

Opposition Testimony to S.B. 156

PART I: Legal conflict with Federal law (42 USC 290dd-2)

PART II: Issues with drug testing as a public policy

PART I: Legal conflict with Federal law (42 USC 290dd-2)

Congress enacted statute 42 USC 290dd-2 for the purpose of protecting the confidentiality of records pertaining to substance abuse treatment or prevention in programs with direct or indirect federal connection/assistance.

Part (a) of the statute reads that:

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e), be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b).

It should be noted that almost all (if not all) drug screening programs that might be undertaken in this state use federal assistance as defined under statute because the only laboratories which handle samples are licensed by SAMHSA (the Substance Abuse and Mental Health Services Administration)

One of the key prohibitions of this statute is subsection (c) which prohibits the use of a substance abuse record in a criminal proceeding or investigation.

3.) This statutory prohibition is further enhanced by 42 CFR § 2.13(a) which states that substance use disorder patient records:

“may not otherwise be disclosed or used in any civil, criminal, administrative, or legislative proceedings conducted by any federal, state, or local authority.”

4.) The purpose of this statute is to ensure that patients under treatment for substance abuse are not penalized by civil or criminal sanctions through the substantiation of their substance abuse as found in their patient records. The record protection noted above is **not** something which the patient can waive.

Obviously, any documentation which would substantiate that an individual defrauded a urine test would constitute, under federal law, a substance abuse record and it would have the protections of 42 USC 290dd-2.

This particular statute often gets overlooked, which is how I think it has been enacted in other states. People often forget that drug screening tests are technically medical tests (they processed as medical tests and are signed by licensed physicians.) Therefore the tests, protocols and records have to be handled under HIPAA. Since positive tests suggest/indicate substance abuse, the results also receive the protections of 42 USC 290dd-2 as outlined above.

I see that the statute as written does indeed accept that federal law may prohibit the testing service from reporting the adulterated/synthetic sample.

This testimony argues that federal law criminalizes the reporting of synthetic samples for purposes of a criminal proceeding in all instances.

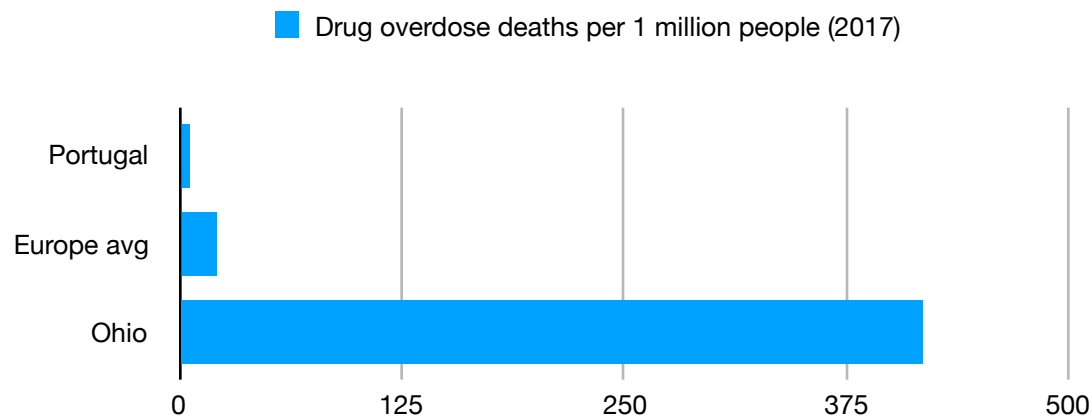
PART II: Issues with drug testing as a public policy

For the last few years I've had the privilege to spend much time traveling abroad (Europe and Asia.) During my five years abroad, I did not have a single conversation about opioid addiction or overdose. Nobody told me about losing someone to drug overdose or knowing someone who died of drug overdose.

I had times in Ohio in which I've had a conversation about drug overdose at least twice a month.

It shocks me deeply how uniquely American the opioid epidemic is, and I have been disturbed to discover that there is so little interest in learning about what is occurring outside of the United States.

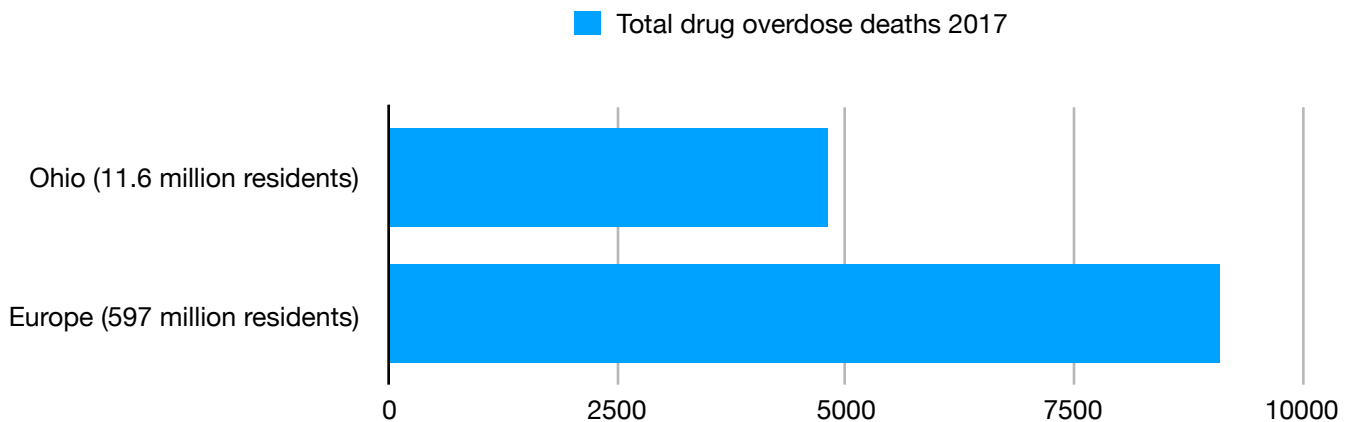
An examination of drug overdose rates in Europe is sobering:



Ohio's drug overdose death rate is 24 times that of the European average.

In 2017 Ohio had 1/2 the drug overdose deaths of the ENTIRE European continent.

Ohio's drug overdose death rate is 70 times that of the best performing European country,



The statistics above speak of a drug overdose problem in Ohio with no comparison globally. What went wrong in Ohio should be mandatory reading in every nation's capital on this planet.

There are factors unique to the United States which have caused the opioid crisis this state has experienced. (Note, Oxycontin is not unique to the US, it was available in some European countries.)

Some of those factors unique to the US are being addressed by S.B. 3.

But with particular relevance to this legislation, and the core public policy which it is addressing, widespread drug testing is uniquely American phenomenon with no parallel globally.

There is no easy way of characterizing drug testing in the European Union, but it is far rarer there than in the US. Many EU nations ban the practice with the exception of some professions (such as airline pilot, train drivers, construction workers) or in certain case specific situations. Other countries allow for the practice, but regulate the protocol under which the tests are administered. Often the test may be done as part of a larger physician's examination. At the end of the examination the doctor determines the fitness of the employee for work, but discloses nothing specific about the examination. EU data protection laws require a standard of consent to process data which would make the American drug testing model illegal to implement.

This testimony argues that America's widespread drug testing and the way it happens is a major contributing factor to the opioid crisis.

The core issue is that the test and its reporting protocol is structured so that no one takes responsibility for the outcome. A licensed physician technically signs off on the positive drug screen, but takes no responsibility over the individual whom he has reported for drug use. This is arguably a violation of medical ethics.

Because drug testing in Europe is less common, drug users are more likely to have a job. That can be a more complicated outcome for the employer, but it would contribute to less drug usage for the drug user. Not having a job increases opportunities to use drugs.

The American model of drug testing is a recipe for failure. That failure is shown in Ohio's drug overdose statistics.

<https://www.odh.ohio.gov/en/features/2018/ODH-2017-Ohio-Drug-Overdose-Report>

http://www.emcdda.europa.eu/data/stats2018/drd_en

http://www.emcdda.europa.eu/publications/pods/preventing-overdose-deaths_en