

Crafting Eligibility Standards for a Prosecutor-Led Diversion Program

Most diversion programs provide a written set of eligibility standards that define who is or who is not eligible for a diversion program. At the heart of these standards is the concern whether a given individual is appropriate for and can be safely and effectively supervised in a community-based setting. As such, eligibility standards are a coarse attempt to assess an individual's risk to the community and amenability to treatment.

In fashioning the eligibility standards of a new program, it should also be noted that different prosecutors may have different norms and values regarding what those standards should be. Prosecutors should also be cognizant of the norms and values of their communities and should attempt to make sure that their standards align with those norms and values.

These are some of the important things to think about when crafting a prosecutor-led diversion program's eligibility standards:

1. **Nature & Circumstances of the Pending Charge** - Because of concerns about offender risk, most prosecutor-led diversion programs categorically exclude persons who are charged with more serious felonies and particularly ones that involve crimes of violence or violent acts.¹
2. **Prior Criminal History/Nature & Circumstances of Those Offenses** - Similarly, many prosecutor-led diversion programs categorically exclude individuals who have criminal history involving crimes that would be excluded if they were the pending charge.
3. **Pendency of Other Proceedings** - Because of concerns about an individual's amenability to treatment, many prosecutor-led diversion programs will exclude an individual if they already have a pending charge, particularly where they were already under a court's jurisdiction when the instant offense occurred or the charge is pending in another jurisdiction.
4. **Pendency of a Diversion or a Prior Diversion** - Similarly, many prosecutor-led diversion programs exclude individuals who already have a pending or prior diversion, irrespective of its outcome. Some prosecutors adopt a one-chance diversion policy, while others permit multiple chances, permit a subsequent opportunity after a wash-out period, or start with a plea-not-required option (pure diversion) followed by a plea-required option (deferred prosecution).
5. **Individual Characteristics of the Offender** - Many standards exclude individuals that have significant drug or alcohol addiction problems or mental health issues if those issues make it unlikely that such individuals will be able to comply with a program's conditions.² On the other hand, such characteristics may be necessary to make an individual eligible if a program is designed to address those issues.
6. **Victim Consent** - Many standards exclude individuals from consideration if the victims of the offense do not give their consent. Other programs provide that victims need to be consulted with prior to a diversion offer being made or require no victim consultation or consent.
7. **Results Obtained from Offender Risks & Needs Assessment Tool** - Use of the results of a validated risks and needs assessment tool can help inform whether a given individual is eligible for diversion consideration. Low and medium risk individuals may be considered eligible, while high-risk individuals may be excluded.³

¹ For these reasons, drug trafficking offenses, domestic violence-related offenses, gang-involved offenses, and gun-related offenses are sometimes deemed ineligible for diversion.

² Exclusion may also be based on the belief that another disposition option may be more appropriate such as a referral to a drug or mental health problem-solving court program.

³ The Milwaukee County District Attorney's Office is a national leader in using risk & needs assessment tools to help inform decisions about who is eligible for diversion and what programming conditions are imposed.