



Diversion Principles

While diversion programs have the potential to further rehabilitative and de-carceral goals, there are significant risks to these programs. In some cases, diversion programs lead to “net widening”—the process in which having a diversion program *increases* the reach of the criminal-legal system, including the population arrested, the population charged, and the population funneled into expensive, exploitative, pay-for-play programs.

At the same time, some jurisdictions have adopted diversion programs that are providing free services to community members who need assistance. These programs coordinate diverse stakeholders, changing district attorney and police culture in the process. They use a model that prioritizes harm reduction and de-carceration. *These* programs, not their exploitative, pay-for-play counterparts, should be our goal.

To ensure that diversion programs help communities and reduce the carceral system, we recommend adhering to the following principles.

TIMING

- 1. Begin Early Stage.** Diversion is most effective when it occurs *before* the criminal process has kicked into gear, ideally before there is a formal arrest or charge. Programs designed in this way avoid creating an arrest record. Early stage programs also save significant resources, since they avoid the need for jail booking, attorney appointment, and early court and prosecutor case management.
- 2. Provide Noncarceral On-Ramps.** As jurisdictions develop free, high-quality diversion programs, they should simultaneously expand non-carceral avenues to care—ways that individuals *not* connected to the criminal-legal system can receive the same treatment, services, or other resources offered to program participants. Although diversion programs may serve as off-ramps from traditional arrests, prosecutions, and sentences, the ultimate goal should be eliminating *any* involvement with the criminal-legal system. You shouldn’t need to be arrested, let alone prosecuted and jailed, to receive social services.

Jurisdictions have developed different approaches to this “on-ramp” question. For example, some jurisdictions have created “Health Hubs” that provide free treatment and case management, but have no connection to the criminal system. [Other jurisdictions](#) have programs through which people can call social workers, not cops, when they see a mental health-related crisis.

PROGRAM DESIGN

- 3. Eliminate Incriminating Admissions as Preconditions for Participation.** Participants should not be required to make incriminating admissions as a precondition for starting a diversion program, as this dissuades participants from challenging onerous and unjust requirements. Mandatory admissions

change the balance of power, creating an imbalance upfront between participant and program officials. These admissions can also force individuals to surrender trial rights—or, if not, make guilt a foregone conclusion—if the participant does not complete the program and faces criminal charges.

4. **Eliminate Fees.** Diversion programs must be free to participants. Participants also should never be forced to accept conditions that they cannot afford financially, such as traveling to a testing center when they lack reliable transportation. Policymakers should consider barriers surrounding the time or travel required for program completion. Policymakers should consider ways to address these roadblocks, such as by providing childcare or transportation, and allowing participants to reschedule classes or other commitments when necessary.
5. **Tailor Program Requirements to Individual Needs.** Diversion programs must not require programming beyond what an individual needs. If an individual has no underlying needs, the appropriate “program” may be a dismissal after a certain time has elapsed. If an individual has underlying issues with mental health or substance use, the program may offer evidence-based treatment options. Even in these situations, though, the treatment plan must be the least restrictive—and intrusive—necessary, while remaining flexible if circumstances change. If drug testing or treatment is not necessary, none should be mandated. The same is true for onerous conditions like in-person reporting, searches, travel restrictions, and alcohol prohibition. In all cases, participants should have input into the plan.
6. **Select Charges Carefully.** Policymakers should maximize the number of charges that are eligible for diversion. When jurisdictions make only low-level charges available for diversion, they often end up “net widening” because these low-level charges were not being prosecuted. Crimes that are not being prosecuted—or for which, in the individual case, the evidence would not support prosecution—are *not* good candidates for diversion. If jurisdictions wish to support these individuals, they should offer voluntary services unconnected to the criminal system. Transformative de-carceral diversion programs will be focused on serious crimes that would definitely be prosecuted and, given existing evidence, would very likely yield conviction.
7. **Respect Differences between Pretrial Diversion and Probation.** Though pretrial diversion is often co-located with probation programs, policymakers must draw clear distinctions between the two: Pretrial diversion is working with individuals who have not been convicted of a crime and therefore have a fundamental interest in pretrial liberty.

PROCEDURAL PROTECTIONS

8. **Provide Access to Counsel.** Defendants must have access to counsel when making decisions that involve any waiver of their state, federal, or other rights, or are asked to make any incriminating admission. If offering pretrial diversion that requires waiver of rights (which is never recommended), officials must ensure participation of counsel. If letters are used to offer diversion, these letters must include contact information for a public defender.
9. **Ensure Due Process Protections.** Diversion programs often involve intrusive commitments. To ensure that participants maintain their rights and avoid unnecessary complications, policymakers should ensure that robust protections are built into the program design. For more information,

including a list of protections that should be included, please see *Due Process Protections for Diversion Programs*.

10. Offer Graduated Responses to Regressive Behavior. Participants of diversion programs are often facing many issues, meaning that setbacks are inevitable. Effective pretrial diversion programs have graduated accountability, rather than immediate termination. An expectation that someone, especially someone with mental health or addiction issues, can change immediately is unrealistic. Harm reduction is an essential aspect of program design.

COMMUNITY OVERSIGHT

11. Stakeholder Participation. Diversion programs cannot succeed in isolation. Policymakers should ensure program buy-in and continuity by formalizing agreements that bring multiple stakeholders to the table—community leaders, police, court officials, prosecutors, and subject experts in addiction, mental health, social work, psychology, and other fields. Community councils, oversight bodies comprised of community members, are an essential part of the process. These councils should remain independent of police and other criminal-legal system actors, meaning that they can challenge existing procedures, and jurisdictions should compensate council members for their time.

12. Transparent Selection Criteria. Diversion programs' selection criteria should be transparent, equitable, consistent, and publicly accessible. Criteria should specify which groups *must* receive diversion offers even if it allows police or prosecutors to go beyond baseline criteria. Such guidelines may help prevent racial disparities that often arise in diversion programs. Furthermore, any deviations from the standard criteria should be documented. Entry into diversion programs should ideally be automatic, rather than discretionary, whenever the eligibility requirements are met. Jurisdictions should hold quarterly meetings with the community council or oversight body, where the council can provide feedback on the data and suggest program improvements.

In addition, tools of algorithmic risk assessment should not determine eligibility. For more information on the problems associated with these tools, please see [A Shared Statement of Civil Rights Concerns](#).

13. Monitoring Procedures. Diversion programs have the capacity to help many individuals and families, but these programs also carry risks: Quality control requires independent evaluations that assess efficacy, bias, participant experiences, failure points, demographic data, and other criteria set by the local community. Policymakers should collect and publish data (including raw data) on these points, as well as metrics that measure overuse. Furthermore, policymakers should review diversion offers to ensure that charging information is accurate. For more information, including a list of data points that should be among those collected, please see *Data Collection for Diversion Programs*.

Diversion programs have the capacity to de-carcerate our jails and help people get back on their feet. But more and more, these programs are losing this mission and becoming simply another hurdle for poor communities. These principles are a step toward reversing this trend and recapturing the promise that diversion holds.