



April 19, 2023

Stephanie Clendenin, Director
Department of State Hospitals
1215 O Street,
Sacramento, CA 95814

Re: Department of State Hospitals (DSH) Incompetent to Stand Trial (IST) Growth Cap Concerns and Recommendations

Dear Director Clendenin:

On behalf of the California State Association of Counties (CSAC), Urban Counties of California (UCC), Rural County Representatives of California (RCRC), County Behavioral Health Directors Association of California (CBHDA), California State Sheriffs' Association (CSSA), and Chief Probation Officers of California (CPOC), we write to express concerns regarding the Department of State Hospital's implementation of the felony incompetent to stand trial (IST) growth cap and penalty program.

Counties have worked with the state to address the challenges related to the needs of the felony IST population by partnering to develop a range of policy and budget solutions at the state and local levels. The aforementioned organizations share in the state's vision to reduce the felony IST population and overall justice involvement for those at risk of becoming IST through jointly developed reforms to increase behavioral health services, access to housing, and options for diversion and local restoration. The confluence of homelessness, a changing drug landscape,¹ and mounting pressure to use penal solutions for quality-of-life problems have drastically increased the number of individuals found IST. The COVID- 19 pandemic has also distorted the population of those with felony findings.

We greatly appreciate the Administration's efforts to increase local support. Several of the DSH IST solutions signed into law last year provide much needed resources and guidance to counties to address the growing number of ISTs at the community level. However, these investments will take time before meaningful impacts are felt. Further, despite the significant investments, we believe DSH's implementation of the growth cap will lead to arbitrarily harsh penalties that undermine our joint goals

¹ <https://www.theatlantic.com/magazine/archive/2021/11/the-new-meth/620174/>

to reduce the state's felony IST waitlist. In particular, counties are concerned with the manner in which the growth cap methodology has been determined. Key county stakeholders were not consulted during the development of the proposed methodology. We believe this has resulted in an unfair and inaccurate application of the proposed penalties. For example, DSH has applied the broadest interpretation of the statute without taking into account the various factors which may contribute to variation in felony IST rates from county to county, including, but not limited to: poor quality monitoring and standardization for alienists that conduct the competency assessments; flawed formulas that disproportionately impact small counties and counties that are high-users of diversion, community-based treatment, and jail-based competency treatment (JBCT); lack of clarity on authorized funding sources for the payment of penalties, as well as authorized use of funds once their penalty funds are returned; no apparent process which allows counties to validate the individuals counted toward the growth cap; and more important, any recourse for discrepancies in IST data. While counties opposed the creation of the growth cap and penalty, we have maintained a willingness to partner on solutions and remain open to further partnerships with DSH. We respectfully request additional dialogue with the department and key county stakeholders to ensure counties understand the terms of the growth cap and can inform the design of a fair and effective process.

Issues and Recommendations:

First and foremost, the baseline and penalties are based on IST “determinations” and strictly applied without recourse. The growth cap formula for this fiscal year proposes to fine counties for every person found IST with five or more IST determinations above their FY 2021 baseline. By 2025-26 the state will increase the potential for penalties as counties will be fined for three or more individuals with felony IST determinations above their baseline. However, counties have found that their IST “counts” against the growth cap include individuals who have been determined IST, but diverted to community-based solutions, are no longer IST, or even deceased. This is also evident in the department's [FAQ on DSH 22-003](#), acknowledging that these scenarios will not reduce the number of determinations that count against a county's cap. This is deeply concerning for counties that are struggling to grapple with those who are deemed IST and those who are referred, committed, and formally added to the felony IST waitlist. Counties are unclear as to what additional strategies they can take with existing resources to reduce or even stabilize the number of IST “determinations” as counted through this process. As noted earlier, even counties who contract with DSH – whether through diversion programs or JBCT – find it unreasonable to expect any year-over-year reductions in their count, because as currently defined in the growth cap and penalty program, there is no recognition of those determined to be IST but returned to counties or found competent to stand trial.

Second, the baseline and penalties are only based on the initial evaluations by alienists. As acknowledged in the IST solutions workgroup process, DSH is aware that alienist evaluations have been substandard and not subject to uniform protocols, any sort of certification process, or quality oversight and monitoring. According to the department, over 30% of individuals on the DSH waitlist were found to be competent upon reevaluation. Thus, following a recommendation from the IST solutions workgroup, the state devoted \$5 million to fund additional training for alienists and is also investing in re-evaluations. The IST solutions workgroup also recommended increasing reimbursements from \$500 to \$1,000 for re-evaluations in jails. These are effective ways to partner with counties to decrease the waitlist more rapidly. But again, state investments will not have a local impact overnight, especially as it relates to uniform training for alienists across all counties and local reimbursements from the state. More notable, even these efforts targeted at reducing the state's felony IST waitlist will not reduce counties' IST count for purposes of the program. Under the state's proposed growth cap formula,

individuals who were incorrectly deemed felony IST and later found competent upon reevaluation would count toward the growth cap penalties.

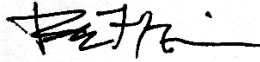
Ultimately, the department's implementation of the growth cap and penalty process does not take into account the validity of the determination and the fluid nature of an individual's determination status, which unintendedly discourages counties from actively working to address the waitlist, instead of incentivizing. If the goal of the penalty is to deter counties from referring individuals with IST determinations to state hospitals, the state should not include individuals who are participating in community-based diversion or restoration toward the count against their growth cap, as the county is demonstrating their partnership to reduce the state's IST waitlist.

In recognition of the outlined concerns, counties believe the creation of a formal dispute process is necessary this year, prior to the imposition of any county penalties. Counties have requested, but in many cases have not received, accurate patient information to verify the individuals who have been counted toward the growth cap formula. If a county can do the work to identify inaccuracies or inconsistencies, there should be a process to formally request a review of the count and a recalculation based on documented data. Additionally, as data can help counties identify gaps and inform calculated decision-making pertaining to strategies and the establishment of programs, we ask that counties are provided not only IST "determination" data, but also IST "referral" or "commitment" data for those that are added on and off the waiting list, disaggregated by county of referral. This will directly assist counties in better understanding the counting rules for the growth cap process, and more importantly, how counties can better identify and address the underlying root causes of IST determinations that lead to DSH referrals.

Finally, as currently structured, the growth cap and penalty process has not created the intended incentive for the various stakeholders across multiple branches of government, who may have a role in impacting the number of IST referrals, to work collaboratively with a common goal of reducing the IST population. Designing a process by which there is lack of clarity around authorized funding sources and authorized use of funds only runs counter to improving coordination and building consensus among impacted entities. Developing a system with the engagement and direct feedback from counties would lead to less punitive and less restrictive solutions for individuals who could be determined felony IST, and counties and county partners responsible for providing effective treatment and other critical resources and services.

For these reasons counties respectfully request consideration of our concerns and request a meeting with DSH staff to consider changes or alternative proposals to ensure that the growth cap is accurately and fairly applied. Lastly, we also request that the growth cap and penalty formula is reevaluated annually given the fluid nature of trends and contributing factors of the IST population. If you have any questions, please do not hesitate to contact any of our organizations.

Sincerely,



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