

Alternatives to Incarceration for Parents in California – Progress in San Francisco

Public defenders, judges, and prosecutors are working together to help parents charged with nonviolent offenses avoid incarceration through the Primary Caregiver Diversion law. Primary Care Diversion began on October 8, 2019, when Governor Gavin Newsom signed California Senate Bill 394 (PC § 1001.83), authorizing the creation of pretrial diversion programs for eligible primary caregivers of minor children.¹

California Senator Nancy Skinner, sponsor of the bill, stated in a press release that the bill’s purpose is to “keep children with their parents when a parent or guardian is charged with a nonserious, nonviolent crime by allowing counties to create a pretrial caregiver diversion program.”² Skinner believes that programs created under this law will help maintain the well-being of both parents and children by establishing “a path for rehabilitation from a wrongdoing that minimizes the negative outcomes on families and children.”³

This bill was supported by many organizations centered around prison reform, including the Public Defender Association, #Cut50, Legal Services for Prisoners with Children, Recidivism Coalition, and Young Women Freedom Center. However, it faced public opposition from several California prosecutors, notably L.A. District Attorney Jackie Lacey, as well as the California District Attorneys Association.

Under this law, the presiding judge of the superior court, in consultation with the presiding juvenile court judge and criminal court judges, and together with the prosecuting entity and the defendant’s attorney, “may agree in writing to establish and conduct a pretrial diversion program for primary caregivers,” suspending criminal proceedings without a guilty plea for no less than six months and no more than twenty-four months.⁴

Upon successful completion of the program, the court will dismiss the caregiver’s original criminal charges.⁵ Notably, the law does not actually *create* any pretrial diversion

¹ See Jeremy Loudonback, *Newsom Inks Several New California Child Welfare Laws*, THE IMPRINT (Oct. 17, 2019), <https://imprintnews.org/child-welfare-2/newsom-inks-several-new-california-child-welfare-laws/38342>.

² Press Release, Nancy Skinner, Senator, California Senate District 09, Gov. Newsom Signs SB 394, Caregiver Court Diversion (Oct. 8, 2019), <https://sd09.senate.ca.gov/news/20191008-gov-newsom-signs-sb-394-caregiver-court-diversion>; see also Policy Directive, San Francisco District Attorney’s Office, Primary Caregiver Diversion (Mar. 9, 2020), <https://sfdistrictattorney.org/wp-content/uploads/2020/11/Primary-Caregiver-Diversion.pdf> (“This law is designed to avoid the trauma and instability caused by parental incarceration while ensuring accountability and rehabilitation.”).

³ *Id.*

⁴ *Id.* § 1001.83(a).

⁵ *Id.* § 1001.83(g).

programs for minor caregivers. Rather, it authorizes the presiding judge, district attorney, and public defender to establish a program in the county, provided that they agree.⁶ Under this new law, individual counties in California will need to create their own pretrial diversion programs, or at least expand on programs that already exist.

Primary caregivers charged with misdemeanor or felony offenses⁷ are eligible for diversion under Section 1001.83, provided that the following requirements are satisfied: (1) the defendant is a custodial parent or legal guardian of a minor child under eighteen years of age; (2) the defendant resides in the same household as that child and provides care or financial support for them; (3) the defendant's absence in that child's life would be detrimental to the child; (4) the defendant is advised of and waives the right to a speedy trial and a speedy preliminary hearing; (5) the defendant is informed of and agrees to comply with the requirements of the program.⁸

Additionally, the court must also be "satisfied that the defendant will not pose an unreasonable risk of danger to public safety...or to the minor child in their custody, if allowed to remain in the community."⁹ To assess this risk, the court is authorized to examine "the positions of the prosecuting entity and defense counsel, the defendant's violence and criminal history, the recency of the defendant's criminal history, the defendant's history of behavior towards minors, the risk of the dependent minor's exposure to or involvement in criminal activity, the current charged offense, child welfare history involving the defendant, and any other factors that the court deems appropriate."¹⁰ Further, the defendant is ineligible for the program if the alleged crime was committed "against a person for whom the defendant is the primary caregiver."¹¹

This law has already begun to take hold in the San Francisco Pretrial Diversion Project. This organization preexisted Primary Caregiver Diversion, so it was in place to be administered in San Francisco courts as soon as the law was passed. Sharon Rose, staff member at the San Francisco Pretrial Diversion Project, recognizes the advantage of having organizations in place

⁶ Press Release, Nancy Skinner, Senator, California Senate District 09, Gov. Newsom Signs SB 394, Caregiver Court Diversion (Oct. 8, 2019), <https://sd09.senate.ca.gov/news/20191008-gov-newsom-signs-sb-394-caregiver-court-diversion>.

⁷ However, defendants accused of serious felonies under California Penal Code section 1192.7 and section 1192.8, or violent felonies under section 667.5(c) are not eligible. *Id.* § 1001.83(d)(5).

⁸ *Id.* § 1001.83(d)(1)–(3).

⁹ *Id.* § 1001.83(d)(4). Unreasonable risk of danger to public safety means "an unreasonable risk that the petitioner will commit a new violent felony" based on any previous violent felony convictions, including but not limited to sexually violent offenses, oral copulation with a child, homicide offenses, and solicitation to commit murder. CAL. PENAL CODE § 667(e)(2)(C)(iv).

¹⁰ CAL. PENAL CODE § 1001.83(d)(4) (West 2020).

¹¹ *Id.* § 1001.83(d)(6).

that are ready to help implement the new law because “bills can springboard off of programs that already exist.”

According to Rose, when a defense attorney, prosecutor, and the judge decide that they want the defendant to participate in the Primary Caregiver Diversion program, the defendant is referred to the San Francisco Pretrial Diversion Project (SFPDP). From there, staff members of SFPDP assess what program requirements are most suitable for the defendant's needs, for example, anger management classes, parenting classes, or drug and alcohol abuse treatment. More often, the Court will determine the program requirements. Staff members will assist the defendant in providing referrals not only to the classes mentioned above but to counseling and cognitive behavioral classes as well. Staff members pride themselves in providing guidance, support, and case management to the defendant in navigating the criminal justice system with the goal of a successful outcome of the case.

Rose has been working with the Primary Caregiver Diversion program since 2020 and is proud of what they have been able to accomplish. A high percentage of the defendants enlisted in the program have been able to move through it successfully and get their charges dismissed.