

**Department of State Hospitals (DSH)
Proposed Trailer Bill Legislation (TBL)**

FACT SHEET

Issue Title: Incompetent to Stand Trial Solutions (IST)

The purpose of this TBL is to implement various solutions proposed to increase access to care for individuals deemed IST on felony charges and help address the growing list of IST patients awaiting placement at DSH for competency restoration treatment. These proposed changes will facilitate early access to stabilization and treatment for IST patients in jail while awaiting transfer to a treatment program, increase and prioritize diversion and community-based restoration for ISTs, refine requirements and processes for the IST re-evaluation services program, implement an IST referral growth cap that includes a county penalty payment methodology if the growth cap is exceeded, and establish an independent placement determination panel to increase transitions from the state hospitals to the Conditional Release Program for individuals ordered to DSH as not guilty by reason of insanity or offenders with mental health disorders.

Background and History:

Beginning in fiscal year (FY) 2012-13, DSH began experiencing an increased number of IST defendants committed and referred to the department which, over the subsequent years, has continued to grow and outpace the new beds, programs and process efficiencies DSH implemented in response to this growing population. As of April 2022, there were 1,915 IST defendants pending placement to a DSH treatment program. While the high number of individuals pending placement can be partially attributed to protective measures implemented by DSH in response to COVID-19, the ISTs pending placement to a DSH program prior to COVID-19 was over 800.

Informed by the Incompetent to Stand Trial Solutions Workgroup established in the fall of 2021, DSH proposes additional solutions to provide timely access to services including providing early stabilization and treatment for ISTs in jail, investing in community-based restoration and diversion housing infrastructure and treatment services, increasing re-evaluation services to identify ISTs who have already restored to competency and return them to court, and establishing a growth cap on county IST referrals.

Justification for the Change:

This TBL will facilitate increased treatment access for ISTs, clarify involuntary medication processes to facilitate IST treatment, clarify eligibility for DSH funded

diversion services, clarify IST eligibility to participate in mental health diversion, prioritize community treatment options for ISTs, address the growing number of felony IST commitments to DSH, and make other amendments to facilitate coordination of care and treatment for felony ISTs. Specifically, it amends, rescinds, or adds statute as follows:

Amends Penal Code (PC) section 1001.36 to:

- Clarify that an IST defendant can be admitted into a diversion program if they are unable to agree to treatment because diversion is treatment in lieu of competency restoration treatment in a DSH facility.

Amends PC section 1369 to:

- Clarify expectations for psychologist and psychiatrist evaluators in assessing for a defendant's lack of capacity to consent and dangerousness in opining to the court about the need for an involuntary medication order.

Amends PC sections 1602, 1603, 1604, 1026, and 1026.2 and creates Welfare and Institutions Code (WIC) section 4360.5 to:

- Authorize an independent placement determination panel and revises the community program director role to increase transitions from the state hospitals to the Conditional Release Program for individuals committed as Not Guilty by Reason of Insanity (NGI) and Offenders with Mental Health Disorders (OMD).

Rescinds PC section 1369.1 and amends PC section 2603 to:

- Streamline the process, remove ambiguity, and clarify which process a jail can use to seek an involuntary medication order for medically appropriate treatment.
- Allow for any jail-obtained involuntary medication order for an individual to transfer over to DSH upon admission. This permits continuity of care across settings and reduces the potential for psychiatric decompensation due to lack of a valid order.

Amends PC section 1370 to:

- Clarify that an IST defendant may be ordered to diversion after they have been admitted into a DSH-funded acute or sub-acute facility as defined in WIC 4361.1 but before the defendant has been restored to competency or reached the maximum term of commitment on the current IST finding.
- Clarify that the court shall process findings of competency by DSH, or court appointed evaluators performing re-evaluations of an IST, in accordance with PC 1372.
- Facilitate and prioritize community outpatient treatment and diversion for IST defendants beginning July 1, 2023.

- Align the court consideration of an opinion by a psychologist or psychiatrist regarding the need for involuntary medication to the changes proposed in PC 1369.
- Clarify that an involuntary medication order issued for an IST defendant authorizes involuntary medication administration by a treatment facility includes the county jail. This facilitates early access to treatment for IST defendants waiting for transfer to a DSH program.
- Allow an involuntary medication order to follow the individual from a DSH facility back to a county jail.
- Clarify the pre-admission documents a court provides to DSH for IST commitments.
- Create a process for courts to issue an involuntary medication order to facilitate treatment following receipt of a re-evaluation or hospital 90-day evaluation that indicates an involuntary medication order is needed, if one was not issued at the time of commitment.
- Clarify the court process to determine whether to issue an involuntary medication order if the initial reason for the order at commitment no longer exists or a new basis for issuing an order exists.

Amends PC section 1370.6 to:

- Remove the reference to PC 1369.1 which is proposed to be rescinded.

Amends PC section 1372 to:

- Clarify the court process for a competency finding that results from an IST Re-Evaluation under WIC 4335.2.
- Clarify that a rejection of a restoration of competency certificate by the court must be based on a clinical opinion of a licensed psychologist or psychiatrist that the defendant is not competent.

Amends PC section 4019 to:

- Conform to amendments to Penal Code section 1369.

Amends WIC section 4335.2 to:

- Allow for the reevaluation of an IST defendant before they have reached 60 days on the DSH waitlist.
- Clarify DSH evaluator access to jail records and to the IST defendant for purposes of determining the defendant's care, treatment and progress.
- Allow DSH evaluators performing re-evaluations to contact defense counsel regarding a defendant's competency status.
- Clarify authority for a court to order county conservatorship proceedings if a defendant who has been re-evaluated and determined to have no substantial likelihood to be restored appears gravely disabled.

- Clarify that a court may issue an involuntary medication order based on findings in the IST re-evaluation, conduct a hearing and if needed, allow for remote evaluator testimony.

Adds WIC section 4336 to:

- Establish a growth cap on the number of IST determinations and a penalty payment methodology. This section would:
 - Establish a baseline to set each county's cap at the total number of felony IST determinations that are made in the current fiscal year (FY 2021-22). For any county with zero felony IST determinations in the current fiscal year, the baseline will be set to one.
 - Establish a methodology with a scaled approach for assessing if a county exceeds their baseline number of IST determinations and charging the county a penalty payment for the total number of individuals determined IST on felony charges above their established baseline.
 - Provide counties flexibility in determining which local funding source they may use to make penalty payments.
 - Require DSH to provide reports to each county tracking referrals compared to baseline during the fiscal year, assess and collect the penalties, and distribute any penalties collected back to the county to be utilized for specified purposes.
 - Establish a new Mental Health Diversion Fund for the purposes of collecting and distributing penalties.
 - Require counties receiving funding from the Mental Health Diversion Fund to submit an annual report to DSH regarding their use on these funds.

Amends WIC section 4361 to:

- Remove eligibility for those who are likely to be found IST from the DSH Diversion Program to prioritize funding for ISTs.
- Clarify the mental health diagnoses that an IST may have to be eligible for placement in a DSH diversion program.
- Define the wraparound services that a DSH-funded diversion program shall include.
- Clarify data reporting requirements for DSH-funded diversion programs.
- Remove the requirement that counties provide matching funds to receive funding for IST diversion programs.

Adds WIC section 4361.7 to:

- Allow DSH to contract with providers to provide early access treatment services for those deemed IST while in jail and pending placement in a treatment program.

- Grant DSH and its contractors reasonable access to county jail facilities to provide early access treatment.
- Authorize DSH or its contractors providing early access treatment services in jails for ISTs to petition for and participate in involuntary medication hearings.

Amends WIC section 5328 to:

- Clarify that DSH is able to provide records in response to a subpoena to conform to the Health Insurance Portability and Accountability Act of 1996 and can share records with the District Attorney for purposes of commitment, recommitment, or petitions for release.

Summary of Arguments in Support:

This trailer bill will increase access to care, streamline processes, and reduce the waitlist for individuals found IST on felony charges. It facilitates providing early treatment access to facilitate stabilization of IST defendants and increase placements in community-based restoration and diversion. Increasing access to community-based treatment for felony IST defendants will help reduce the cycle of criminalization for individuals with serious mental illness.

This trailer bill also clarifies authority and process regarding involuntary medications orders for felony IST defendants to facilitate timely access to care. Appropriate care for defendants can be delayed due to a lack of clear authority and process regarding involuntary medication orders. Patients in the acute stages of an illness often do not recognize they need medication, and they lack capacity to make decisions regarding medications. They also can present as a danger to themselves or others and require medication for those reasons. The language regarding scope of practice for medication consideration is confusing. Increased clarity is likely to improve the necessary consideration of these factors. Currently, medication orders cannot transfer across settings, resulting in needless disruption in care. The proposed changes will facilitate access to medication and continuity of care for IST defendants.

Estimate and Title: Incompetent to Stand Trial Solutions ECP and Re-Evaluation Services ECP