Guidance & FAQs for the New Protective Custody Law

FOR IMMEDIATE RELEASE TO ALL LAW ENFORCEMENT PERSONNEL

As many are already aware, the new protective custody law (G.L. c. 111E, § 9A – Chapter 161 of the Acts of 2016) was signed into law three weeks ago. Since that time, many common questions have arisen with respect to the new law and its operational application in everyday encounters. This article is meant to provide guidance and answers to frequently asked questions (FAQs) for law enforcement professionals with respect to the provisions of G.L. c. 111E, § 9A. This is a follow-up to the article sent out on July 27, 2016, which provided preliminary guidance.

➤ When does the new protective custody law become effective?

Immediately. The law as it appears in Chapter 161 of the Acts of 2016 includes an emergency preamble and advises that it “shall take effect as of July 1, 2016. The Governor signed the bill into law on July 22, 2016 and became effective immediately.

➤ Does G.L. c. 111E, § 9A change the protective custody law with respect to intoxicated individuals (G.L. c. 111E, § 8)?

No. Chapter 111E, § 9A applies to individuals who are incapacitated by reason other than the consumption of alcohol. The new law does not affect the protective custody law relative to intoxication which continues to remain in full force and effect.

➤ Who can be placed into protective custody under G.L. c. 111E, § 9A?

The new law provides that “any person who is incapacitated” may be placed into protective custody by a police officer. The law defines “incapacitated” to mean the condition of a person who, by reason of the consumption of a controlled substance or toxic vapor or other substance other than alcohol is: (i) unconscious; (ii) in need of medical attention; (iii) likely to suffer or cause physical harm or damage property; or (iv) disorderly.
Who has the power to place a person into protective custody?

The law only authorizes police officers to place individuals into protective custody under G.L. c. 111E, § 9A. Other first responders (such as emergency medical service and firefighting personnel), and medical professionals (such as doctors and nurses) are not vested with the power to place a person into protective custody under G.L. c. 111E, § 9A.

How does a police officer determine that a person is “incapacitated” under the new law?

Police officers should make an individualized determination of whether a person is “incapacitated” by considering the totality of circumstances and any available and reasonable testing to assist the officer in making that determination. For example, officers may request the person to submit to reasonable tests of coordination, coherency of speech, and breath. If such tests or other information or observations indicate that the person is incapacitated, the police officer may place the individual in protective custody under the law.

Should an individual placed into protective custody under G.L. c. 111E, § 9A be taken to the police station and booked?

No. This is a major difference between the new protective custody law and the law relative to intoxicated persons. If a person is placed into protective custody under G.L. c. 111E, § 9A, that person shall not be taken to the police station and/or booked. The spirit of the law was to ensure that those who are incapacitated and require medical attention and refuse transport are nevertheless taken to a medical facility identified in the statute. This is particularly important given the current opioid crisis in the Commonwealth of Massachusetts.

While the person shall not be booked, the officer should gather sufficient information on-scene in order to complete the required entry of custody. The entry of custody must include the date, time, place of custody, the name of the assisting officer and the name of the officer in charge. In addition, a best practice should be that officers also record the facts and circumstances relied upon in making the determination that the person was “incapacitated” under the law and what steps and actions the officer took in response thereto.
Is an individual placed into protective custody under the new law “under arrest”?

No. Keep in mind that a person placed into protective custody under G.L. c. 111E, § 9A is not considered to be under arrest and no entry of custody will be treated as an arrest or criminal record for any purpose.

What happens after an individual has been placed into protective custody under G.L. c. 111E, § 9A?

The individual must be immediately transported to an acute care hospital, a satellite emergency facility or to otherwise obtain emergency medical treatment.

How long can the police “hold” a person placed into protective custody under G.L. c. 111E, § 9A?

The police can only “hold” a person placed into protective custody under G.L. c. 111E, § 9A to the extent of time required to complete the person’s immediate transport to receive medical treatment (either to an acute care hospital, emergency facility or to otherwise obtain the appropriate emergency medical treatment).

What if a person placed into protective custody under G.L. c. 111E, § 9A is under the age of 18?

The police shall notify the parent or guardian of the person that he/she was placed into protective custody and transported to a particular location.

Are police officers allowed to use force in placing a person into protective custody under G.L. c. 111E, § 9A?

The law authorizes the police to use “…such force as is reasonably necessary to carry out the officer’s authorized responsibilities....” As always, officers are cautioned that the level of force used should be appropriate under the totality of circumstances involved in each situation.

What if a person placed into protective custody under G.L. c. 111E, § 9A refuses to be transported to a medical facility?

The law empowers the police to force an individual to be transported to a medical facility identified in the statute provided the officer determines the person to be “incapacitated” under the law.
How should a person placed into protective custody under G.L. c. 111E, § 9A be transported?

The law does not define how the transport must occur or who must transport the individual. The law only provides that “Any person who is incapacitated may be placed into protective custody by a police officer without the person’s consent for the purpose of immediately transporting the person to a medical facility identified in the statute. As a result, the best practice should be that the person should be transported in an emergency medical service vehicle where the individual can receive life-saving, life-stabilizing and life-sustaining treatment while the person is en route to the medical facility. The officer who placed the individual into protective custody should either accompany the person in the emergency medical services vehicle or at least escort the emergency medical services vehicle to ensure the protective custody status is enforced. In some situations, emergency medical services personnel may refuse to transport the individual. While it is best practice to have such personnel accomplish the transport, nothing in the statute mandates that emergency medical services personnel effectuate the transport. In such limited instances, the officer would then be able to transport the individual in their cruiser, paying particular attention to the appropriate safety standards for accomplishing such a transport.

What if a person suffering from an opioid overdose is treated with naloxone (e.g. Narcan) and refuses treatment after being revived?

The person may still be placed into protective custody as being “incapacitated” since that person is still: (a) in need of medical attention; and/or (b) likely to suffer physical harm without medical treatment. A common myth about naloxone is that it removes opioids from the body and/or blocks their effects entirely. In actuality however, naloxone causes the opioids to be removed from the opiate receptors in the brain. It is reported that naloxone will start to wear off after approximately 30 to 90 minutes. During that time, the body will process some of the opioids already in the system, but any remaining in the body after the naloxone has worn off will re-attach to the opiate receptors in the brain. The problem is that when a person suffering from an opioid overdose is given naloxone, the person will likely feel as though the “high” has been taken away. If the person is not taken to receive the appropriate treatment, then the person could re-dose, placing more opioids into their body. The newly added opioids will then combine with the “left-over” opioids and re-attach to the opiate receptors in the brain once the naloxone has worn off. This can cause another overdose, and possibly, death. As a result, such individuals should be placed into protective custody under G.L. c. 111E, § 9A and immediately transported to a medical facility for treatment.
Can police search a person who is placed into protective custody under G.L. c. 111E, § 9A?

The law gives police the power to search an incapacitated person and the immediate surroundings for any items or weapons which may pose a danger if the officer reasonably believes that there may be a risk to the safety of the incapacitated person, the safety of the officer or the safety of other persons present. Any item taken shall be inventoried and, unless the item is contraband or otherwise unlawfully possessed, shall be returned to the person when the person is no longer incapacitated.

May a person who has been placed into protective custody under G.L. c. 111E, § 9A be charged if the officer discovers contraband during a search?

It depends. Remember that G.L. c. 94C, § 34A only applies to provide immunity from prosecution for possession of a controlled substance if a person, in good faith, seeks medical assistance for himself/herself or another person, experiencing a drug-related overdose. Unless that has occurred, then the person could be charged if contraband is found on a person during a search pursuant to G.L. c. 111E, § 9A.

What if a person placed into protective custody under G.L. c. 111E, § 9A leaves the medical facility after being transported there?

The individual retains the right to refuse medical treatment pursuant to common-law rights and G.L. c. 111, § 70E. Keep in mind that G.L. c. 111E, § 9A only vests the police with the power to have the person transported to a medical facility. This does not necessarily mean treated, as well. As a result, after the transport is complete, the individual very well may leave the facility if they refuse treatment. This may create a paradox for many police officers. For example, if an officer places a person into protective custody after determining the person to be incapacitated, and the person is transported to a medical facility and immediately receives, it is likely that the person is still “incapacitated” under the law and that the officer could re-transport the person to the medical facility. This creates a never-ending loop until such time that either: (a) the person finally obtains treatment; (b) the police officer gives up; or (c) the person is no longer incapacitated. In some instances, medical personnel have “encouraged” such individuals to stay to receive treatment after advising them that the police could simply place them into protective custody again if they refused treatment and left. There is no one-size-fits-all approach to this problem, and as a result, the proper course of action should be dependent upon the totality of circumstances involved in each situation.