



Supervised Injection Facilities: Legal Considerations for New York

What is a SIF?

A supervised injection facility (SIF)¹ is a place where people who inject drugs can self-administer pre-obtained drugs under the supervision of healthcare professionals or other staff. Facility staff members do not directly assist in injection but are present to provide sterile injection supplies, answer questions on safer injection practices, monitor for potential overdose, administer first aid if needed, and link people to healthcare and social services, such as housing, addiction treatment, and mental health support.

As many of the harms associated with injection drug use, including overdose and transmission of diseases such as HIV/AIDS and hepatitis C, stem from scarcity of sterile injection equipment and fear of criminal sanction, SIFs are designed to create safer spaces that reduce these risks. Strong evidence has demonstrated that supervision of injection dramatically reduces the risk of fatal overdose; providing sterile equipment and an unhurried, indoor place to inject reduces the risks of disease transmission from injecting in an unclean or unsecure environment; indoor injection reduces disorder associated with public injecting and discarded needles in communities; and creating supportive environments for interaction with healthcare professionals and peers offers opportunities for “hard to reach” populations of people who inject drugs to access services, including drug treatment.

SIFs are not a new intervention. In fact, SIFs have been operating in Europe since the 1980s and in Canada since 2003. By mid-2015, at least 66 cities worldwide had established 98 SIFs as a means to reduce the harms of injection drug use, with an additional 4 sites recently approved in France. The overwhelming conclusion supported by available evidence demonstrates that SIFs have consistently led to less risky injection behavior and fewer overdose deaths among clients, increased client enrollment in drug treatment services, reduced nuisances associated with public injection, such as discarded needles and public intoxication, and have saved public resources.²

How Could a SIF be Legally Established in NY?

Despite the current lack of SIFs in the United States, all states and some municipalities have the authority to sanction the operation of SIFs. In fact, there are currently no laws in the U.S. that either explicitly authorize or forbid a SIF. The authority of the state to legislate in this arena stems from the government’s duty to protect and preserve the welfare of their citizens, including

¹ SIFs are also known as “drug consumption rooms” or “safe injection sites” in various settings.

² See generally Jo Kimber *et al.*, Nat’l Drug & Alcohol Research Ctr. Univ. of N.S.W., *International Survey of Supervised Injecting Centres (1999–2000)* (2001); Jo Kimber *et al.*, *Drug Consumption Facilities: An Update Since 2000*, 22 *Drug & Alcohol Rev.* 227 (2003); Thomas Kerr *et al.*, Editorial, *Drug Use Settings: An Emerging Focus for Research and Intervention*, 18 *Int’l J. Drug Pol’y* 1 (2007); Dan Small, Commentary, *Fools Rush in Where Angels Fear to Tread: Playing God with Vancouver’s Supervised Injection Facility in the Political Borderland*, 18 *Int’l J. Drug Pol’y* 18, 24 (2007); Dagmar Hedrich, European Monitoring Center for Drugs and Drug Addiction, *European Report on Drug Consumption Rooms* 19 (2004), available at www.emcdda.europa.eu/index.cfm?fuseaction=public.AttachmentDownload&nNodeID=2944&slanguageISO=EN.

providing reasonable public health interventions to address the host of problems associated with injection drug use.³ The legal authority to fulfill this duty, called the “police power,” has been recognized as a basic attribute of the state since the founding of the nation.⁴⁻⁵

While a SIF could be implemented in New York through legislation at either the state or municipal level, legislation at the state level could be advantageous in that it removes uncertainty about the legality of the SIF in light of other state laws and legitimizes the operation in the eyes of subordinate government agencies, decreasing the chance that local police or prosecutors will feel compelled to act formally or informally against the SIF.

Although perhaps advantageous to do so, there is nothing that requires state authorization and, should a New York municipality wish to authorize a SIF, there is no legal barrier to the municipality doing so. It is important to understand, however, that state or federal government could challenge a municipality’s exercise of this authority and/or the actual implementation of a locally authorized SIF, subjects that are dealt with further below.

Possible courses (not mutually exclusive) for establishing a SIF include:

1. The New York State Legislature could enact a state law that explicitly authorizes a particular SIF or SIFs generally in New York State. This course creates the greatest degree of certainty and direction as to legislative intent.
2. An administrative action by the executive branch of the state could authorize a SIF in New York. Health agencies in all states, including New York, have rule-making authority to protect public health.⁶ Similarly, executive power generally extends to authorizing activities that do not conflict with existing law, although executive authority to alter controlled substances rules is generally narrow, so it might be challenged as exceeding the executive’s authority on these grounds.
3. A SIF could also be locally authorized by a mayor, local health commissioner, county agency, or city council. The power to enact local laws is granted by the New York State Constitution, and the scope of this power and procedures for implementing it are set out in the Municipal Home Rule Law.⁷ In New York, the police power granted by the Constitution and Home Rule has been defined as the power to regulate persons and property for the purpose of securing the public health, safety, welfare, comfort, peace, and prosperity of the municipality and its inhabitants.⁸

³ Burriss S, Anderson ED, Beletsky L, Davis CS. Federalism, Policy Learning, and Local Innovation in Public Health: The Case of the Supervised Injection Facility. *St Louis Univ Law J* 2009;53:1089-1154

⁴ See, e.g., Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* 26–27, 205, 211 (2000); *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824); *Robinson v. California*, 370 U.S. 660 (1962).

⁵ Beletsky L et. al. (2008). The Law (and Politics) of Safe Injection Facilities in the United States, *American Journal of Public Health* 98(2): 231–237.

⁶ For example, executive orders by the Commissioner to authorize needle exchange services. See NY Comp Codes R & Regs Tit 10 §80.135 (2006).

⁷ See N.Y. Const. art. IX, §§ 2(b)(1), 2(c), 3(d)(1); N.Y. Mun. Home Rule Law § 10.

⁸ In fact, the first syringe exchange programs in New York were established through public health emergency waivers by the Health Commissioner. See:

<https://www.health.ny.gov/diseases/aids/providers/workgroups/aac/docs/syringeaccess.pdf>

What Are the Legal Risks?

Although SIFs are designed to be interventions targeted at reducing the personal and public health risks and costs of injection drug use, they can carry some legal risks for SIF clients, staff/operators, owners, funders, and government. These risks, though, must be weighed against the many public health and safety benefits of establishing a SIF. For the most part, the legal risks associated with a SIF revolve around the possession and consumption of controlled drugs within the facility. As syringe exchange programs (SEPs) were established within the US, similar risks were mitigated and legal hurdles minimized, leading to enormous health benefits for hundreds of thousands of individuals in the country.

Risks for clients, staff, and operators related to local and state law:

1. The first potential risk that exists is the threat of civil lawsuits and attendant liability for SIF staff and operators. These risks, however, are very similar to the current risks already inherent in operating a needle exchange program. It is likely that a SIF engaged actively in overdose prevention and other health interventions with people who inject drugs actually *reduces* the civil liability faced by the operators. Barring demonstrated gross negligence, New York's civil Good Samaritan protections, for example, would shield staff from liability when intervening on behalf of a person having an overdose.⁹
2. Second, a professional licensure board could determine that the involvement of staff, such as doctors or nurses, in operating a SIF does not constitute professional practice, and consequently subject such personnel to administrative discipline. The threat of such action is likely minimal, as SIF staff would not directly assist clients in injecting, but rather provide medical care, education on injection hygiene, disease transmission, overdose prevention, and similar activities that are widely understood to be within the scope of practice of medical personnel who serve people who use drugs.
3. The third potential risk is that of criminal charges for clients, SIF staff, and operators. While New York law excludes drug residue in used syringes from criminal drug law offenses,¹⁰ a SIF would require either designation by the NY State Department of Health as a Syringe Exchange Program or some form of local emergency authorization in order to legally operate syringe exchange services. SIF staff and operators could also be subject to potential criminal charges under the federal "crack house" statute (discussed below), and New York has a criminal nuisance statute¹¹ that creates potential risk for any persons who knowingly conducts or maintains any premises where persons gather for purposes of engaging in unlawful conduct. Both of these statutes create legal risks, but there are

⁹ See N.Y. Public Health Law § 3000-a,

¹⁰ See N.Y. Penal Law § 220.03

¹¹ N.Y. Penal Law § 240.45.

also potential legal defenses that may be raised in such cases. The primary risk to clients would be from local, state, or federal law enforcement, such as through a raid of the facility and the consequential arrest of anyone in and around the facility found to be in possession of illegal drugs. Law enforcement must have probable cause in order to conduct the raid and search any individuals believed to be in possession of illegal drugs. Creating the right statutory authority for the SIF through executive or legislative action, though, would greatly reduce such risk from local law enforcement.

The impact of federal drug laws:¹²

Although states have clear legal authority to authorize SIFs, it is also clear that state authorization cannot nullify federal drug laws, and will not protect a SIF from being shut down by federal law enforcement through raids, arrests, or other legal proceedings, or threats thereof. There are at least two sections of the federal Controlled Substances Act that could be interpreted to bar a SIF. Firstly, Section 844 prohibits drug possession and so is violated by every client who appears at the SIF with drugs. Although federal law enforcement officials rarely, if ever, target simple possession by individuals, the law would allow them to do so if they wished to shut down an SIF or interfere with its operation. An analogy could be made, for example, with the history of federal police action and prosecutions against medical marijuana in a number of states.

The second provision, Section 856, is the so-called “crack house statute,” as mentioned above. This provision makes it illegal to knowingly open or maintain a place that is for the purpose of using controlled drugs. However, there are reasonable legal arguments to be made for the proposition that the law should not be read to cover a SIF, including looking at the legislative history of the law (as a response to crack cocaine and raves). It is possible to conclude that the law was never intended to interfere with a legally authorized healthcare facility such as a SIF nor to infringe on states’ authority in public health absent a clear statement from Congress to that effect. While these arguments are reasonable, litigation around such matters is typically uncertain and carries risk.

The owner of the property used as a SIF could also be subject to a potential civil forfeiture action under federal law.¹³ The property owner would be able to rely on an “innocent owner” defense only if the owner were unaware of the illegal activity (i.e., the SIF). United States District Attorney for the Northern District of California, Melinda Haag, for example, has used the federal forfeiture statute as a mechanism by which to attempt to dismantle medical marijuana dispensaries in the Bay Area. It is possible that other justice department officials like her would employ the same tactic against SIFs authorized at the state or local level.

How Could a SIF Minimize Legal Risk?

¹² This section based on Beletsky 2008.

¹³ See 21 U.S.C. § 881(a)(7).

The legal risks associated with authorizing a SIF in New York may be minimized through two means. First, municipal or state government could authorize a SIF located within an existing SEP as a natural extension of current harm reduction practice, and acknowledging that individuals who lack a safe or hygienic place to inject due to homelessness or other factors often utilize SEP bathrooms for injecting. Incorporating an authorized SIF in an existing facility holds the least political and legal risk and can be done incrementally through simple steps, creating a seamless transition from the services currently offered by these programs. Incorporating a SIF as one of the many services offered to people who use drugs in the syringe exchange facility makes “stop and frisks” from law enforcement more difficult to legally carry out, as those entering the facility could be there for any number of the myriad of services offered. Even in the case of a SIF, however, there is minimal risk for searching an individual based on probable cause merely because they entered the site.

Second, the extent to which any of the potential legal risks outlined above ever become a reality is dependent on the discretion of law enforcement officials and prosecutors. These risks could be minimized by securing the cooperation and commitment of law enforcement and prosecutors at all levels of government (municipal, state, federal) to support SIFs. Through the building of these relationships with local law enforcement and gaining their support, it is possible to create a safe environment for those visiting the SIF as well as for government and private entities engaged in the authorization or operation of a SIF. Educating local law enforcement and prosecutors about the public health benefits of SIFs is therefore crucial to keeping legal risks at bay.