DRUG POLICY ALLIANCE

**New York State Joint Legislative Budget Hearing on Mental Hygiene**
**February 13, 2024**

## Testimony submitted to the Joint Legislative Budget Hearing on Mental Hygiene by the Drug Policy Alliance

The Drug Policy Alliance (DPA) appreciates the opportunity to submit testimony to the Joint Legislative Budget Hearing on Mental Hygiene. DPA is the leading organization in the U.S. promoting alternatives to the War on Drugs. We envision a just society in which the use and regulation of drugs are grounded in science, compassion, health, and human rights; in which people are no longer punished for what they put into their own bodies; and in which the fears, prejudices, and punitive prohibitions of today are no more.

According to preliminary data reported to the Centers for Disease Control and Prevention, over 6,500 of New Yorkers died from a preventable overdose in 2022 alone – the highest recorded deaths in New York State history. There are many factors leading to this sharp rise but the most concerning trend that we are seeing is the changing response to drug use from a public health concern to a criminal legal system concern.

Historically, it has been found that increased penalties and criminalization have not reduced the distribution of fentanyl and other synthetic substances, nor does it prevent overdoses. In fact, increased penalties and criminalization are not just ineffective, they are actively harmful while also undermining current efforts to address the opioid overdose crisis and disproportionately harming communities of color. For nearly a decade, DPA has been working toward comprehensive responses to drug use and the everchanging drug supply that are rooted in evidence-based public health responses rather than the criminal legal system. We cannot be more clear when we say that to reverse rising overdose death rates and actually end the overdose crisis – a public health response is needed.

DPA commends the work being done by the Opioid Settlement Fund Advisory Board, echoing and supporting the recommendations that they have made, and urges the Legislature to do the same. The testimony herein will focus on areas of concern in the Executive Budget proposal including the addition of fentanyl analogs and depressants including xylazine. Adding substances to the New York State Controlled Substances list will only serve to further exacerbate the overdose concerns it purports to solve while threatening to send New York backwards in the state's drug policy. In light of that and the relevant research that supports this position, the Drug Policy Alliance strongly **opposes Part U of the Health and Mental Hygiene Article 7 legislation.**

### Scheduling Substances Accelerates Changes to the Drug Supply and Amplifies Overdose Risk

The scheduling of fentanyl related substances is often done with the belief that by criminalizing different variations of fentanyl there will be less overdose deaths. There is no evidence that criminalizing substances reduces fatal overdoses but there is plenty of scholarship on how drug prohibition created the fentanyl crisis.[1] Yet as the policy responses have focused on the criminalization of fentanyl and its related substances, deaths have skyrocketed.[2] Rather than eliminating the harms of the adulterated drug supply, data reflects that the criminalization of adulterants including fentanyl analogs results in the introduction of further adulterants. When new and unstable adulterants are added into the drug supply

to fill the "void" created by scheduling new substances, we see another wave of the overdose crisis, this time in which multiple substances contribute to overdose deaths, in addition to other harmful symptomology.

Alex Krotulski, PhD serves as Associate Director of Toxicology and Chemistry at The Center for Forensic Science Research & Education and Program Manager for NPS Discovery, which is an open-access drug early warning system operating in the United States. In 2023 he gave a presentation that underscored the above referenced trend. In an analysis about how federal drug scheduling impacts the drug supply, his data presented a correlation between when a substance was added to the federal schedule and the emergence of a new substance into the supply shortly after.[3]

However, we need not take only his word for it. In fact, the Drug Enforcement Administration's own scheduling announcements paint a similar picture. For example, in February 2018, the federal government's announcement of temporary placement of fentanyl analogs in Schedule I, provided the following justification:

> DEA has responded to this crisis by issuing eight temporary scheduling orders to control seventeen substances structurally related to fentanyl since 2015. However, this approach has not been completely effective in preventing the emergence of new substances structurally related to fentanyl. This is because when DEA temporarily controls a given substance structurally related to fentanyl, illicit manufacturers located abroad begin producing new such substances through other structural modifications.[4]

Since 2018, nationwide overdose deaths increased from 68,000 to nearly 110,000 annually. Fentanyl continues to dominate the drug supply; however, new non-fentanyl substances are becoming more present. In October 2023, the following explanation was included in the federal announcement to temporarily place two synthetic opioids in Schedule I.

> Following the class-wide scheduling of fentanyl-related substances, there has been an increase in the emergence of synthetic opioids that are not structurally related to fentanyl. Beginning in 2019, a new class of synthetic opioids known as benzimidazole-opioids, commonly referred to as "nitazenes," emerged on the recreational drug market.[5]

## Scheduling Substances Does Not Reduce Drug Supply or Demand

Creating a destabilized drug supply is not the only negative consequence of scheduling substances and adding criminal penalties. Substantial evidence demonstrates that criminal penalties do not have any effect on reducing either the supply of drugs or the demand for them. Studies on tough on crime policies clearly show that incarceration does not decrease the demand for drugs.[6] One study found that states that increase their incarceration rates do not experience a decrease in drug use.[7] When a drug seller is incarcerated, the supply of drugs is not reduced nor is the drug market impacted. Because the drug market is driven by demand rather than supply, research indicates that an incarcerated seller will simply be replaced by another individual to fill the market demand.[8] Moreover, rather than diminishing the harms of drug misuse, criminalizing people who sell and use drugs amplifies the risk of fatal overdoses. A 2023 study found that drug busts were associated with a 23.6% increase in opioid overdose deaths in the following weeks after the seizures.[9] The continued criminalization of substances only serves to offer up harms, including increased stigma and marginalization, racial and economic disparities in enforcement, and barriers to needed treatment, health, and harm reduction services.[10]

The penalties incurred by being on the Controlled Substances list will not reduce fentanyl, xylazine, and other synthetic drug distribution in New York. The process of adding fentanyl and other substances to drug formulations (including cutting heroin and other drugs with fentanyl) is usually done early in the

production process. According to the Drug Enforcement Administration, these substances are generally added to heroin before it enters the U.S.[11] Low-level sellers thus may not know they are distributing fentanyl. These proposals would not reduce the inclusion of fentanyl in the drug supply, as it takes place high in the distribution chain. Furthermore, Part U's proposed scheduling of xylazine as a Schedule 3 drug would put New York State's schedule at odds with the Federal Controlled Substance List, which has not put xylazine on a schedule, and would add depressants that are only temporarily scheduled at the federal level.

**Scheduling Fentanyl Analogs and Novel Substances Undermines Drug Checking Services**

In 2023, New York State launched a drug checking program in four Upstate regions - Central New York, Southern Tier, Mohawk Valley, and the Capital Region - on top of 5 existing drug checking programs across New York City. Distinct from the more broadly accessible fentanyl or xylazine testing strips – which only confirm if a sample is positive or negative for these substances – drug checking technology offers granular level information on the various substances that may be present in a sample – down to the percentage. With this information, technicians can provide consumers with education and resources to use more safely. The availability and accessibility of this technology is a crucial component in the state's public health solutions to the overdose crisis.

However, to be most effective, community members need to trust that knowing what is in their drugs will not be used to criminalize them. Scheduling additional substances is wholly at odds and incompatible with the State's drug checking programs. The expansion of drug checking services should be paired with thorough research and descheduling of substances to ensure our public health investments are not undermined by fear of criminalization.

For example, New York's Good Samaritan law encourages people to contact emergency services in case of an overdose.[12] The threat of police involvement and over a decade in prison may make an individual hesitant to call emergency services or run from the scene rather than help the victim. The history of the Good Samaritan law provides us with a guide to why we should be rooted in harm reduction. Passed in 2011, it was championed in the Senate by Republican Senator John DeFrancisco. As Senator DeFrancisco said in his statement on the bill's signing, "fear of prosecution has become an obstacle in seeking medical care for someone suffering from a drug or alcohol overdose."[13]

Furthermore, under New York law, the act of sharing substances – which is common practice with those who use drugs – is considered sale. As drug checking machines come online, individuals – especially those who may share substances with others – may avoid utilizing these crucial services for fear that knowing what is in their substance will enhance the potential for criminal penalties. Criminalizing substances is wholly at odds and incompatible with the State's harm reduction plan to provide drug testing services and is likely to undermine the health-based work New York is doing to prevent overdose deaths. Harm reduction education about the drug supply does not rely on scheduling classifications to inform people about the effect substances may have in the body. Rather, this education relies on a feedback loop between service providers and consumers to ascertain from consumers whether the result of a drug sample analysis is consistent with what they expected in the supply and whether the supply is producing unintended effects. With this information, drug checking technicians report that when consumers know what's in their supply, they do take measures to reduce their exposure to the substances that produce undesired effects or harms. This information, gathered because of the trusting relationships between service providers and consumers, is critical to our understanding of the supply and its impact on consumers, and is key to informing our policy responses.

## Scheduling Fentanyl Analogs, Xylazine, and Novel Substances Hinders Lifesaving Research

Some of the most important medications developed to reduce overdose deaths are the result of research on opioid derivatives. Broad scheduling criminalizes substances that hold lifesaving potential by inhibiting the kind of research that has developed medications to respond to the current overdose crisis. For example, naloxone, commonly sold under the brand name Narcan, has become one of New York State's most widely used tools to prevent overdose deaths. Naloxone is specifically exempted from New York's Schedule II because although it has some shared properties of substances on Schedule II, it acts as an opioid antagonist, which counteracts the effects of opioids. Naltrexone, a medication used to curb alcohol and opioid withdrawal and cravings, is likewise exempted from New York's Schedule II. In a May 2023 letter to Congress, a collective of scientists and researchers urged against broad scheduling because it prevents most researchers from studying substances. Regarding fentanyl analogs they wrote, "… there is evidence that [fentanyl related substances] may hold the key to better life-saving treatments for fentanyl abuse and overdose. However, research on Schedule 1 substances is prohibitively difficult for most researchers. Placing substances into Schedule 1 has the effect of severely limiting further research and development, which in this case could preclude the development of life-saving therapies."

For this same reason, in response to efforts at the federal level to schedule xylazine, in December 2023 public health officials, scientists, and researchers urged Congress not to schedule xylazine and instead prioritize funding for research and harm reduction.[14] Specifically, they outlined three concerns related to scientific research and medical practice:

> First, large states that have scheduled xylazine have seen increases in drug overdose deaths. Placing xylazine in Schedule III is not effective in preventing overdose deaths. Second, we are on the precipice of scientific discoveries to medically address skin wounds and overdose related to xylazine. Placing xylazine in Schedule III would have an immediate chilling effect in our ability to find biomedical solutions. Third, placing xylazine in Schedule III would have massive disruptive impacts on medical practice.

As New York works to reverse the growing tide of overdose deaths, our policy decisions must be rooted in strategies proven to reduce overdose deaths. Data from states that have scheduled xylazine underscores that scheduling is not working to reduce overdose deaths. In 2018, Florida scheduled xylazine. By 2021, the number of overdoses in the state had nearly doubled, from 3,727 to 6,442.

There are urgent questions still to be answered about how to best respond to overdoses where xylazine is involved. New York's investment in making naloxone widely available is important, yet it is still unclear how effective naloxone is in reversing xylazine-involved overdoses. Research may be key to informing the most effective formularies and dosing.

We need more research into xylazine, not criminalization. Scheduling xylazine will limit research and slow our overdose response strategies while overdose deaths climb.

## Following the Federal Schedule is not Grounded in Evidence-Based Health Responses

There are numerous ways substances are added to the federal schedule, some of which are not guided by science and research. While some substances on the federal schedule have been added by administrative process following researching and testing, others – like many fentanyl analogs – are on the schedule as a result of legislative action that subverts the research and testing process.

The relative potency of fentanyl and fentanyl analogs varies widely: some analogs, like acetyl fentanyl, are less potent than fentanyl; others, like carfentanil, are many times more potent. Scientific research has identified specific substances, like benzylfentanyl, that are believed to be essentially biologically inactive and have little to no pharmacological potential for abuse but meet the criteria for broad scheduling of fentanyl analogs. Criminalizing substances based solely on their molecular structure does not support evidence-based approaches to reducing harm to consumers and often slows or stops lifesaving discoveries.

In addition to broad scheduling through legislation, other substances, such as benzodiazepines, are added to the schedule on a temporary basis, pending research and medical evaluation. Part U of the Health and Mental Hygiene Article 7 legislation proposes to add to Schedule I five benzodiazepines that are temporarily placed on the federal schedule. Following the federal schedule is not grounded in evidence-based research and permanently scheduling substances that even the federal government has yet to make a final ruling on is the wrong direction for New York.

## Scheduling Substances Perpetuates Failed War on Drugs Logic

Amid continued fractures in our health care and housing systems that are contributing to the visibility of unaddressed health needs, there is pressure to revert to the failed policies that catalyzed mass incarceration and skyrocketing overdose deaths. The State has an important role to play in fully committing to health-based interventions while continuing to undo drug war policies. Recent reporting makes clear that there are vast gaps in access to treatment for substance use disorder across the state, and specifically in Upstate regions.[15] State-led efforts to increase access to medication-assisted treatment – the gold standard for treating opioid use disorder – seek to narrow these access gaps. These efforts must be matched by a commitment to continue undoing the criminalization and stigma that create barriers to care. This is particularly necessary in the face of local resistance to the placement of treatment clinics,[16] public villainizing of people who use drugs, such as Rensselaer County's passage of a potentially unlawful public registry[17] of people with drug selling convictions, and the nearly 25 percent increase in New York City drug arrests in 2023. Approximately 90 percent of people currently incarcerated in New York prisons on a drug-related conviction were convicted of drug possession or low-level sales.[18]

There is ample evidence indicating that relying on law enforcement intervention is detrimental to those who use drugs or witness a drug overdose. Those who favor the use and proliferation of drug-induced homicide measures and severe sentencing for drug sellers contend that the threat of harsh sentencing will deter drug use, drug selling, and prevent fatal overdose. This logic is fundamentally false, and decades of ineffectual drug war policies provide evidence to refute the notion. Arresting and detaining a person for selling, or giving, a small amount of drugs to another person does nothing to interrupt the availability of opioids or any other illegal substance. While these statutes do nothing to decrease use, they do increase drug-war-fueled racial disparities in the criminal justice system. There is abundant research showing that racial bias influences prosecutors' decision-making, and there is no reason to believe that this will not be evident in the enforcement of drug-induced homicide laws.

The real effect of further criminalization is to inevitably punish and further stigmatize individuals who use drugs while also placing these very people within a criminal legal system that is not designed to provide treatment. In fact, convictions can serve as an additional barrier to those who are attempting to move on with their life or those who want to focus on treatment and recovery. Furthermore, the imposition of harsh penalties – especially for sale – only exacerbates issues for people who use drugs and may suffer from the disease of addiction. Individuals who sell or distribute substances often do so to support their own substance use disorder.

A preponderance of evidence demonstrates that criminalization disproportionately harms people from low-income and disinvested communities, which overwhelmingly comprise Black and Brown people. By continuing with a 'tough-on-crime' approach, Black and Brown communities will experience the consequences most harshly. In fact, one recent study of federal charges revealed that 75% of all individuals sentenced for fentanyl trafficking were people of color.[19] In this way, despite recent rhetoric about a "gentler" approach to substance use, increasing penalties on fentanyl and other synthetic substances is akin to the devastating crack vs. powder cocaine disparities of the past, which will only further increase racial disparities in arrest. Moreover, the continued criminalization of drugs keeps people trapped in a recurrent cycle that increases painful experiences that are often self-medicated with substance use. Instead of helping end drug use, criminalization impacts communities twofold.

In stark contrast to criminalization, empirical evidence from the US and around the world suggests that eliminating criminal penalties would not significantly change rates of drug use.[20] In Baltimore, a no-prosecution policy for minor drug possession led to fewer 911 calls, fewer arrests, and almost no rearrests for people whose charges were dropped due to the policy.[21] Portugal decriminalized drug possession in 2001, and more than two decades later, drug use has remained about the same – but arrests, incarceration, disease, overdose and other harms are all down.[22] Other countries that have decriminalized all or some drugs have not experienced significant increases in non-drug crimes and some have even seen reductions in theft and other offenses. Aggressive policing may in fact lead to more crime because policing diverts resources away from combatting more serious crime.

The steady work to undo the harms of drug war policies is seen in data and felt in the lives of countless New Yorkers who are not experiencing the harms of criminalization. Over the past two decades, hard-fought reforms to New York's criminal legal system have been spurred by the evidence that arrest and incarceration are not solutions to poverty, health care needs, and fractures in our social services systems. These monumental reforms have aimed to repair and undo the harms caused both by mass incarceration and the drug war, and have seen the prison population steadily decline. We cannot go backwards – as was established in 2009 when the draconian Rockefeller Drug Laws were dismantled, criminalization is not a solution to drug use.

While there is still progress we must make in further dismantling punitive drug policies, we must stay the course. Now is the time to continue investing in a health-based infrastructure to provide the care and resources that sustain healthy and stable communities.

## Instead of criminalization, the Legislature can help save lives by:

**Decriminalizing medication for opioid use disorder (S.699/A.612):** Medication for opioid use disorder (buprenorphine and methadone) is considered the gold standard for opioid use disorder treatment. Medication-assisted treatment increases patients' retention in treatment, improves social functioning, reduces the risks of transmission of hepatitis C and HIV, reduces engagement in the criminal-legal system, and reduces overdose deaths. Unfortunately, because of stigma, structural racism and economic disparities, people living with opioid use disorder experience significant barriers to accessing prescribed buprenorphine. Further, because buprenorphine is a Schedule III drug, it is illegal to use without a prescription and those found in possession of diverted buprenorphine or suspected of selling diverted prescriptions are at risk of arrest.

S699/A612[23] will remove buprenorphine from the New York State Schedule of Controlled Substances, a critical step in expanding access to life-saving treatment in New York State in the midst of a catastrophic

overdose crisis. Decriminalizing buprenorphine possession is a public health strategy to reduce overdose deaths, enroll more New Yorkers in treatment, reduce stigma, and keep communities safe.

**Protecting Drug Checking Services (S.4880/A.7487):** State legislation to protect drug checking services, would extend legal immunity to all parties involved in the drug checking infrastructure. This includes participants who would test their samples, technicians who operate the drug checking machines, and the organization who hosts the drug checking services.

This bill also protects the anonymity of participants, and results of any drug checking cannot be entered as evidence in any civil, criminal, or administrative proceedings.

This legislation takes an important step in separating the criminal-legal system from an essential public health tool, making it clear to New Yorkers that our state's drug checking program is about care, not criminalization.

**Expanding overdose prevention centers (S.399/A.338):** Overdose prevention centers (OPCs) are monitored health care settings where people can more safely use pre-obtained drugs under clinical supervision and receive health care, counseling, and referrals to health and social services, including drug treatment. OPCs prevent fatal overdoses especially for high-risk populations, like street homeless individuals, and they foster stigma-free spaces for engaging a population that has traditionally been unlikely to participate in formal health care services.

Beyond the health benefits, overdose prevention centers also encourage public safety without reliance on policing and criminalization. Research shows that overdose prevention centers reduce public drug use, syringe litter, and drug-related crime in surrounding neighborhoods. According to OnPoint NYC – the harm reduction organization that runs New York's first OPCs – in the month prior to opening their OPCs, the NYC Parks Department collected 13,000 syringes from Highbridge Park, across the street from their Upper Manhattan location. In the month after the OPCs opened, the number of syringes collected from the park dropped to just 1,000.

Fewer syringes on the street, in parks, and in other public places means a safer environment for our kids to play in, and for sanitation and parks department employees to work in. Less public drug use means a more comfortable, safe, and predictable environment for everyone, drug-users and non-drug users alike.

We urge the Legislature to act on this as soon as possible as overdoses have risen to a point beyond a crisis and have become a real emergency. A New York Times report found that "drug overdoses now account for between 80 and 85 percent" of all accidental deaths New York City.[24] Because fentanyl overdoses occur in a matter of minutes (as opposed to hours for a heroin overdose), this number is likely to rise.

With the amount of fentanyl in the drug supply, the best way to truly care for people who use drugs is to provide them with a safe place to do so, where a person is nearby to immediately administer oxygen, naloxone and other services in the event of an overdose – this must be included in this year's budget to save lives.

The facts speak for themselves – as overdoses are raging across New York, OnPoint NYC has successfully intervened in the more than 1,300 overdoses in the two years the centers have been open.[25] It's clear – OPCs work, and they're a needed intervention as overdose numbers increase across New York City and New York State as a whole.

The State has the authority and the resources to expand OPCs. In accordance with the recommendations of the Opioid Settlement Fund Advisory Board, a portion of these dedicated funds should be allocated toward OPCs.

In conjunction with funding allocation, the Safer Consumption Services Act (SCSA) allows the New York State Department of Health to authorize and fund community-based organizations to operate OPCs. OPCs would be regulated by the New York State Department of Health identically to Syringe Service Programs. SCSA would dramatically shift the tide in the overdose crisis in New York State.

**The Drug Policy Alliance urges the Legislature and Executive to reject Part U of the Health and Mental Hygiene Article VII Budget, which calls for additional scheduling and penalties for xylazine, fentanyl analogs, and other novel substances.**

**New York can save lives and continue being on the forefront of effective overdose prevention by choosing smarter public health and evidence-based approaches.**

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