add words that the Legislature had an option to, but chose not to include.'" Commonwealth v. Wade, 475 Mass. 54, 63 (2016) (quoting Comm'r of Correction v. Superior Court Dep't of the Trial Court for the County of Worcester, 446 Mass. 123, 126 (2006)). See also

Fernandes v. Attleboro Housing Authority, 470 Mass. 117, 129 (2014) (declining to add provision not present in statute "'whether the omission came from inadvertence or of set purpose'") (quoting General Elec. Co., 429 Mass. at 803) (internal quotations omitted); Dartt v. Browning-Ferris Indus., 427 Mass. 1, 3, 8 (1997) (no requirement that plaintiff show he was terminated "solely" because of his handicap where the statute does not use the term "solely"; "we hesitate to rewrite the statute judicially to import such a restriction"); Cargill, Inc., 429 Mass. at 82 ("[w]here ... the language of the statute is clear, it is the function of the judiciary to apply it, not amend it"; declining to "look beyond the clear language of the statute and infer an intention on the part of the Legislature").

3. The Legislature's 2006 Repeal of Prohibitions on the Distribution and Exchange of Hypodermic Needles and Syringes Confirms -- and Explains -- the Lack of Restrictions on ASGCC's Activities.

The absence in Massachusetts law of any prohibition on the possession, distribution, or exchange of needles or syringes by a private individual or entity is not a result of inadvertent

omission. Rather, it is due to the deliberate decision of the Legislature in 2006 to repeal all such restrictions in Massachusetts law in the face of the spread of HIV and HCV by people who inject drugs. See St. 2006, c. 172, § 3.

Prior to the passage of the 2006 Act, hypodermic needles and syringes were defined as "drug paraphernalia." The 2006 Act removed hypodermic syringes and needles from the definition of "drug paraphernalia" in G. L. c. 94C, § 1. St. 2006, c. 172, § 2; G. L. c. 94C, § 1, Clause 11, as existing before the 2006 Act, Add. 19-21.

Similarly, prior to the 2006 Act, G. L. c. 94C, § 27 contained ¶¶ (a)-(f) that regulated the possession and exchange of hypodermic needles and syringes. A copy of G. L. c. 94C, § 27 as it existed prior to the 2006 Act is at Add. 26-29. The 2006 Act repealed all of the paragraphs of the then-existing G. L. c. 94C, § 27 and replaced it with the current single paragraph, supra, that solely prohibits the sale of syringes by anyone other than a pharmacist. See St. 2006, c. 172, § 3 ("Said chapter 94C is hereby further amended by striking out Section 27, as so

appearing, and inserting in place thereof the following 2 sections").

An examination of the statutory language repealed by the Legislature unmistakably reveals its intent to remove all restrictions on the possession, distribution, and exchange of hypodermic needles and syringes by any private individuals and entities. It was a wholesale deregulation.

First, the 2006 Act repealed then-existing G. L. c. 94C, § 27(a) which provided that "[n]o person, not being [specifically designated health care providers, and manufacturers or dealers in surgical or embalming supplies] shall have in his possession a hypodermic syringe, hypodermic needle, or any instrument adapted for the administration of controlled substances by injection." See Add. 26, ¶ (a).

Second, the 2006 Act repealed then-existing G. L. c. 94C, § 27(b) which provided that "[n]o such syringe, needle or instrument shall be delivered or sold to, or exchanged with, any person except [specifically designated health care providers and entities]." See Add. 26, ¶ (b) (emphasis supplied).

Third, the 2006 Act repealed then-existing G. L. c. 94C, § 27(e) which provided that "[n]o person

except [specifically designated health care providers, and manufacturers or dealers in surgical or embalming supplies] shall sell, offer for sale, deliver, or have in possession with intent to sell hypodermic syringes, hypodermic needles, or any instrument adapted for the administration of controlled substances by injection[.]" Add. 27-28, ¶ (e) (emphasis supplied).

The removal of the explicit wording "exchange" of syringes or needles in the prior language of G. L. c. 94C, § 27 underscores that private entities can now do what only the Department of Public Health was previously authorized to do. See Add. 26, ¶ (b). G. L. c. 111, § 215 also uses the word "exchange." The term "exchange" in the prior G. L. c. 94C, § 27 and in a related statute, G. L. c. 111, § 215, must be given the same meaning. See Kain, 474 Mass. at 287 ("[w]here the same word is used in different parts of a statute, it 'should be given the same meaning ... barring some plain contrary indication'") (quoting CFM Buckley/North LLC v. Assessors of Greenfield, 453 Mass. 404, 408 (2009)). By repealing the word "exchange" in § 27, it is evident that the Legislature intended to permit private individuals and entities to undertake the very same activity that the Department

of Public Health undertakes pursuant to G. L. c. 111, § 215.

Further, when the Legislature originally passed G. L. c. 111, § 215, it added a provision to the then-existing G. L. c. 94C, § 27 that:

> Notwithstanding any general or special law to the contrary, needles and syringes may be distributed or possessed as part of a pilot program approved by the department of public health in accordance with [G. L. c. 111, § 215] and any such distribution or exchange of said needles or syringes shall not be a crime.

Add. 28, ¶ (f). The legislature thus viewed G. L. c. 94C, § 27 at that time as an absolute bar to the possession or exchange of hypodermic syringes or needles under all circumstances except as it specifically permitted. The 2006 Act, however, repealed this provision. G. L. c. 94C, § 27. The Legislature did not see a reason to specifically permit possession and exchange via Department of Public Health-implemented exchange programs once all such prohibitions were repealed by the 2006 Act. The same is true for any other person or entity who previously could not possess, distribute, or exchange syringes under the prior § 27.

Prior to the passage of the 2006 Act, G. L. c. 111, § 215 was the only lawful means to obtain hypodermic needles without a prescription. The distribution or exchange of hypodermic syringes and needles by non-medical personnel was otherwise prohibited. That was because G. L. c. 94C defined hypodermic syringes and needles as drug paraphernalia, and expressly prohibited their possession, delivery or exchange. With the removal of all such provisions, however, there is no basis for any assertion by the Town that G. L. c. 111, § 215 is the exclusive vehicle for the distribution and exchange of hypodermic needles and syringes under Massachusetts law. While the Legislature requires that state programs operated by the Department of Public Health must have local board of health approval, Massachusetts law does not otherwise restrict the distribution of needles by any other person or entity.

If the Legislature had intended such a restriction, it would have indicated so and adopted a more limited, nuanced repeal of G. L. c. 94C, § 27. The Legislature could easily have included conditions on entities beyond the Department of Public Health, but chose not to. See Commonwealth v. Cahill, 442

Mass. 127, 134 (2004) ("If the Legislature had intended for the amended paragraphs ... to apply to second offenders ... it easily could have included language to that effect."); Cargill, Inc., 429 Mass. at 82 ("Had the Legislature intended to limit the [tax] credit in the manner advocated by the commissioner, it easily could have done so.").

Instead, the Legislature enacted a complete deregulation of possession and distribution in order to combat the devastating impact of the HIV and HCV epidemics. In sum, the repeal of § 27 in 2006 makes it clear that there is no restriction on the possession and distribution of free hypodermic needles by any private individual or entity.

CONCLUSION

For the foregoing reasons, this Court should enter, or direct the trial court to enter: (1) a declaration that the cease and desist orders dated September 22, 2015 and September 23, 2015 are unlawful, and that Massachusetts law permits, without condition or restriction, the non-sale distribution of hypodermic needles and syringes by any private individual or entity; and (2) an order permanently

enjoining enforcement of the cease and desist orders dated September 22, 2015 and September 23, 2015.

Appellant AIDS Support Group
of Cape Cod

By Its Attorneys

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November 15, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to, mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules and regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 20 (form of briefs, appendices and other papers).

/s/ Bennett H. Klein

November 15, 2016

CERTIFICATE OF SERVICE

I hereby certify that I, on November 16, 2016, served the foregoing document by email and by mailing two copies, postage prepaid, to Charles S. McLaughlin, Jr. and Ruth J. Weil, Counsel for Defendants-Appellees, Town of Barnstable et al., 367 Main Street, Hyannis, MA 02601.

/s/ Bennett H. Klein

November 15, 2016

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Current through Act 303 of the 2016 Legislative Session

Annotated Laws of Massachusetts **>** ***PART I ADMINISTRATION OF THE GOVERNMENT [Chapters 1 - 182]*** **>** ***TITLE XV REGULATION OF TRADE [Chapters 93 - 110H]*** **>** ***Chapter 94C Controlled Substances Act***

§ 27. Sale of Hypodermic Syringes and Needles.

Hypodermic syringes or hypodermic needles for the administration of controlled substances by injection may be sold in the commonwealth, but only to persons who have attained the age of 18 years and only by a pharmacist or wholesale druggist licensed under the provisions of chapter 112, a manufacturer of or dealer in surgical supplies or a manufacturer of or dealer in embalming supplies. When selling hypodermic syringes or hypodermic needles without a prescription, a pharmacist or wholesale druggist must require proof of identification that validates the individual's age.

History

1971, 1071, § 1; 1972, 806, § 20; 1973, 1190, §§ 15–17; 1980, 572, §§ 83, 84; 1982, 554, §§ 1, 2; 1982, 602; 1983, 714; 1985, 200, § 8; *1993, 110, § 142*; *1993, 224, § 2*; *2006, 172, § 3*.

Annotated Laws of Massachusetts

End of Document

ALM GL ch. 94C, § 27A

Current through Act 303 of the 2016 Legislative Session

Annotated Laws of Massachusetts > *PART I ADMINISTRATION OF THE GOVERNMENT [Chapters 1 - 182]* > *TITLE XV REGULATION OF TRADE [Chapters 93 - 110H]* > *Chapter 94C Controlled Substances Act*

§ 27A. Collection and Disposal of Spent Non-Commercially Generated Hypodermic Needles and Lancets.

(a) Notwithstanding any general or special law to the contrary, the department of environmental protection and the department of public health, in conjunction with other relevant state and local agencies and government departments, shall design, establish and implement, or cause to be implemented a program for the collection and disposal of spent non-commercially generated hypodermic needles and lancets. The program shall be designed to protect the public health and the environment by providing for the safe, secure and accessible collection and disposal of hypodermic needles and lancets. The departments may collaborate with private companies as well as not-for-profit agencies when designing, establishing and implementing this program.

(b)

(1) Sharps disposal programs may include, but are not limited to the following:—

(i) a program for safe, secure home sharp disposal;

(ii) establishing sharps collection centers in medical facilities and pharmacies;

(iii) establishing sharps collection centers in municipal facilities, including, but not limited to, fire stations, police stations and public health offices; provided that sharps collection centers may be located at senior centers only for the purpose of disposing of medically necessary hypodermic needles; and

(iv) medical waste mail-back programs approved by the United States Postal Service.

(2) Medical facilities, pharmacies and participating municipal facilities may work with the department of public health and the department of environmental protection to determine the proper program for sharps disposal implementation within each community.

(c) For the purposes of this section, a “sharps collection center” shall be an identified site within a community which:

(1) uses only collection containers that meet the requirements of the federal Occupational Safety and Health Administration and the federal Department of Transportation and is marked with the international biohazard symbol;

(2) provides secure and accessible collection containers on site;

(3) accepts sharps from sharps users that are in leak-proof, rigid, puncture-resistant and shatterproof containers;

(4) provides appropriate transfer containers for sharps users who fail to bring their sharps in suitable containers for placement in the collection container;

(5) has a written agreement with a medical waste transporter providing for regularly scheduled waste pickups; and

(6) stores, handles, transports and treats the collected waste in accordance with department of public health regulations.

(d) The program shall be designed to protect the public health and the environment by providing for the safe, secure and accessible collection and disposal of hypodermic needles and lancets. The department of public health, in consultation with the department of environmental protection, shall adopt regulations to ensure the safe, secure and accessible collection and disposal of hypodermic needles and lancets, and shall provide recommendations for legislative action to the joint committee on public health, the senate and house committees on ways and means and the clerks of the senate and house of representatives. Included in the recommendations for legislative action shall be recommended punishments and fines for the inappropriate, unsafe or unlawful disposal of the hypodermic needles and lancets.

History

2006, 172, § 3.

Annotated Laws of Massachusetts

End of Document

ALM GL ch. 111, § 215

Current through Act 303 of the 2016 Legislative Session

Annotated Laws of Massachusetts **>** ***PART I ADMINISTRATION OF THE GOVERNMENT [Chapters 1 - 182]*** **>** ***TITLE XVI PUBLIC HEALTH [Chapters 111 - 114]*** **>** ***Chapter 111 Public Health***

§ 215. Needle Exchange Program.

The department of public health may implement needle exchange programs for the exchange of needles in cities and towns. Prior to implementation of a needle exchange program, approval shall be obtained from the board of health in the hosting city or town. The city or town shall, in a manner determined by the department, provide notice of such approval to the department.

Not later than 1 year after the implementation of a needle exchange program, the department shall report the results of the program and any recommendations by filing the same with the senate and house chairs of the joint committee on health care financing and the house and senate chairs of the joint committee on public safety and homeland security.

History

1993, 110, § 148; *1995, 38, § 128*; *2016, 133§ 65*.

Annotated Laws of Massachusetts

End of Document

promulgated thereunder shall be punished by a fine of not less than two hundred dollars nor more than two thousand dollars.

Added by St.1990, c. 480, § 1.

Library References

Texts and Treatises

51 Am Jur 2d, Licenses and Permits §§ 106 to 114.

NEEDLE EXCHANGE PILOT PROGRAM

Caption editorially supplied

§ 215. Pilot program for exchange of needles

The department of public health is hereby authorized to promulgate rules and regulations for the implementation of not more than ten pilot programs for the exchange of needles in cities and towns within the commonwealth upon nomination by the department. Local approval shall be obtained prior to implementation of each pilot program in any city or town.

Not later than one year after the implementation of each pilot program said department shall report the results of said program and any recommendations by filing the same with the joint legislative committees on health care and public safety.

Added by St.1993, c. 110, § 148. Amended by St.1995, c. 38, § 128.

Historical and Statutory Notes

St.1993, c. 110, § 148, was approved July 19, 1993, and by § 390 made effective as of July 1, 1993.

St.1995, c. 38, § 128, approved June 21, 1995, and by § 358 made effective July 1, 1995, in the first paragraph, in the first sentence, substituted "not more than ten pilot programs" for "a pilot program" and, in the second sentence, substituted "each" for "the".

Library References

Controlled Substances ⇐96H49.
Health ⇐388.
WESTLAW Topic Nos. , 198H.

FRAGRANCE ADVERTISING INSERTS

Caption editorially supplied

§ 216. Fragrance advertising inserts; microencapsulated fragrance; penalty

All fragrance advertising inserts contained in a newspaper, magazine, mailing, or other periodically printed material shall contain only microencapsulated oils. Glue tabs or binders shall be used to prevent premature activation of the

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS. SUPERIOR COURT

CIVIL ACTION NO. BACV2015-00586

AIDS SUPPORT GROUP OF CAPE COD, INC.,
Plaintiff

vs.

TOWN OF BARNSTABLE, et al.,[1]
Defendants

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

In 2006, our Legislature amended G.L. c. 94C, § 27 to provide that "[h]ypodermic syringes or hypodermic needles for the administration of controlled substances by injection" could only be "sold" in the Commonwealth by pharmacists or certain other licensed professionals.[2] The amendment also limited sale to persons who could prove that they had attained the age of eighteen years. The newly re-written statute, however, did more. It eliminated the remainder of the original statute and thereby lawfully permitted the previously proscribed acts of possessing and delivering hypodermic needles and syringes. Citing this amendment, the plaintiff, AIDS Support Group of Cape Cod, Inc. ("ASGCC"), asserts that it acts lawfully and appropriately when it delivers free needles and syringes to intravenous drug users regardless of age from its program site in a commercial district at 428 South Street, Hyannis, Massachusetts. With the explicit intent of reducing the spread on HIV and Hepatitus C ("HCV") infection among its client community, ASGCC dispenses these needles and syringes in numbers

[1] Board of Health of the Town of Barnstable, and Thomas McKean, in his official capacity as Director of Public Health of the Town of Barnstable

[2] Wholesale druggists licensed under G.L c. 112, manufacturers of or dealers in surgical supplies, and manufacturers of and dealers in embalming supplies.

commensurate with its clients' reported habits and needs. Those needs have increased substantially of late as a result of what all concerned have described as "the present opioid crisis." According to the program's director of prevention and screening services, during its recently concluded fiscal year, ASGCC dispensed needles and syringes at a rate of approximately 10,000 per month.

The Town of Barnstable ("Town") views the matter differently. Pointing to discoveries of discarded hypodermic needles and syringes --- sometimes in significant numbers --- in public parks, comfort facilities, and areas occupied by numerous homeless persons, the Town has identified what it deems to be "a public health crisis." Several of these discoveries have included evidence tending to show that the source of the discarded materials was the ASGCC program. Consequently, the Town ordered in writing[3] ASGCC to "cease and desist" from "the distribution of any needles/syringes within the Town of Barnstable." As its authority and rationale, the Town claimed in its notice that ASGCC was acting in violation of G.L. c. 94C, § 27 because neither it nor its staff were pharmacists or other licensed professionals statutorily designated. The Town further claimed that ASGCC was acting in violation of G.L c. 111, § 215 because its program was not one of the ten pilot needle-exchanges which the Massachusetts Department of Public Health ("DPH") was authorized to implement and because ASGCC had not obtained local approval, as required of such programs under that statute.

In this setting, ASGCC filed a civil complaint pursuant to G.L. c. 231A, § 1, seeking, *inter alia*, a declaration by this court that the Town was without lawful authority to issue its cease and desist order. ASGCC also sought a temporary restraining order, under Mass,R.Civ.P.

[3] Two written notices were served upon ASGCC. One, issued on September 21 or 22, 2015, was on a pre-printed form completed in handwriting. The other, issued on September 23, 2015, was in letter form.

65(a), enjoining the Town and its agents from enforcing the cease and desist order. After a hearing in which counsel for the plaintiff and all defendants appeared, the requested temporary order issued, and a hearing date was set for seven days later to consider whether ASGCC's motion for preliminary injunctive relief under Mass.R.Civ.P. 65(b) should be granted. The court thereupon received evidence, including the testimony of ten witnesses and various exhibits, as well as the parties' legal submissions on November 20 and 23, 2015.

A court may enter a preliminary injunction if, after an abbreviated presentation of the facts and the law, the plaintiff has demonstrated 1) a reasonable likelihood of success on the merits of the claims and 2) a substantial risk of irreparable harm if the injunction does not issue. *Packaging Indus. Group, Inc. v. Cheney,* 380 Mass. 609, 617 (1980). Additionally, where one of the parties is a public entity, "the risk of harm to the public interest also may be considered." *GTE Products Corp. v. Stewart*, 414 Mass. 721, 723 (1993). If the plaintiff meets its burden, then the court must balance the risk of harm to the plaintiff against any similar risk of irreparable harm that an order granting the injunction would create for the defendant. "What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits. Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue." *Id.* at 617.

ASGCC has demonstrated a reasonable likelihood of prevailing upon its claim. Both statutory prongs of the Town's position have their difficulties.

While G.L. c. 94C, § 27 sets forth various requisites by which hypodermic needles and syringes may be lawfully "sold," ASGCC points out that the section says nothing about possessing such items and dispensing them without sale. Accordingly, it asserts that its free distribution of needles and syringes was intended by the 2006 amendment to be permissible conduct. The court agrees. G.L. c. 94C, § 27 does not in any way prohibit the conduct of the ASGCC program as it has been described in the evidence. See *Director of the Division of Milk Control v. Haseotes,* 351 Mass. 372, 373 (1966). The court additionally observes that the statute's amendment, St. 2006, § 172, was enacted with the title, "An Act Relative to HIV and Hepatitus C Prevention," the very aim of the ASGCC program. See *Commonwealth v. Savage,* 31 Mass.App.Ct. 714, 716 n.4 (1991) ("The title of an act is relevant as a guide to legislative intent"). Moreover, the court notes the breadth of the proscriptions eliminated by the subject amendment, St. 2006, § 172, and the new statute's attention to programs facilitating the safe disposal of sharps (i.e. hypodermic needles and syringes) in communities throughout the Commonwealth. The amendment clearly marked a change in the Legislature's approach to intravenous drug users: a shift away from criminal enforcement and toward the promotion of health. This change appears to be entirely consistent with the stated goals and demonstrated activities of ASGCC's program.

The second statute cited in the Town's notice, G.L. c. 111, § 215, provides as follows:

> The department of public health is hereby authorized to promulgate rules and regulations for the implementation of not more than ten pilot programs for the exchange of needles in cities and towns within the commonwealth upon nomination by the department. Local approval shall be obtained prior to implementation of each pilot program in any city and town.
>
> Not later than one year after the implementation of each pilot program said department shall report the results of said program and any recommendations by filing the same with the joint legislative committees on health care and public safety.

Again, as pointed out by ASGCC, while the statute places limits upon the number of programs which the DPH may implement, it is silent as to whether others may initiate additional programs, which may or may not resemble those envisioned by the DPH. The statute certainly does not express a prohibition against such programs, and this court is disinclined to infer one. The court sees nothing in the language of G.L. c. 111, § 215 which would fairly support such a severe reading, particularly in light of the decriminalization of the possession and delivery of needles and syringes established by G.L. c. 94C, § 27. Accordingly, the court agrees with ASGCC's argument. Moreover, the description of the ASGCC program offered by the DPH's Director of the Bureau of Infectious Diseases, when he testified in this matter, has not been lost upon this court. Rejecting the characterization suggested by counsel for the Town that the program was unauthorized or unapproved, the witness instead described it as "not contracted." The witness also testified concerning the effect of the pilot-program initiative, noting that, though enacted in 1995, Section 215 has led to the implementation of only five DPH-sponsored programs. One of these is operated by ASGCC in Provincetown, Massachusetts.

Mere likelihood of success, however, does not win injunctive relief. The court must further engage in a suitable weighing of the equities, giving due consideration to any risks of harm to the public interest.

ASGCC states that it is one of the first AIDS organizations established in the United States. Founded in 1983 in Provincetown, it opened a second office in Hyannis in 2007. It describes its mission as fostering "health, independence and dignity for people living with HIV/AIDS and viral hepatitis by providing care, support and housing." Its services include "medical case management, peer support, housing, nutritional programs, testing for HIV, HCV

and sexually transmitted infections, and programs to reduce the spread of HIV and HCV." Because these infections are blood-borne, ASGCC has actively reached out to intravenous drug users to engage them in the agency's services. It has done so since 1995 and these services are now provided throughout Barnstable County as well as Martha's Vineyard and Nantucket.

ASGCC asserts without challenge that, in the nation, Massachusetts, and particularly Barnstable County, the "epidemics of HIV and HCV are a medical and public health crisis." Experts in the area agree that intravenous drug users are particularly vulnerable to these infections. The shared use of injection equipment has been identified as "one of the primary sources of HIV, HCV, and HBV (Hepatitis B) transmission in the United States." Recent surveys have shown, according to ASGCC, that approximately one-third of all intravenous drug users between the ages of 18 and 30 years are infected with HCV and that, among older users, the rate is at 70% to 90%. Barnstable County, it states, currently has the highest rate of HCV infection among 15-25 year-olds in Massachusetts. Among its clients generally, ASGCC found that in July, August and September of this year, 70% tested positive for HCV.

ASGCC began its present program at the Hyannis site in 2009. Its new registrations have increased in number over the years: 18 in 2010; 34 in 2011; 34 in 2012; 72 in 2013; and 183 in 2014.

The approach taken by ASGCC with respect to intravenous drug users is one which the agency and its witnesses assert is standard and effective. Known as "harm reduction," the approach is described as "a set of strategies aimed at reducing the negative consequences of substance abuse, including disease transmission and overdose, while encouraging and facilitating entry into substance abuse treatment." A phlebotomy-trained "harm reduction specialist" at the Hyannis facility testified as to how this approach is employed as part of the intake procedure and

regular care for intravenous drug users. The new client's name and date of birth are recorded upon a card which is coded to protect the person's privacy. The new client is then asked about health insurance. If the person is not insured, guidance is offered to assist the person in acquiring such insurance, most commonly MassHealth. Inquiry is then made of the new client concerning the nature and frequency of his or her intravenous drug ingestion. This information is useful in determining the number of needles and syringes to be issued to the client. This information is also maintained by the agency to keep track of consistent and inconsistent behaviors. Particular attention is paid to counselling all clients toward safe practices and away from shared use and reuse of injection equipment. The client is then tested for HIV and HCV. Additionally, clients are counseled in the areas of vein care, available drug-abuse treatment, and the risks of sexual transmission. Clients in need of acute medical care are brought to the nearby Duffy Community Health Center.

The ASGCC program is not a "needle exchange program." It is a "needle *access* program." It does not sell needles or syringes and never has. It issues them free of charge upon request. The issuance of new needles and syringes is not dependent upon the return of used needles and syringes. However, such return is actively encouraged by the program, and clients are continually counseled about the hazards of public discard. A kiosk for dropping off used injection materials stands in the lobby of the ASGCC office to accommodate safe client returns. Also, individualized sharps containers are issued to clients along with their needles. ASGCC reports that during its most recent fiscal year, it issued 112,604 syringes and received back 115,209, for a rate of return of 102%.

ASGCC also issues other supplies with the intent of helping its clients to protect their health while engaging in intravenous drug use. These supplemental supplies are likely to include

tourniquets, sterile water, alcohol wipes, clean cotton, and cookers which are color-coded to help avoid shared or repeated use. Additionally, Narcan (Naloxone), an opioid antagonist used to reverse overdoses, is provided to clients, along with instruction for its appropriate use.[4] ASGCC states that it issued Narcan to 488 persons in its last fiscal year (i.e. July1, 2014 to June 30, 2015) and that 216 overdose reversals were reported. The agency reports 66 overdose reversals in just the first three months of the current fiscal year.

ASGCC sees its mission as crucial in the context of "Massachusetts's growing opioid crisis." It points to studies showing that many younger drug users have transitioned to intravenous abuse from oral oxycodone abuse within the past 1½ years. Experts in the field have concluded that, as a consequence of this rapid transition has been that between 2012 and 2014, there has been a 57% rise in opioid overdose deaths in Massachusetts. In 2014 alone, 1,200 people in Massachusetts died from unintentional opioid overdoses. Fifty-one of those deaths occurred in Barnstable County.

ASGCC has demonstrated that its approach of "harm reduction" has considerable support among public health professionals, particularly those engaged in attempting to control the spread of infectious diseases such as HIV and HCV. Experts agree that the best way to avoid infection through intravenous drug use, of course, is to avoid abusing drugs. Short of that optimum, the goal of the DPH's Bureau of Infectious Diseases, in the words of Kevin Cranston, its director, is for intravenous drug users to use "a sterile syringe every time a person injects." Ease of access is key to achieving this goal in the opinion of Cranston. He further explained that DPH as a matter of policy does not insist that its pilot programs require that a client return a used needle and/or

[4] Some of these materials, labelled with ASGCC's contact information, have been offered by the Town to demonstrate a connection between ASGCC and at least some of the publicly discarded needles and syringes discovered by the Town.

syringe in order to obtain a new one. DPH also does not insist that its programs require that clients prove their identity or age. "The more needles you distribute, the safer people are," testified Dr. Robert Heimer, Professor of Microbial Diseases at the Yale University School of Public Health and Professor of Pharmacology at the Yale University School of Medicine. He also testified that research has shown that programs providing their clients with "as many syringes as they need" tend to have greater participation and tend to have better rates of return of used equipment. He added that he favors "relaxed" programs with educational components as being more effective at promoting safe practices among the at-large community of intravenous drug users. He observed that, where needles are scarce, there is a greater likelihood of an outbreak of HIV and HCV infections. Dr. Camilla S. Graham of the Division of Infectious Disease at Boston's Beth Israel Deaconess Medical Center stated that there is "conclusive scientific evidence" that programs providing access to clean needles decrease new HIV infections, increase the numbers of injection drug users who are referred to and retained in substance abuse treatment, and uniquely reach and furnish medical care to disenfranchised populations who are at high risk of HIV infection. She also asserted that programs such as that of ASGCC, providing easy access to clean injection equipment, increase the rates of people seeking treatment *while not increasing substance abuse*.

The cease and desist order issued by the Town was in effect for approximately forty days,[5] and ASGCC complied with the order. Previously, ASGCC had been visited by 20 to 30 intravenous drug users daily. After the order, the rate fell to 2 to 3 per day.

[5] The Town of its own accord suspended its September 23, 2015 order on November 3, 2015 for one week for the stated purpose of determining whether the parties could resolve their differences. The instant complaint was filed on November 10, 2015.

ASGCC states that the availability of hypodermic needles and syringes provided by pharmacies was an inadequate alternative to its "harm reduction" model during the period of its ceased operation. In the evidence presented, the consensus of opinion supports this position. Limited supply has been cited as a serious issue for pharmacy-based distribution, with some outlets imposing strict restrictions upon availability. A survey conducted by ASGCC during the cessation revealed that several pharmacies were repeatedly out of stock while one pharmacy chain limited sales to ten needles per person in any one day. Also, traditional pharmacies have been historically viewed as not being "consumer friendly" to the intravenous-drug-using market. Affordability has been a further issue cited, though ASGCC grants that many of its clients are eligible for MassHealth. Of particular significance to the issues here at hand, though, is that none of the area's pharmacies provide receptacles for the safe discard of used needles and syringes and none provide free Narcan to assist their customers in countering overdoses.

Though, as earlier indicated, the court questions the precise statutory basis cited by the Town in its cease and desist notice, the Town is certainly within its historical authority to act promptly, through its board of health, to remove or otherwise interdict "all nuisances, sources of filth, and causes of sickness within its town…which may, in its opinion, be injurious to the public health." G.L. c. 111, § 122.. See *Baker v. Boston*, 29 Mass. 184, 12 Pick. 184, 192-193 (1831). And it may act with special dispatch in emergency situations. See G.L. c. 111, § 30; 310 CMR § 11.05. Whether the Town exercised its authority appropriately under the circumstances here presented, however, is a question best left for a more thorough hearing of ASGCC's complaint and the Town's formal response thereto. In the meantime, this court accepts that the Town's attention to what it perceived to be a public health risk posed by the unprotected discard of used hypodermic needles and syringes was prudently grounded.

The Town's foremost concern from these unprotected discards is the risk of infection to members of the public from needle stick injuries. It is an understandable concern. However, even the Director of its Board of Health granted that such risk is "very low." The aforementioned Dr. Heimer, with his experience specializing in infectious diseases and substance abuse, opined that the chances of such transmission was "miniscule." He estimated that the risk of a HCV infection from a needle stick is approximately 1 in 10,000 and that the corresponding risk of an HIV infection is approximately 1 in a million.[6] Of course, infection is not the only consequence of needle stick injuries. This court received and credits testimony that police officers and other town employees are at increased risk of such injuries owing to the nature of their work. That risk is an ever-present stressor upon such employees and their families. Even if found not to be infected, such employees will have undergone arduous testing, suspension of regular activities, and worrisome waiting. Several needle sticks to police over a period of ten years and one recent near miss by a public works employee were reported; however, no evidence of a transmitted infection was presented.

Both sides have responded to this risk. The Town has installed sharps receptacles at four of its five fire stations. According to witnesses, such devices, if sturdy and designed to prevent tampering, have shown themselves to be effective in facilitating the safe disposal of injection materials. ASGCC, in addition to distributing individual sharps containers and maintaining its own disposal kiosk, has also conducted sweeps of its own neighborhood to locate and secure discarded materials. Both sides have also shown a willingness to expand these efforts and to

[6] The Town offered into evidence a "fact sheet" published by the World Health Organization (updated November, 2015), concerning "waste generated by health-care activities." The document offered that a person experiencing a stick injury from a needle earlier used on an infected patient had a risk of infection of 30% for Hepatitis B, 1.8% for Hepatitis C, and 0.3% for HIV. No evidence was offered concerning the applicability of these figures to random public settings.

coordinate their resources in doing so (e.g. installing secure sharps receptacles in public comfort facilities, increasing public awareness and education). This willingness, to the court's view, shows the most promise, in both focus and scope, to address the Town's foremost concern.

Greater and more immediate are the risks posed by the ASGCC program ceasing its operation. No witness, no exhibit, and no report offered into evidence denied ASGCC's foundational claim that we today face a "crisis" from the combined epidemics of opiate overdose and HIV/HCV transmission. It is upon this foundation that the plaintiff asserts, "ASGCC's work saves lives."

The assertion is apt. Unquestionably, it is the free needles that draw people to ASGCC's door. These aren't just any people. They are extremely vulnerable people. They are men and women, young and old, people from all places and from all stations. They are our brothers and our sisters. They are driven by a disease that has taken away their choices and left them with a need. To fill this need they require needles and syringes. They can obtain these items under reasonably relaxed conditions from ASGCC --- free of charge, clean, and supplied in ample enough quantities to reduce the necessity to share or reuse. And they get some advice, some equipment, and some training to help keep themselves and others safe. And they get a substance to help keep themselves and others alive.

ASGCC's "harm reduction" approach may not be the perfect approach. No witness has claimed that it is. However, the evidence here presented has persuaded this court that, in this place and at this time, it is an effective approach. It "saves lives." Failing to grant ASGCC's requested injunctive relief would quite clearly place lives in jeopardy.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Plaintiff's Motion for a Preliminary Injunction be **ALLOWED** in that:

1.) The defendants, their agents, and employees are preliminarily enjoined and restrained from enforcing the Town of Barnstable's cease and desist orders, issued against the plaintiff and dated September 22, 2105 and September 23, 2015, and from otherwise prohibiting, restricting and interfering with the possession, distribution and exchange of hypodermic needles and syringes at the plaintiff's place of business at 428 South Street, Hyannis, Massachusetts;

2.) On at least one occasion every thirty (30) days, a representative of ASCGG and a representative of the Town shall have a face-to-face meeting to discuss issues of mutual concern relating to the ASCGG's possession, distribution and exchange of hypodermic needles and syringes within the town of Barnstable, the topics of said meetings to include at a minimum:

   a. Ways in which the parties may combine or coordinate efforts to reduce instances of unprotected and public discard of used injection materials;

   b. Ways in which the parties may coordinate efforts to reduce the risk of needle stick injury, including public education;

   c. The feasibility of developing a set of metrics to measure the strengths and weaknesses of the working hypothesis known as "harm reduction."

Raymond P. Veary, Jr.
Justice of the Superior Court

Dated: December 1, 2015

A true copy, Attest: Scott W. Nickerson

Clerk

of Motor Vehicles. John Shaffer, 28 New Eng. L.Rev. 1071 (1994).

Personal search incident to custodial arrests for traffic violations: Supreme Court, 1973 term. (1974) 88 Harv.L.Rev. 181.

White investment in black bondage. Geiza Vargas-Vargas, 27 W. New Eng. L. Rev. 41 (2005).

United States Supreme Court

Motor vehicles, searches and seizures, vehicle stops at highway checkpoints, drug interdiction programs, see City of Indianapolis v. Edmond, 2000, 121 S.Ct. 447.

§ 1. Definitions

As used in this chapter, the following words shall, unless the context clearly requires otherwise, have the following meanings:

"Administer", the direct application of a controlled substance whether by injection, inhalation, ingestion, or any other means to the body of a patient or research subject by—

(a) a practitioner, or

(b) a nurse at the direction of a practitioner in the course of his professional practice, or

(c) an ultimate user or research subject at the direction of a practitioner in the course of his professional practice.

"Agent", an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser; except that such term does not include a common or contract carrier, public warehouseman, or employee of the carrier or warehouseman, when acting in the usual and lawful course of the carrier's or warehouseman's business.

"Bureau", the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice, or its successor agency.

"Class", the lists of controlled substances for the purpose of determining the severity of criminal offenses under this chapter.

"Commissioner", the commissioner of public health.

"Controlled substance", a drug, substance, or immediate precursor in any schedule or class referred to in this chapter.

"Counterfeit substance", a substance which is represented to be a particular controlled drug or substance, but which is in fact not that drug or substance.

"Deliver", to transfer, whether by actual or constructive transfer, a controlled substance from one person to another, whether or not there is an agency relationship.

"Department", the department of public health.

"Depressant or stimulant substance",

(a) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid; or any derivative of barbituric acid which the United States Secretary of Health, Education, and Welfare has by regulation designated as habit forming; or

(b) a drug which contains any quantity of amphetamine or any of its optical isomers; any salt of amphetamine or any salt of an optical isomer of amphetamine; or any substance which the United States Attorney General has by regulation designated as habit forming because of its stimulant effect on the central nervous system; or

(c) lysergic acid diethylamide; or

(d) any drug except marihuana which contains any quantity of a substance which the United States Attorney General has by regulation designated as having a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

"Dispense", to deliver a controlled substance to an ultimate user or research subject or to the agent of an ultimate user or research subject by a practitioner or pursuant to the order of a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary for such delivery.

"Distribute", to deliver other than by administering or dispensing a controlled substance.

"Drug",

(a) substances recognized as drugs in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them;

(b) substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or animals;

(c) substances, other than food, intended to affect the structure, or any function of the body of man and animals; or

(d) substances intended for use as a component of any article specified in clauses (a), (b) or (c), exclusive of devices or their components, parts or accessories.

"Drug paraphernalia", all equipment, products, devices and materials of any kind which are primarily intended or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance in violation of this chapter. It includes, but is not limited to:

(1) kits used, primarily intended for use or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

(2) kits used, primarily intended for use or designed for use in manufacturing, compounding, converting, producing, processing or preparing controlled substances;

(3) isomerization devices used, primarily intended for use or designed for use in increasing the potency of any species of plant which is a controlled substance;

(4) testing equipment used, primarily intended for use or designed for use in identifying or in analyzing the strength, effectiveness or purity of controlled substances;

(5) scales and balances used, primarily intended for use or designed for use in weighing or measuring controlled substances;

(6) diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, primarily intended for use or designed for use in cutting controlled substances;

(7) separation gins and sifters used, primarily intended for use or designed for use in removing twigs and seeds from or in otherwise cleaning or refining marihuana;

(8) blenders, bowls, containers, spoons and mixing devices used, primarily intended for use or designed for use in compounding controlled substances;

(9) capsules, balloons, envelopes and other containers used, primarily intended for use or designed for use in packaging small quantities of controlled substances;

(10) containers and other objects used, primarily intended for use or designed for use in storing or concealing controlled substances;

(11) hypodermic syringes, needles and other objects used, primarily intended for use or designed for use in parenterally injected controlled substances into the human body;

(12) objects used, primarily intended for use or designed for use in ingesting, inhaling, or otherwise introducing marihuana, cocaine, hashish or hashish oil into the human body, such as:

(a) metal, wooden, acrylic, glass, stone, plastic or ceramic pipes, which pipes may or may not have screens, permanent screens, hashish heads or punctured metal bowls;

(b) water pipes;

(c) carburetion tubes and devices;

(d) smoking and carburetion masks;

(e) roach clips; meaning objects used to hold burning material, such as a marihuana cigarette that has become too small or too short to be held in the hand;

(f) miniature cocaine spoons and cocaine vials;

(g) chamber pipes;

(h) carburetor pipes;

(i) electric pipes;

(j) air-driven pipes;

(k) chillums;

(*l*) bongs;

(m) ice pipes or chillers;

(n) wired cigarette papers;

(*o*) cocaine freebase kits.

In determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(a) the proximity of the object, in time and space, to a direct violation of this chapter;

(b) the proximity of the object to controlled substances;

(c) the existence of any residue of controlled substances on the object;

(d) instructions, oral or written, provided with the object concerning its use;

(e) descriptive materials accompanying the object which explain or depict its use;

(f) national and local advertising concerning its use;

(g) the manner in which the object is displayed for sale;

(h) whether the owner, or anyone in control of the object, is a supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(i) direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;

(j) the existence and scope of legitimate uses for the object in the community;

(k) expert testimony concerning its use.

For purposes of this definition, the phrase "primarily intended for use" shall mean the likely use which may be ascribed to an item by a reasonable person. For purposes of this definition, the phrase "designed for use" shall mean the use a reasonable person would ascribe to an item based on the design and features of said item.

"Immediate precursor", a substance which the commissioner has found to be and by rule designates as being a principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture.

"Isomer", the optical isomer, except that wherever appropriate it shall mean the optical, position or geometric isomer.

"Manufacture", the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, including any packaging or repackaging of the substance or labeling or relabeling of its container except that this term does not include the

preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging, or labeling of a controlled substance:

(a) by a practitioner as an incident to his administering a controlled substance in the course of his professional practice, or

(b) by a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching or chemical analysis and not for sale, or

(c) by a pharmacist in the course of his professional practice.

"Marihuana", all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; and resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil, or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil, or cake or the sterilized seed of the plant which is incapable of germination.

"Narcotic drug", any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(a) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate;

(b) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (a), but not including the isoquinoline alkaloids of opium;

(c) Opium poppy and poppy straw;

(d) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

"Nuclear pharmacy", a facility under the direction or supervision of a registered pharmacist which is authorized by the board of registration in pharmacy to dispense radiopharmaceutical drugs.

"Nurse", a nurse registered or licensed pursuant to the provisions of section seventy-four or seventy-four A of chapter one hundred and twelve, a graduate nurse as specified in section eighty-one of said chapter one hundred and twelve or a student nurse enrolled in a school approved by the board of registration in nursing.

"Nurse practitioner", a nurse with advanced training who is authorized to practice by the board of registration in nursing as a nurse practitioner, as provided for in section eighty B of chapter one hundred and twelve.

"Opiate", any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include, unless specifically designated as controlled under section two, the dextrorotatory isomer of 3-methoxy-n-methyl-morphinan and its salts, dextromethorphan. It does include its racemic and levorotatory forms.

"Opium poppy", the plant of the species Papaver somniferum L., except its seeds.

"Oral prescription", an oral order for medication which is dispensed to or for an ultimate user, but not including an order for medication which is dispensed for immediate administration to the ultimate user by a practitioner, registered nurse, or practical nurse.

"Person", individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity.

"Pharmacist", any pharmacist registered in the commonwealth to dispense controlled substances, and including any other person authorized to dispense controlled substances under the supervision of a pharmacist registered in the commonwealth.

"Pharmacy", a facility under the direction or supervision of a registered pharmacist which is authorized to dispense controlled substances, including but not limited to "retail drug business" as defined below.

"Physician assistant", a person who is a graduate of an approved program for the training of physician assistants who is supervised by a registered physician in accordance with sections nine C to nine H, inclusive, of chapter one hundred and twelve.

"Poppy straw", all parts, except the seeds of the opium poppy, after mowing.

"Practitioner",

(a) A physician, dentist, veterinarian, podiatrist, scientific investigator, or other person registered to distribute, dispense, conduct research with respect to, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research in the commonwealth;

(b) A pharmacy, hospital, or other institution registered to distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in the commonwealth.

(c) An optometrist authorized by sections 66 and 66B of chapter 112 and registered pursuant to paragraph (h) of section 7 to utilize and prescribe therapeutic pharmaceutical agents in the course of professional practice in the commonwealth.

"Prescription drug", any and all drugs upon which the manufacturer or distributor has, in compliance with federal law and regulations, placed the following: "Caution, Federal law prohibits dispensing without prescription".

"Production", includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

"Radiopharmaceutical drug", any drug which is radioactive as defined in the Federal Food, Drug and Cosmetic Act.

"Registrant", a person who is registered pursuant to any provision of this chapter.

"Registration", unless the context specifically indicates otherwise, such registration as is required and permitted only pursuant to the provisions of this chapter.

"Registration number", such registration number or numbers, either federal or state, that are required with respect to practitioners by appropriate administrative agencies.

"Retail drug business", a store for the transaction of "drug business" as defined in section thirty-seven of chapter one hundred and twelve.

"Schedule", the list of controlled substances established by the commissioner pursuant to the provisions of section two for purposes of administration and regulation.

"State", when applied to a part of the United States other than Massachusetts includes any state, district, commonwealth, territory, insular possession thereof, and any area subject to the legal authority of the United States of America.

"Tetrahydrocannabinol", tetrahydrocannabinol or preparations containing tetrahydrocannabinol excluding marihuana except when it has been established that the concentration of delta-9 tetrahydrocannabinol in said marihuana exceeds two and one-half per cent.

"Ultimate user", a person who lawfully possesses a controlled substance for his own use or for the use of a member of his household or for the use of a patient in a facility licensed by the department or for administering to an animal owned by him or by a member of his household.

"Written prescription", a lawful order from a practitioner for a drug or device for a specific patient that is communicated directly to a pharmacist in a licensed pharmacy; provided, however, that "written prescription" shall not include an order for medication which is dispensed for immediate administration to the ultimate user by a practitioner, registered nurse or licensed practical nurse.

Added by St.1971, c. 1071, § 1. Amended by St.1972, c. 806, §§ 1 to 6; St.1973, c. 1190, §§ 1 to 6; St.1981, c. 669, § 1; St.1983, c. 565, §§ 1, 2; St.1986, c. 97, §§ 1, 2; St.1997, c. 55, § 1; St.1998, c. 50, § 1; St.1998, c. 104, § 1.

Historical and Statutory Notes

St.1971, c. 1071, § 1, adding this chapter, consisting of this section and §§ 2 to 48, was approved Nov. 11, 1971.

St.1972, c. 806, § 1, in the definition of Class, substituted "lists" for list ".

Section 2 of St.1972, c. 806, deleted the definition of clinical research, which read:

" 'Clinical research', any systematic investigation or study carried out in connection with the good faith professional practice of medicine, dentistry, or podiatry for the alleviation of pain

Law Review and Journal Commentaries

Powers reserved to states: Validity of order form requirement under Federal Marihuana Tax Act. (1971) 5 Suffolk U.L.Rev. 696.

Library References

Controlled Substances ⇐9, 10.
Health ⇐303.
Westlaw Topic Nos. 198H, 96H.

Research References

Treatises and Practice Aids
32 Mass. Prac. Series § 465, Control of Drug Distribution.

§ 27. Instruments for administering controlled substances by injection; pilot needle exchange program

(a) No person, not being a physician, dentist, nurse or veterinarian registered under the laws of this commonwealth, or of the state where he resides, or a registered embalmer, manufacturer of or dealer in embalming supplies, pharmacist, wholesale druggist, manufacturing pharmacist, manufacturer of or dealer in surgical supplies, student engaged in an activity necessary to a course prescribed by a school of medicine, dentistry, podiatry, veterinary medicine, nursing or embalming approved under the provisions of chapter one hundred and twelve, official of any government having possession of the articles hereinafter mentioned by reason of his official duties, or a person authorized to administer a sentence of death imposed under the provisions of chapter two hundred and seventy-nine while in the performance of his lawful duties thereunder, nurse acting under the direction of a physician or dentist, employee of a hospital or other facility licensed by the department acting under the direction of its superintendent or officer in immediate charge, or a carrier or messenger engaged in the transportation of such articles, or a person who has received a prescription issued under subsection (c), or a podiatrist who has received a certificate from the board of registration in podiatry stating that upon examination by said board he has been determined to be competent to use hypodermic needles or a scientific investigator registered pursuant to the provisions of section seven, or a person licensed under subsection (e), shall have in his possession a hypodermic syringe, hypodermic needle, or any instrument adapted for the administration of controlled substances by injection.

(b) No such syringe, needle or instrument shall be delivered or sold to, or exchanged with, any person except a pharmacist, dentist, physician, veterinarian, registered embalmer, manufacturer of or dealer in embalming supplies, scientific investigator registered pursuant to the provisions of section seven, wholesale druggist, manufacturing pharmacist, manufacturer of or dealer in surgical supplies, a *student* enrolled in a course for which such possession is necessary and prescribed at an approved school of medicine, dentistry, podiatry, veterinary medicine, nursing or embalming, an official of any government agency requiring the use of such syringe, needle or instrument by reason of his

official duties, a person authorized to administer a sentence of death imposed under the provisions of chapter two hundred and seventy-nine while in the performance of his lawful duties thereunder, a nurse upon the written order of a physician or dentist, or a person who has received a written prescription issued under subsection (c), a podiatrist certified as aforesaid, or an employee of a hospital, clinic, nursing home, rest home or detoxification facility licensed by the department, or scientific institution upon the written order of its superintendent or officer in immediate charge of a person licensed under subsection (e).

(c) A physician may issue to a patient under his immediate charge a written prescription to purchase, or may issue an oral prescription to a pharmacist on behalf of said patient to purchase, from a pharmacist only, any of the instruments specified in subsection (a). Such prescription shall contain the name and address of the patient, the description of the instrument prescribed and the number of instruments prescribed. The pharmacist filling the prescription shall *record upon the face of said prescription, over the signature* of the pharmacist making the sale, the date of such sale. Such prescription may be renewed or refilled for one year unless the physician indicates otherwise on the prescription, and each refilling shall be noted upon the prescription. No prescription for such instruments shall be refilled after one year from date of issue. The pharmacist filling the prescription shall dispense any such instrument in a sanitary container which shall completely enclose such instrument, and shall affix to said container a label bearing (1) the name and address of the pharmacy, and if said pharmacy is in a hospital, the name and address of said hospital, (2) the name and address of the patient, (3) the file number of the prescription, and (4) the name of the physician prescribing the same. The person to whom the prescription is issued shall keep such instrument in said container at all times, except when such instrument is in actual use or is in the process of being cleaned.

(d) A record shall be kept by the person selling such syringes, needles or instruments, which shall give the date of the sale, the name and address of the purchaser and a description of the instrument. This record shall be open to inspection pursuant to a judicial warrant or to the provisions of section thirty.

(e) No person except a manufacturer of or dealer in surgical supplies, a manufacturer of or dealer in embalming supplies, a pharmacist or wholesale druggist, which pharmacist or wholesale druggist is licensed under the provisions of chapter one hundred and twelve, shall sell, offer for sale, deliver, or have in possession with intent to sell hypodermic syringes, hypodermic needles or any instrument adapted for the administration of controlled substances by injection, unless licensed so to do by the department. Such license shall be valid for a period of one year. The fee for such license shall be determined annually by the commissioner of administration under the provision of section three B of chapter seven. A license issued to a company or corporation which has more than one branch or department shall include any and all branches and departments or sections of said company or corporation.

No person except a person listed in subsections (b) or (c) shall obtain, receive or purchase a hypodermic syringe, hypodermic needle or any instrument adapted for the administration of controlled substances by injection, unless licensed so to do by the department, or by a local board of health. A license to obtain, receive or purchase any such instrument, which license shall be valid throughout the commonwealth, may be obtained from the department upon payment of a fee as determined annually by the commissioner of administration under the provision of section three B of chapter seven, and a license to obtain, receive or purchase any such instrument, which license shall be valid only in a particular city or town of the commonwealth, may be obtained from the local board of health upon payment of a fee of fifty cents. Said license shall be valid for one year.

(f) Notwithstanding any general or special law to the contrary, needles and syringes may be distributed or possessed *as part of a pilot* program approved by the department of public health in accordance with section two hundred and fifteen of chapter one hundred and eleven and any such distribution or exchange of said needles or syringes shall not be a crime.

The department of public health shall ensure that individuals participating in a pilot needle exchange program will be encouraged to seek and will be placed in contact with substance abuse treatment and health care.

Added by St.1971, c. 1071, § 1. Amended by St.1972, c. 806, § 20; St.1973, c. 1190, §§ 15 to 17; St.1980, c. 572, §§ 83, 84; St.1982, c. 554, §§ 1, 2; St.1993, c. 110, § 142; St.1993, c. 224, § 2.

Historical and Statutory Notes

St.1972, c. 806, § 20, in subsec. (c), in the third sentence, substituted "face" for "fact".

St.1972, c. 806, was approved July 19, 1972. Emergency declaration by the Governor was filed July 20, 1972.

St.1973, c. 1190, § 15, approved Dec. 11, 1973, in subsec. (a), inserted ", student engaged in an activity necessary to a course prescribed by a school of medicine, dentistry, podiatry, veterinary medicine, nursing or embalming approved under the provisions of chapter one hundred and twelve" and "or other facility licensed by the department".

Section 16 of St.1973, c. 1190, in subsec. (b), inserted ", a student enrolled in a course for which such possession is necessary and prescribed at an approved school of medicine, dentistry, podiatry, veterinary medicine, nursing or embalming" and ", clinic, nursing home, rest home or detoxification facility licensed by the department,".

Section 17 of St.1973, c. 1190, in subsec. (e), in the first paragraph, in the first sentence, substituted "manufacturer of or dealer in surgical supplies, a manufacturer of or dealer in embalming supplies, a pharmacist or wholesale druggist, which pharmacist or wholesale druggist is licensed under the provisions of chapter one hundred and twelve" for "person registered under chapter one hundred and twelve and listed under subsection (a)".

St.1980, c. 572, § 83, in subsec. (e), in the first paragraph, in the third sentence, substituted "determined annually by the commissioner of administration under the provision of section three B of chapter seven" for "ten dollars".

Section 84 of St.1980, c. 572, in subsec. (e), in the second paragraph, in the second sentence, substituted "as determined annually by the commissioner of administration under the provision of section three B of chapter seven" for "of five dollars".

St.1980, c. 572, was approved July 16, 1980. Emergency declaration by the Governor was filed July 23, 1980.

St.1982, c. 554, § 1, approved Dec. 22, 1982, and by § 8 made effective Jan. 1, 1983, in subsec. (a), inserted ", or a person authorized to administer a sentence of death imposed under the provisions of chapter two hundred and seventy-nine while in the performance of his lawful duties thereunder".

Section 2 of St.1982, c. 554, in subsec. (b), inserted ", a person authorized to administer a sentence of death imposed under the provisions

of chapter two hundred and seventy-nine while in the performance of his lawful duties thereunder".

Section 7 of St.1982, c. 554, provides:

"If any of the provisions of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provisions or applications, and to this end the provisions of this act are declared severable."

St.1993, c. 110, § 142, approved July 19, 1993, and by § 390 made effective as of July 1, 1993, added subsec. (f).

St.1993, c. 224, § 2, approved Nov. 8, 1993, in subsec. (a), deleted "written" preceding "prescription issued under subsection (c)"; and, in subsec. (c), in the first sentence, inserted ", or may issue an oral prescription to a pharmacist on behalf of said patient to purchase".

Prior Laws:

St.1917, c. 275, § 15.
St.1919, c. 350, § 96.
St.1922, c. 535, § 1.
St.1924, c. 239, §§ 1, 2.
G.L.1932 (Ter.Ed.) c. 94, §§ 209, 209A.
St.1945, c. 509.
St.1954, c. 226, §§ 1, 2.
G.L. c. 94, § 211, as added by St.1957, c. 660, § 1.
St.1958, c. 276.
St.1959, c. 248.
St.1961, c. 345, §§ 4 to 6.
St.1970, c. 443, §§ 12 to 14.

Cross References

Penalties for violation of this section, see c. 94C, § 38.

Library References

Controlled Substances ⇐9, 10.
Health ⇐303.
Westlaw Topic Nos. 198H, 96H.

Research References

Treatises and Practice Aids

32 Mass. Prac. Series § 470, Unlawful Possession and Sale of Instruments.
14A Mass. Prac. Series § 9.318, Possession or Sale of Hypodermic Instruments.
17B Mass. Prac. Series § 53.31, Drugs -- Possession, Distribution, Manufacture.
30A Mass. Prac. Series § 1443, Statutory Burden If Relying on License.

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1. Validity

Provisions of death penalty statute (St.1982, c. 554, § 1 et seq., amending this section and c. 265, § 2, c. 279, § 4, and enacting c. 279, § 57 et seq.), impermissibly burden state constitutional rights against self-incrimination and right to jury trial, in that the death penalty may be imposed, if at all, only after trial by jury and thus, defendants are discouraged from asserting their right not to plead guilty and their right to demand trial by jury; however, provisions of the statute which do not relate to the death penalty are severable and are not invalid. Com. v. Colon-Cruz (1984) 470 N.E.2d 116, 393 Mass. 150. Jury ⇐ 31.3(1); Statutes ⇐ 64(6); Witnesses ⇐ 297(1)

2. In general

Defendant was entitled to possess hypodermic needles in municipality that did not have needle-exchange program for drug users, where she was a participant in another municipality's needle-exchange program. Com. v. Landry (2002) 779 N.E.2d 638, 438 Mass. 206. Controlled Substances ⇐ 49

3. Search and seizure

Suspect's possession of hypodermic needles did not furnish probable cause for arrest, where suspect carried facially valid card identifying her as a participant in Commonwealth needle-exchange program for drug users. Com. v. Landry (2002) 779 N.E.2d 638, 438 Mass. 206. Arrest ⇐ 63.4(16)

Motion to suppress heroin and drug paraphernalia, which were in plain view during per-