

Office of the Director  
1215 O Street  
Sacramento, California 95814  
[www.dsh.ca.gov](http://www.dsh.ca.gov)



DEPARTMENT LETTER: 22-003

**December 19, 2022**

TO: ALL COUNTY CHIEF ADMINISTRATIVE/EXECUTIVE OFFICERS

SUBJECT: INCOMPETENT TO STAND TRIAL GROWTH CAP AND PENALTY  
PAYMENTS-WELFARE & INSTITUTIONS CODE (WIC) 4336

EXPIRES: October 31, 2023

### **Purpose**

The purpose of this Departmental Letter (DL) is to inform counties of recent statutory requirements included in Senate Bill (SB) 184 (Chapter 47, Statutes of 2022) that established a growth cap for all counties for individuals committed as Incompetent to Stand Trial (IST) on felony charges pursuant to Section 1370 of the Penal Code. This DL outlines background on individuals determined to be IST and associated programs, the current annual rate to be charged for penalty payments and the felony IST determination baseline per county.

### **Background**

The Legislature enacted Welfare & Institutions Code (WIC) section 4147 through the passage of Assembly Bill 133 (Chapter 143, Statutes of 2021) and the Budget Act of 2021 (Chapter 69, Statutes of 2021), which charged the California Health & Human Services Agency (CalHHS) and the Department of State Hospitals (DSH) to convene a IST Workgroup comprised of state, local, advocacy and family member representatives to identify actionable solutions that address the increasing number of individuals with serious mental illness who become justice-involved and deemed IST on felony charges. The strategies and solutions identified by this Workgroup culminated in a report published on November 30, 2021, and can be found at the following link: [IST Solutions Report \(Final\).pdf \(ca.gov\)](#).

Subsequently, the 2022 Budget Act authorized DSH to implement many of the recommended strategies and solutions and appropriated DSH \$535.5 million in 2022-23 increasing to \$638 million ongoing by 2025-26. The components of the IST solutions provide early stabilization, care coordination, expand community-based treatment and diversion options for felony ISTs by 5,000 beds over four years, improve IST discharge planning and coordination, implement a pilot for independent placement panels, and improve alienist training. To effectively implement these new and expanding programs and services, new and updated statutory language was enacted in budget trailer bill SB 184 (Chapter 47, Statutes of 2022). These solutions together

will help reverse the cycle of criminalization for individuals with serious mental illnesses and increase community transitions for state hospital patients.

To help ensure that the expansion of DSH funded community-based care does not create unintended incentives that result in an increased number of individuals being found IST on felony charges, WIC section 4336 establishes a growth cap for each county for felony IST determinations and includes a county penalty if a county exceeds its growth cap. WIC section 4336 also creates the Mental Health Diversion (MHD) Fund in the State Treasury for deposit of penalty payments collected from counties. The funds collected in the MHD Fund shall be used for the purpose of supporting county activities that will divert individuals with serious mental illnesses away from the criminal justice system and lead to the reduction of felony IST determinations. Disbursements made to a county from the MHD shall equal the penalty payment made into the fund by that county. Counties that are not charged any penalties will not receive any disbursements from the MHD.

### **General IST Growth Cap Program Overview**

Per WIC section 4336, county baselines were established by using total felony IST determinations made in FY 2021-22. Beginning in FY 2022-23, if a county's total number of annual felony IST determinations exceeds the county's baseline, the county will be subject to a penalty payment. DSH will calculate the county's penalty and a county shall pay the penalty to DSH to be deposited into the MHD Fund. A county may make penalty payments from any local funding source.

DSH will subsequently make payment back to a county from the MHD Fund equivalent to the penalty payment amount paid by the county. All funds a county receives from the MHD Fund must be used to support local initiatives designed to prevent the arrest of individuals with serious mental illnesses. Counties subject to penalty payments pursuant to WIC section 4336 will be required to submit a plan for the use of funds in accordance with one or more of the activities outlined below prior to disbursement to the county. After funds from the MHD have been received by a county and beginning in 2024-25, the county will be required to report to DSH annually regarding the actual use of the funds. DSH will provide direction to counties on the required format and contents of the plan by July 1, 2023 and annual report by July 1, 2024.

Funds paid to a county from the MHD Fund shall be used to support one or more of the following activities:

- Pre-booking MHD to serve those with serious mental illness and prevent their felony arrest. This may include funding the treatment, support services, or housing of individuals who have been approved by a court to participate in Care Court. The target population that shall be served are individuals demonstrating psychosis manifesting as hallucinations, delusions, disorganized thoughts, or disorganized behavior at the time of the interaction.

- Post-booking MHD, which may include treatment, support services, and housing, to serve those with serious mental illness and who are likely to be found IST, to prevent the IST determination and divert the individual from incarceration. The target population that shall be served are individuals diagnosed with a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, and schizoaffective disorder but excluding a primary diagnosis of antisocial personality disorder, borderline personality disorder, and pedophilia, and who are presenting non-substance-induced psychotic symptoms.
- Re-entry services and support, which may include housing, to serve those who have been restored to competency following a felony IST commitment and directly released to the community from jail.

### **Reporting Timeline and Process**

This letter includes a report identifying for each county its reconciled 2021-22 IST determinations (Attachment A). This will serve as each county's baseline number of IST determinations for future penalty calculations.

Also included in this letter is a report of each county's unreconciled data for the first quarter of FY 2022-23 (Attachment B). This data is provided to help a county determine how the current year's IST determinations are trending to the county's baseline to determine if focused efforts may be needed to avoid exceeding the baseline.

Going forward annually, by the end of November, DSH will provide counties with an annual report of the four quarters of reconciled referral data from the prior FY.

Beginning December 31, 2022, and quarterly thereafter, within 60 days of the end of each quarter, DSH will provide counties with a progress report of the quarter's unreconciled IST determination data along with a summary of year-to-date IST determination data and reference to the FY 2021-22 baseline felony IST counts.

- November's annual report issued each year will include four quarters of reconciled referral data from the prior year and the first quarter of unreconciled referral data for the current year.
- February's progress reports issued each year will include first and second quarter unreconciled referral data for the current FY.
- May's progress report issued each year will include first, second and third quarter unreconciled referral data for the current FY.
- August's progress report issued each year will include first, second, third and fourth quarter unreconciled referral data for the prior FY.

Beginning October 1, 2024, and annually thereafter, all counties assessed a penalty payment must submit a report to DSH detailing the use of the funding paid from the MHD Fund to support local activities as described under "General Program

Overview.” DSH shall provide direction to counties on the required format and content of the report no later than July 1, 2024. The table below outlines the timelines for the issuance of annual and quarterly reports to the counties and the invoicing and payment process:

<b>Timeline</b>	<b>Action</b>	<b>Process</b>
December 2022	Report Issued by DSH	Baseline provided (Attachment A)  Report of unreconciled data for the first quarter of FY 2022-23 provided (Attachment B)
Beginning February 28, 2023 and continuing quarterly	Report Issued by DSH	Progress reports issued 60 days following end of each quarter: <ul style="list-style-type: none"> <li>• Quarter 1: July – September</li> <li>• Quarter 2: October – December</li> <li>• Quarter 3: January – March</li> <li>• Quarter 4: April – June</li> </ul>
July 1, 2023 – One Time	Notice Issued by DSH	Expenditure plan format and required contents will be provided to counties.
By the end of November 2023 and ongoing annually	Report Issued by DSH	Annual report issued of IST determinations from the prior FY and notice of any change in methodology related to the calculation of the bed rate for the upcoming year.
By the end of November 2023 and ongoing annually	DSH Issues Penalty Invoices	Invoices will be sent to the county if penalty payment for prior year is owed.
<b>90 days after receipt of Invoice</b>	<b>Payment Due to DSH</b>	<b>County penalty payments are due to DSH.</b>
45 days after formal county expenditure plan is received by DSH	Payment Issued to Counties	Money issued back to the county via the MHD Fund after receipt and approval of expenditure plan.
July 1, 2024 - One Time	Notice Issued by DSH	Report format and required contents will be provided to counties.
<b>Beginning October 1, 2024, and ongoing annually</b>	<b>Report Due from Counties</b>	<b>Counties assessed a penalty payment must submit a report to DSH detailing the use of funding received from the MHD and spent in the prior fiscal year.</b>

## Methodology

### *Felony IST Baseline Count*

Each county's felony IST growth cap is based on the total number of felony IST determinations accounted for in FY 2021-22 (Attachment A). The methodology used for establishing a county's baseline count includes all felony ISTs from that county that are initially referred to DSH or a DSH-funded program. For any county that had zero felony IST determinations in FY 2021-22, the county's baseline is set at one individual.

### *Penalty Rate*

The penalty rate each FY is calculated using the current published daily bed rate at a state hospital multiplied by the average length of stay (ALOS) of an IST patient admitted to a state hospital. For FY 2022-23, DSH will use the pre-COVID three-year state hospital ALOS so that the penalty rate is not disproportionately impacted by pandemic-related increases in DSH's IST ALOS. DSH will reassess the ALOS on an annual basis and will notify counties of any change in the methodology.

- FY 2022-23 Bed Rate: \$728 per day
- FY 2016-17 through FY 2018-19 ALOS: 155 days
- FY 2022-23 Penalty Rate per Individual: \$113,000

## Tiered Penalty Charges

This section outlines the tiered penalties to be assessed by DSH based on each county's annual IST determinations compared to the baseline.

FY 2022-23 through FY 2025-26	
For FY 2022-23 through FY 2025-26, any county that exceeds its baseline IST determination count, regardless of whether the county contracts with DSH for IST community-based restoration or IST diversion, shall pay penalties as follows:	
For the <b>fifth, sixth, and seventh</b> IST determinations over the baseline	County shall pay 50% of the penalty rate per IST.
For the <b>eighth and ninth</b> IST determinations over the baseline	County shall pay 75% of the penalty rate per IST.
For the <b>tenth and all subsequent</b> IST determinations over the baseline	County shall pay 100% of the rate penalty rate per IST.
FY 2026-27 and Ongoing	
Beginning in FY 2026-27, counties shall pay penalties for the <b>third and subsequent</b> felony IST that exceeds the baseline as follows:	
<u>Counties <b>with</b></u> a DSH-funded Diversion or CBR contract:	County shall pay 100% of the rate.
<u>Counties <b>without</b></u> a DSH-funded Diversion or CBR contract:	County shall pay 150% of the rate.

The table below provides an example of how the penalty charges will be assessed and charged following the provisions described in the previous table:

Example of Penalty Rate Calculations						
Referrals	Penalty Rate	FY 2022-23 through FY 2025-26			FY 2026-27 and Ongoing	
		Penalty Rate Owed @ 50%	Penalty Rate Owed @ 75%	Penalty Rate Owed @ 100%	Penalty Rate @ 100% for Counties <i>with</i> DSH Funded Diversion	Penalty Rate @ 150% for Counties <i>without</i> DSH Funded Diversion
Over County Baseline	\$113,000					
3rd and more					\$113,000.00	\$169,500.00
5th		\$ 56,500				
6th		\$ 56,500				
7th		\$ 56,500				
8th			\$ 84,750			
9th			\$ 84,750			
10th and more				\$ 113,000		

If you have any questions or require additional information, please send inquiries to: [DSHISTGrowthCap@DSH.CA.GOV](mailto:DSHISTGrowthCap@DSH.CA.GOV).

Original Signed By



Stephanie Clendenin  
 Director  
 Department of State Hospitals

- cc: All counties' Behavioral Health Directors  
 All counties' Sheriffs  
 All counties' Public Defenders  
 All counties' District Attorneys  
 All Presiding Judges of the Superior Courts of California  
 State Controller's Office

**DIVISION OF HOSPITAL STRATEGIC PLANNING AND IMPLEMENTATION**  
**RESEARCH, EVALUATION AND DATA**



**ATTACHMENT A: Department of State Hospitals IST Referrals - FY 2021-22, Annual Baseline**

Committing County	FY 2021-22 Total Baseline IST Referrals	FY 2021-22 Monthly Average	County Referral Map
Alameda	88	7.3	
Alpine	0	0.0	
Amador	4	0.3	
Butte	50	4.2	
Calaveras	3	0.3	
Colusa	2	0.2	
Contra Costa	93	7.8	
Del Norte	12	1.0	
El Dorado	27	2.3	
Fresno	140	11.7	
Glenn	9	0.8	
Humboldt	55	4.6	
Imperial	20	1.7	
Inyo	3	0.3	
Kern	248	20.7	
Kings	51	4.3	
Lake	30	2.5	
Lassen	4	0.3	
Los Angeles	1,708	142.3	
Madera	29	2.4	
Marin	21	1.8	
Mariposa	3	0.3	
Mendocino	31	2.6	
Merced	59	4.9	
Modoc	1	0.1	
Mono	1	0.1	
Monterey	62	5.2	
Napa	28	2.3	
Nevada	3	0.3	
Orange	92	7.7	
Placer	51	4.3	
Plumas	3	0.3	
Riverside	177	14.8	
Sacramento	244	20.3	
San Benito	10	0.8	
San Bernardino	280	23.3	
San Diego	228	19.0	
San Francisco	27	2.3	
San Joaquin	103	8.6	
San Luis Obispo	59	4.9	
San Mateo	53	4.4	
Santa Barbara	90	7.5	
Santa Clara	78	6.5	
Santa Cruz	67	5.6	
Shasta	43	3.6	
Sierra	1	0.1	
Siskiyou	13	1.1	
Solano	88	7.3	
Sonoma	72	6.0	
Stanislaus	120	10.0	
Sutter	15	1.3	
Tehama	19	1.6	
Trinity	9	0.8	
Tulare	85	7.1	
Tuolumne	17	1.4	
Ventura	92	7.7	
Yolo	35	2.9	
Yuba	23	1.9	
<b>DSH Total</b>	<b>4,979</b>	<b>414.9</b>	

<span style="display:inline-block; width:15px; height:10px; background-color:orange;"></span>	Top Referring County - highest monthly referral rate
<span style="display:inline-block; width:15px; height:10px; background-color:lightorange;"></span>	Top 2-15 Referring Counties - monthly referral rate ranging from 23.3 to 7.3
<span style="display:inline-block; width:15px; height:10px; background-color:lightblue;"></span>	Remaining Referring Counties - monthly referral rate less than 7.3

**DIVISION OF HOSPITAL STRATEGIC PLANNING AND IMPLEMENTATION**  
**RESEARCH, EVALUATION AND DATA**

**ATTACHMENT B: Department of State Hospitals IST Referrals - FY 2022-23, Quarter 1**

Committing County	FY 2021-22 Total Baseline IST Referrals	FY 2021-22 Monthly Average	FY 2022-23 Quarter 1	FY 2022-23 Quarter 2	FY 2022-23 Quarter 3	FY 2022-23 Quarter 4	FY 2022-23 YTD Total	FY 2022-23 YTD Monthly Average	Monthly Average Difference
Alameda	88	7.3	28				28	9.3	2.0
Alpine	0	0.0	0				0	0.0	0.0
Amador	4	0.3	4				4	1.3	1.0
Butte	50	4.2	12				12	4.0	(0.2)
Calaveras	3	0.3	0				0	0.0	(0.3)
Colusa	2	0.2	2				2	0.7	0.5
Contra Costa	93	7.8	29				29	9.7	1.9
Del Norte	12	1.0	5				5	1.7	0.7
El Dorado	27	2.3	8				8	2.7	0.4
Fresno	140	11.7	42				42	14.0	2.3
Glenn	9	0.8	3				3	1.0	0.3
Humboldt	55	4.6	14				14	4.7	0.1
Imperial	20	1.7	6				6	2.0	0.3
Inyo	3	0.3	1				1	0.3	0.1
Kern	248	20.7	66				66	22.0	1.3
Kings	51	4.3	23				23	7.7	3.4
Lake	30	2.5	8				8	2.7	0.2
Lassen	4	0.3	3				3	1.0	0.7
Los Angeles	1,708	142.3	493				493	164.3	22.0
Madera	29	2.4	7				7	2.3	(0.1)
Marin	21	1.8	3				3	1.0	(0.8)
Mariposa	3	0.3	2				2	0.7	0.4
Mendocino	31	2.6	6				6	2.0	(0.6)
Merced	59	4.9	23				23	7.7	2.8
Modoc	1	0.1	0				0	0.0	(0.1)
Mono	1	0.1	2				2	0.7	0.6
Monterey	62	5.2	22				22	7.3	2.2
Napa	28	2.3	3				3	1.0	(1.3)
Nevada	3	0.3	4				4	1.3	1.1
Orange	92	7.7	18				18	6.0	(1.7)
Placer	51	4.3	12				12	4.0	(0.3)
Plumas	3	0.3	0				0	0.0	(0.3)
Riverside	177	14.8	65				65	21.7	6.9
Sacramento	244	20.3	79				79	26.3	6.0
San Benito	10	0.8	4				4	1.3	0.5
San Bernardino	280	23.3	72				72	24.0	0.7
San Diego	228	19.0	83				83	27.7	8.7
San Francisco	27	2.3	9				9	3.0	0.8
San Joaquin	103	8.6	34				34	11.3	2.8
San Luis Obispo	59	4.9	15				15	5.0	0.1
San Mateo	53	4.4	20				20	6.7	2.3
Santa Barbara	90	7.5	38				38	12.7	5.2
Santa Clara	78	6.5	41				41	13.7	7.2
Santa Cruz	67	5.6	12				12	4.0	(1.6)
Shasta	43	3.6	19				19	6.3	2.8
Sierra	1	0.1	1				1	0.3	0.3
Siskiyou	13	1.1	5				5	1.7	0.6
Solano	88	7.3	33				33	11.0	3.7
Sonoma	72	6.0	26				26	8.7	2.7
Stanislaus	120	10.0	43				43	14.3	4.3
Sutter	15	1.3	8				8	2.7	1.4
Tehama	19	1.6	4				4	1.3	(0.3)
Trinity	9	0.8	1				1	0.3	(0.4)
Tulare	85	7.1	32				32	10.7	3.6
Tuolumne	17	1.4	1				1	0.3	(1.1)
Ventura	92	7.7	29				29	9.7	2.0
Yolo	35	2.9	10				10	3.3	0.4
Yuba	23	1.9	3				3	1.0	(0.9)
<b>DSH Total</b>	<b>4,979</b>	<b>414.9</b>	<b>1,536</b>				<b>1,536</b>	<b>512.0</b>	<b>97.1</b>

Counties with zero determinations in the baseline year default to one determination for the baseline referral rate.

Penalty charges begin accruing with the fifth IST determination over the baseline.