Local Mandate Fiscal Impact Estimate
Kentucky Legislative Research Commission
2015 Regular Session

Part I: Measure Information

Bill Request #: 981

Bill #: HB 213 GA

Bill Subject/Title: AN ACT relating to controlled substances and declaring an emergency.

Sponsor: Rep. Tilley

Unit of Government: X City X County X Urban-County
X Charter County X Consolidated Local X Unified Local Government

Office(s) Impacted: Local law enforcement, local jails, coroners, local substance abuse treatment programs

Requirement: X Mandatory ___ Optional

Effect on
Powers & Duties: X Modifies Existing X Adds New ___ Eliminates Existing

Part II: Purpose and Mechanics

HB 213 GA retains original provisions, but amends Section 9 which pertains to criminal immunity for overdose victims and those who seek medical assistance for overdose victims.

The following sections of HB 213 GA would have an impact on local governments and local government agencies and offices.

Section 1 amends KRS 72.026 in two ways. Coroners and medical examiners are currently required by this statute to test bodies for controlled substances. Section 1 removes the term "blood" from the statute's original language replaces it with "biological" so that a coroner is required to take a "biological sample" when testing for controlled substances. Section 1 also amends KRS 72.026 by requiring coroners, and not medical examiners, to provide notice of the death to the Commonwealth's attorney and a local law enforcement agency in the circuit where the death occurred, if the death resulted from the use of a Schedule I controlled substance. The notice shall include all information as to the types and concentrations of Schedule I drugs detected.

Section 3 amends KRS 196.288 to provide additional funding to county jails, regional jails, or

other local detention centers for the provision or contracting of substance abuse treatment programs for non-state inmates with opiate or other substance abuse disorders. Grants are provided from the Kentucky Agency for Substance Abuse Policy (KY-ASAP) programs for treatment. Section 3 requires KY-ASAP to distribute a portion of funds to community mental health centers for substance abuse treatment resources and programming. KY-ASAP is also required to provide supplemental grant funding for residential treatment services for pregnant women to address neonatal abstinence syndrome.

Section 6 amends KRS 216B.020 to exempt certain inpatient substance abuse treatment facilities and outpatient behavioral health treatment programs from Chapter 216's provisions relating to the issuance of a certificate of need.

Section 7 amends KRS 217.186 to *permit*, but not require, peace officers, firefighters, paramedics, emergency medical technicians and others to receive a naloxone prescription, possess naloxone and related equipment needed for its use, and to administer naloxone to an individual suffering from an apparent opiate-related overdose. A person or agency administering naloxone that is received pursuant to this section shall be immune from criminal and civil liability for the administration, unless personal injury results from the gross negligence or willful or wanton misconduct of the person administering the drug.

Section 9 provides that a person shall not be prosecuted for possession of a controlled substance or the possession of drug paraphernalia if that person: (a) responds to a drug overdose by seeking medical assistance from local law enforcement or other first responders or a health practitioner; (b) remains with the overdose victim until help arrives; and (c) if the evidence for such a prosecution was obtained as a result of the drug overdose and the need for medical assistance. The provisions of Section 9 shall extend to the person who suffered the drug overdose. This immunity shall not extend to the investigation and prosecution of any other crimes committed by a person who otherwise qualifies under this section.

Section 10 requires substance abuse treatment or recovery service providers that receive state funding to give priority to serving pregnant women. Such treatment centers are also forbidden from refusing service solely due to pregnancy if the provider's services are appropriate for pregnant women.

HB 213 GA also creates four new drug offenses: Peddling in a controlled substance in the first, second, and third degrees and aggravated trafficking in a controlled substance in the first degree. Each of the peddling offenses consists of the elements of certain pre-existing trafficking offenses. Specifically, HB 213 GA deletes certain portions of KRS 218A.1412, 218A.1413, and 218A.1414 (Trafficking in the 1st, 2nd, and 3rd degrees, respectively). Those deleted portions now comprise the new peddling offenses created by HB 213 GA.

Section 11 establishes the offense of "peddling in a controlled substance in the first degree." To be guilty of this, one must knowingly and unlawfully traffic in less than 4 grams of cocaine, less than 2 grams of heroin or methamphetamine, or less than 10 dosage units of a Schedule I or II controlled substance that is a narcotic drug or a controlled substance analogue. Peddling in the first degree is a Class D felony for the first offense and a Class C felony for second and subsequent offenses.

Section 14 sets forth the offense of "peddling in a controlled substance in the second degree." A person is guilty of this offense when he or she knowingly and unlawfully traffics in less than ten dosage units of a Schedule I or II controlled substance that is not a narcotic drug; or one that is specified in KRS 218A.1412 and which is not a synthetic drug, salvia, or marijuana. Also prohibited is trafficking in less than 20 dosage units of a controlled substance classified in Schedule III. Peddling in the second degree is, for first offenses, a Class D felony with a maximum sentence of three years. Second and subsequent offenses are Class D felonies, with no maximum limits.

Section 16 prohibits the offense of "peddling in a controlled substance in the third degree." The elements of this offense involve the knowing and unlawful trafficking of less than 20 dosage units of a Schedule IV or V controlled substance. This is a Class A misdemeanor for the first offense, subject to the imposition of "presumptive probation," which is defined in KRS 218A.010 (37). Second or subsequent offenses are Class D felonies with a maximum sentence of three years.

Section 13 creates the offense of "aggravated trafficking in a controlled substance in the first degree." A person is guilty of this offense when he or she knowingly and unlawfully traffics in one or more kilogram of heroin. Aggravated trafficking in the first degree is a Class B felony.

HB 213 GA also amends certain drug offense statutes. Currently, KRS 218A.1412 establishes the crime of trafficking in a controlled substance in the first degree and provides the penalties. A person who traffics in four or more grams of cocaine; two or more grams of heroin or methamphetamine; ten or more dosage units of a controlled substance that is classified in Schedule I or II and is a narcotic drug or a controlled substance analogue; or any quantity of LSD, GBH, or flunitrazepam is guilty of a Class C felony for a first offense and a Class B felony for a second or subsequent offense. However, a person who traffics in less than four grams of cocaine; less than two grams of heroin or methamphetamine; or less than ten dosage units of a controlled substance that is classified in Schedule I or II and is a narcotic drug or a controlled substance analogue is guilty of a Class D felony for the first offense and a Class C felony for a second or subsequent offense.

HB 213 GA deletes the language in KRS 218A.1412(1)(e) (and its companion penalty provision, paragraph (3)(b)) which is the provision that prohibits trafficking in less than four grams of cocaine, less than two grams of heroin or methamphetamine, or less than ten dosage units of a controlled substance that is classified in Schedule I or II and is a narcotic drug or a controlled substance analogue.

Section 15 deletes the language in KRS 218A.1413(1)(c) which prohibits the knowing and unlawful trafficking in any quantity less than ten or more dosage units of a Schedule I or II controlled substance that is not a narcotic drug or is a controlled substance that is specified in KRS 218A.1412 and which is not a synthetic drug, salvia, or marijuana; or less than 20 or more dosage units of a Schedule II controlled substance. Section 15 also deletes the penalty provision at subsection (2) (b).

Section 17 amends KRS 218A.1414, trafficking in a controlled substance in the third degree. Currently, a person who is guilty of trafficking in the third degree is convicted as a Class A misdemeanant for a first offense and a Class D felon for a second and subsequent offense. HB 213 GA amends this provision by making it a Class A misdemeanor to traffic in 120 or fewer dosage units of a Schedule IV or V controlled substance and a Class D felony for a first offense involving more than 120 dosage units.

The current language regarding second and subsequent offenses remains unchanged. Section 17 also deletes the language prohibition against trafficking in Schedule IV or V controlled substances in quantities less than 20 or more dosage units.

As stated previously, the language deleted in KRS Sections 218A.1412, 218A.1413, and 218A.1414 now comprise the various degrees of peddling in a controlled substance.

Section 18 amends KRS 218A.510 to permit a local health department to operate a substance abuse treatment outreach program which allows participants to exchange hypodermic needles and syringes. Items exchanged through the program shall not be deemed drug paraphernalia under this section.

Section 18 further amends KRS 218A.510 to permit a peace officer, prior to searching a person, a person's premises, or a person's vehicle, to inquire as to the presence of needles or other sharp objects in the areas to be searched that may cut or puncture the officer. When making the inquiry, an officer may offer to not charge a person with possession of drug paraphernalia if the person notifies the officer of the presence of needles or other sharp objects. If prior to the search, the person alerts the officer to the presence of the needle or other sharp object, the person shall not be charged for possession of drug paraphernalia for the needle or sharp object or for possession of a controlled substance for residual or trace amounts present on the needle or sharp object. This exemption from prosecution shall not apply to any other drug paraphernalia that may be found during a search or to controlled substances present in other than residual or trace amounts.

Part III: Fiscal Explanation, Bill Provisions, and Estimated Cost

The fiscal and administrative impact of HB 213 GA on local governments is expected to be a minimal to moderate impact.

Under current law, in situations in which a post-mortem examination is mandated by KRS 72.025, coroners and medical examiners are required to test bodies for controlled substances. Section 1 of HB 213 GA amends KRS 72.026 by requiring such tests to be done through the use of "biological" samples, as opposed to "blood" samples.

HB 213 GA requires that a coroner notify the local Commonwealth's attorney and a local law enforcement agency of a drug overdose death. **According to the Kentucky Coroner's Association and the Office of Drug Control Policy (ODCP), this reporting requirement will impose a nil to minimal cost on coroners in most counties.** The impact on coroners will depend on location. If a coroner works in a county where there are numerous drug overdose deaths then that coroner will incur a greater cost and experience more of a burden compared to coroners in counties with fewer overdose deaths. In most counties that cost will be minimal, according to ODCP, but in some counties, it may be minimal to moderate, according to the Kentucky Coroner's Association.

HB 213 GA's impact on coroners will depend on location in another aspect. The language of Section 1(2)(c) requires coroners to notify the Commonwealth's Attorney and law enforcement "in the circuit where the death occurred." For coroners, there is often a dichotomy between

location of the overdose and location of the death. Some coroners work in counties in which a hospital is located. Others do not. According to the Kentucky Coroner's Association, for coroners in counties which have a hospital, Section 1(2) (c) has the potential to increase their workload a great deal more so than it would for corners located in counties without a hospital. This is because patients are often transported to a hospital outside of the county in which they overdosed. If a patient dies in a hospital, it becomes a coroner's case for the coroner in whose county the death occurred as opposed to the county in which the overdose occurred (if, in fact, it is not the same county).

Sections 3 contains new language which would provide additional funding for various programs and resources designed to further drug treatment. For example, new language in Section 2(b) creates a 10% earmark from the savings generated under KRS 196.288 to be used by local jails and detention centers for substance abuse treatment. These treatment programs are required to provide best evidence-based behavioral support or medically assisted treatment for non-state inmates with opiate addiction or other substance abuse disorders. Further, this earmark is limited to those jurisdictions that assign at least 40% of their "peddling" cases (defined above) to a deferred prosecution or a diversion program that requires substance abuse treatment.

Section 3 creates three additional draws on the savings generated under KRS 196.288, each used for KY-ASAP for different purposes – a 25% allocation for community mental health centers, a 10% draw for residential treatment services for pregnant women to address neonatal abstinence syndrome, and an additional 5% allocation for traditional KY-ASAP substance abuse programming under KRS 15A.

According to the **Kentucky Association of Regional Programs**, with the exception of the 10% allocation for jails, the KY-ASAP allocations will not have any impact on local governments. This is because the programs that will receive the money are not affiliated with local governments. Community mental health centers, for example, are all non-profit organizations. The **Kentucky League of Cities (KLC)** is unaware of any city-operated treatment facilities or services that are associated with KY-ASAP

Section 6 exempts inpatient substance abuse treatment facilities with 16 or fewer beds and outpatient behavioral health treatment programs from the provisions of KRS 216B regarding the issuance of certificates of need. Again, **KLC** is unaware of any such programs that are run by cities.

Several provisions of HB 213 GA will affect county jails and other county detention facilities. **The Kentucky Jailers Association has provided analysis of these provisions.**

--Section 3(5)(b) allocates 10% of the savings brought about by 2011RS HB 463 to substance abuse treatment programs in county jails. These treatment programs must provide best evidence-based behavioral support or medically assisted treatment for non-state inmates and be located in jurisdictions that assign at least 40% of the peddling cases to a deferred prosecution or diversion program that includes a requirement of substance abuse treatment. According to the Kentucky Jailers Association, the **impact of this provision on jails is hard to quantify** because the jailers do not know which jurisdictions will assign 40% of their peddling cases to a deferred

prosecution or a diversion program.

--Section 11 creates the offense of peddling in a controlled substance in the first degree.

-- Section 12 amends KRS 218A.1412, trafficking in the first degree

--Section 14 creates the offense of peddling in the second degree.

--Section 15 amends KRS 218A.1413.

--Section 16 creates the offense of peddling in a controlled substance in the third degree.

--Section 17 amends KRS 218A.1414, trafficking in the third degree.

According to the Kentucky Jailers Association, the creation of the peddling offenses and the concomitant changes to the existing trafficking statutes are not expected to have any impact on local jails and detention centers.

A person convicted of a Class A or Class B felony is not housed in a local jail.

When a court denies bail to a Class C or Class D felony defendant, the local government is responsible for incarcerating the defendant until disposition of the case in one of Kentucky's 78 full service jails or five Life safety jails. While the expense of housing inmates varies by jail, each additional inmate increases facility costs by an estimated average of $31.34 per day. Upon sentencing, a Class D felon is housed in one of Kentucky's full service jails for the duration of his or her sentence. The Department of Corrections pays a jail $31.34 per day to house a D felon. Since the per diem pays for the estimated average cost of housing a Class D felon, the per diem may be less than, equal to, or greater than the actual housing cost.

Certain Class C felons are housed in one of Kentucky's full service jails for a portion of their sentences. The Department of Corrections pays the same per diem rate ($31.34 on average) for these Class C felons as it does for Class D felons. Class C felons are ineligible for placement in local jails until they are classified at the lowest custody level with 18 months or less to their minimum expiration date or parole eligibility date.

Eighteen full service jails provide an in-patient substance abuse program (SAP) to nearly 1000 convicted felons incarcerated in the jails. The estimated average cost of jailing a convicted felon participating in a SAP is $40.34 per day. This amount is reimbursed by the Department of Corrections and is $9 more than the estimated average cost of $31.34 per day, including medical costs, to jail an individual not participating in a SAP. Since the $40.34 per diem pays for the estimated average cost of housing a convicted felon participating in a SAP, the per diem may be less than, equal to, or greater than the actual housing cost.

According to the Administrative Office of the Courts, in FY 2014, there were 1,210 Circuit Court cases involving 1,858 charges for heroin trafficking. Six hundred and sixty four of the Circuit Court cases resulted in a conviction on one or more heroin trafficking charges.

The majority of those cases were for heroin trafficking 1st offense in an amount less than two grams. Under current law, trafficking less than two grams of heroin is a Class D Felony for a 1st offense and a Class C felony for subsequent offenses.

HB 213 GA also contains several provisions that pertain to local law enforcement. **The Kentucky Association of Chiefs of Police has provided analysis of these provisions.**

--Sections 3 allows for additional grant money to flow to local jails through KY-ASAP.
HB 213 GA's provisions pertaining to treatment programs will have a minimal to moderate impact on law enforcement depending on the effectiveness of the treatment programs. If treatment programs are effective, it should lower the workload for law enforcement agencies.

--Section 7 permits peace officers, among others, to administer naloxone to a person suffering from an apparent opiate-related overdose. If a peace officer administers naloxone in good faith, the peace officer shall be immune from criminal and civil liability. According to the Police Chiefs, **the cost to local law enforcement**, if required by local law to possess and administer naloxone, will be determined by **whether local law enforcement will have to pay for training and the purchase of naloxone.** The KLC, however, is unsure how much training would be required to adequately educate police officers on heroin-related overdoses and the administration of naloxone. KLC is also concerned whether the Good Samaritan law would apply to peace officers who are trained in naloxone administration, thereby potentially exposing cities to liability in court.

--Section 9 provides for immunity from prosecution for possession of a controlled substance or possession of drug paraphernalia if a person seeks medical assistance from a local law enforcement officer, among others, for a drug overdose. This opportunity is also extended to the victim of an overdose.

--Section 11 creates the offense of peddling in a controlled substance in the first degree.

--Section 12 amends 218A.1412, trafficking in the first degree.

--Section 13 creates the offense of aggravated trafficking in the first degree.

--Section 14 creates the offense of peddling in a controlled substance in the second degree.

--Section 15 amends 218A.1413, trafficking in the second degree.

--Section 16 creates the offense of peddling in a controlled substance in the third degree.

--Section 17 amends KRS 218A.1414, trafficking in the third degree, by narrowing the scope of the statute's misdemeanor provision to 120 or fewer dosage units of a Schedule IV or V controlled substance. Section 17 also makes first offense trafficking in more than 120 dosage units a Class D felony. Second or subsequent offenses remain Class D felonies.

The changes made in Sections 11 to 17 are expected to have a minimal impact on law

enforcement.

--Section 19 permits a peace officer to question a person prior to searching that person, that person's premises, or that person's vehicle. The peace officer may ask about the presence of needles or other sharp objects that may injure the peace officer in the course of his or her search. If the person notifies the peace officer prior to the search about hypodermic needles or other sharp objects, that person shall receive criminal immunity. Peace officers already question individuals about hypodermic needles and other sharp objects. **The criminal immunity incentive will provide a minimal benefit to local law enforcement.**

As for one final provision in the bill not related to law enforcement, **Section 10** requires substance abuse treatment or recovery service providers that receive state funding to give priority to serving pregnant women. The **KLC states that this requirement that "should not have any cost to cities."** Under this provision, pregnant women would simply be placed ahead of others for participation in treatment programs. KLC is unaware, however, of any city governments that operate these programs.

Ultimately, however, **KLC** states that HB 213 GA would have an overall **minimal impact** on cities.

Data Source(s): Kentucky Association of Chiefs of Police; Ky Coroner's Assoc.; Office of Drug Control Policy; Dept. of Corrections; Kentucky Association of Regional Programs; Kentucky League of Cities; Administrative Office of the Courts; LRC Staff;

Preparer: Josh W. Nacey **Reviewer:** MCY **Date:** 2/18/15