June 3, 2021

The Honorable Nancy Skinner
Chair, Senate Budget & Fiscal Review Committee
California State Senate
Sacramento, CA 95814

The Honorable Susan Talamantes Eggman
Chair, Senate Budget Subcommittee 3
California State Senate
Sacramento, CA 95814

The Honorable Phil Ting
Chair, Assembly Budget Committee
California State Assembly
Sacramento, CA 95814

The Honorable Dr. Joaquin Arambula
Chair, Assembly Budget Subcommittee 1
California State Assembly
Sacramento, CA 95814

RE: Proposed DSH budget Fails to Appropriately Address the IST Waitlist Crisis and the Over-Incarceration of Individuals with Significant Psychiatric Disabilities

Dear Budget Committee and Subcommittee Chairs:

We write regarding the California Department of State Hospitals ("DSH") plans in the Governor's proposed 2021-22 Budget to address longstanding delays in the treatment of people found incompetent to stand trial ("IST"). As you are no doubt aware, the Alameda Superior Court found in *Stiavetti v. Ahlin* that the State's extended delays prior to the initiation of substantive services for incompetent defendants constitutes a systemic due process violation. In April 2019, the court ordered the State to provide substantive competency restoration services within fixed deadlines. By the end of this year, the deadline will be 28 days of the transfer of responsibility of individuals declared incompetent.[1] While this order has been on appeal, the delays have become even more extensive; an increasing number of individuals with significant psychiatric disabilities are languishing in jail settings pre-trial waiting for substantive services.[2]

The problem extends beyond individuals classified as IST. California's prison system has systematically failed to adequately treat incarcerated people with significant psychiatric

[1] *Stiavetti v. Ahlin*, No. RG15779731, April 19, 2019 Judgment. The Court of Appeal heard the government's appeal on April 21, 2021 and should decide the case before the end of July.
[2] According to DSH's most recent data, there were 1,583 individuals waiting for a DSH restoration bed – many of whom have been waiting for well over six months. DSH 2021-22 May Revision Proposals and Estimates Report ("DSH May Revise") at 29 (data as of April 26, 2021).

disabilities.[3] Experts have repeatedly recognized that the incarceration of people with significant psychiatric disabilities does a disservice to both the individuals and the public.[4]

It is long past time for the State to address this crisis. The State's response should be centered on an urgent and dramatic expansion of county mental health diversion and community-based treatment options (including community-based restoration programs (CBR)). Both DSH analysts and independent researchers have concluded that the majority of individuals found IST are suitable for diversion,[5] yet diversion programs are severely under-resourced. At the same time, the State should avoid expanding incarcerative remedies – including jail-based competency restoration (JBCT) and increased DSH IST beds – which do more harm than good.

1. DSH Should Sharply Expand DSH Diversion Programs and Funding

In 2018, with the passage of AB 1810, California established a new mental health diversion ("MHD") process. As codified in Penal Code § 1001.36, most individuals with significant psychiatric disabilities may be diverted from prosecution to a behavioral health treatment program. This MHD program could have a substantial impact on limiting the number of people with significant psychiatric disabilities in criminal custody, including the IST population. DSH acknowledges this.[6] But despite the potential presented by this law, mental health diversion programs have been severely limited in reach and impact. A dramatic expansion of mental health diversion—and the requisite funding—is essential to effectively respond to the crisis of extensive IST waitlists and the over-incarceration of people with significant psychiatric disabilities in California's jail and prison system.

The State has not provided the funding and leadership sufficient to implement AB 1810 effectively and scale up MHD statewide. To facilitate the implementation of the MHD process, the 2018-19 budget provided $100 million in one-time funds to DSH to award contracts to counties to help create diversion programs.[7] DSH used $86.6 million of those funds to help twenty counties with high IST referral numbers set up felony diversion programs.[8] These programs have been inadequate, diverting only 291 people across the whole state. Only 88 of

---

[3] Despite 25 years of court supervision and scores of court orders in the *Coleman* litigation regarding mental health treatment for people incarcerated by the California Department of Corrections and Rehabilitation ("CDCR"), the *Coleman* Special Master recently reported that CDCR had the second highest suicide rate of the nation's ten largest prison systems for the most recent period, 2001-16. *See* January 28, 2021 Special Master Report on 2016 Suicides, ECF No. 7038 at 23.

[4] *See. e.g.*, Darrell Steinberg *et al*., "When Did Prisons Become Acceptable Mental Healthcare Facilities?," Stanford Law School Three Strikes Project (Feb. 19, 2015), *available at* https://law.stanford.edu/publications/when-did-prisons-become-acceptable-mental-healthcare-facilities/.

[5] DSH May Budget Revision at 234 ("As of March 2020, DSH found that little more than half of IST cases on the waitlist reviewed may be eligible for diversion based on the diagnosis and/or the condition of homelessness in relation to the charged offense. These individuals are not likely to pose a safety risk to the community with appropriate medication and treatment and are not charged with one of the exclusionary crimes listed in Penal Code (PC) 1001.36."). *See, e.g.*, Stephanie Brooks Holliday *et al.,* "Estimating the Size of the Los Angeles County Jail Mental Health Population Appropriate for Release into Community Services," RAND Corporation (Jan. 7, 2020), *available at* https://www.rand.org/pubs/research_reports/RR4328.html.

[6] *See supra*, note 4.

[7] DSH May Budge Revision at 227.

[8] *Id* at 228-229.

these people were found IST prior to diversion.[9] Even the target goals of these programs were far too modest given the need: the existing MHD programs aimed to divert only 820 people over their three-year lifespan.[10] Given that the pre-Covid statewide IST referral rate was 350 people per month, DSH's diversion programs are currently slated to divert only *seven percent* of potential ISTs out of the criminal justice system.[11] This would make barely a dent in the backlog. Many others who have a significant psychiatric disability but are not deemed IST are also unable to benefit from the law because of this slow scale-up.

The State's planned expansion of diversion in this year's proposed budget is similarly modest. In this budget cycle, DSH has requested only $46.7 million to expand existing DSH Diversion programs and to create DSH Diversion programs in the remaining counties.[12] These expansions would increase the size of DSH Diversion programs to 1,200 people over the three-year pilot timeframe – fewer than the number of referred ISTs in a *three-month* period.[13] Furthermore, the budget does not set aside funds for resources – like supported housing – that are necessary to ensure that diversion is a feasible and effective option for individuals and counties.

The State should provide at least double its current funding to county agencies to expand their diversion programs. The main limiting factor preventing further expansion of county MHD programs is State funding. In Contra Costa County, an early beneficiary of DSH Diversion contracts, there are only three clinicians funded, limiting MHD in Contra Costa to sixty people at a time. Similarly, the $1.4 million provided to Sacramento County allows for diversion for only 50 people at one time, only 25 of whom can access housing. In Tulare County, where DSH did not provide any funding, the Tulare Health & Human Services Agency can provide treatment to only 30 individuals at once. Given that the diversion period under Penal Code § 1001.36 is up to two years, these programs reach capacity quickly.

The State should also eliminate its match-funding requirement. This requirement forces counties to match any funding that DSH provides for a diversion program, making it harder for diversion programs to get off the ground. The match funding requirement has already prevented at least two counties (Stanislaus and San Joaquin) from scaling up diversion programs.[14]

In addition to providing funding for treatment providers and facilities, the State should provide funding to counties explicitly directed for housing individuals who are participating in MHD. Approximately half of people found IST were unhoused prior to their incarceration.[15] Yet the California Health and Human Services Agency's Behavioral Health Continuum Infrastructure Proposal does not "designate funds specifically to individuals experiencing homelessness" as part of its behavioral health infrastructure funding.[16] Many counties lack sufficient supportive housing for people with significant psychiatric disabilities,

---

[9] *Id* at 232.
[10] *Id* at 229-230.
[11] *Id* at 29.
[12] *Id* at 233.
[13] *Id* at 232-234.
[14] *Id* at 230.
[15] 2018 DSH Annual Report at 10 (noting that their "research indicates that almost half of the IST patient referrals were unsheltered homeless individuals at the time of their arrest.").
[16] May 24, 2021 LAO Preliminary Comments on the Governor's Major May Revision Behavioral Health Proposals at 11.

which effectively forecloses the diversion of people found IST, because judges are unwilling to divert people without housing for them to go to.[17]

The State should also direct funding to county public defender offices to help them evaluate candidates for mental health diversion programs. Many resource-constrained public defender agencies lack the staffing and resources to prepare MHD requests. In order for MHD to be successful, public defender agencies need social workers to evaluate potential diversion candidates and attorneys to write MHD motions. Without this funding, MHD will remain limited.

Lastly, the State should require counties with diversion programs to provide regular data on their programs. This data should be publicly available on DSH's website. Currently, needed data on diversion programs is sorely lacking. Publicly available diversion data provides only the number of diverted individuals (including the number of attempted diversion motions and the number of diverted individuals deemed likely to become IST) without any county-level breakdowns or point-in-time tracking.[18] The State should require detailed tracking of DSH Diversion programs and should make this data available to the public. This data should include, at minimum, a disaggregated and anonymized list of the diversion motions made per county program per month, including whether the person was successfully diverted, the race/ethnicity of the person, and criminal charge(s) of the case in question. Similar data should also be maintained showing the number of completed diversion periods and the number of aborted diversion periods. This data should be maintained publicly on the DSH website.

2. DSH Should Expand Community-Based Treatment, Including CBR

DSH should expand treatment programs to keep individuals with significant psychiatric disabilities in their communities and connect them with needed programs upon release. This should include, but not be limited to, community-based restoration (CBR) programs. The Governor's May Revision Budget proposes $59.8 million in increased funding for CBR programs, which treat IST patients in the community in a variety of treatment settings, ranging from locked acute units to residential environments.[19] Currently, the only CBR program is in Los Angeles County, where patients can return to treatment programs after their cases have resolved. DSH's proposal would expand the CBR program by 200% in Los Angeles County and add a further 252 beds in other as-yet-unidentified counties over the next three years.[20] If these program expansions are successful, they would represent a 368% increase in CBR capacity. Diverting individuals from the criminal legal system should be the first option. However, ensuring that individuals found IST have access to community-based treatment is both better for patients and less expensive than jail or inpatient hospital placement.[21]

---

[17] In Tulare County, for instance, there is only one Board-and-Facility for the entire county.
[18] DSH May Revise at 232, 239-246.
[19] *Id* at 247-253.
[20] *Id*.
[21] For instance, one study found that states spend nearly $400 per day per patient by using outpatient programs over inpatient treatment. *See* W. Neil Gowensmith, *et al*., "Lookin' for Beds in All the Wrong Places: Outpatient Competency Restoration as a Promising Approach to Modern Challenges," Psychology, Public Policy, and Law (June 6, 2016), *available at* http://dx.doi.org/10.1037/law0000088, at 9.

The State should also require data tracking of CBR programs so that the public can evaluate their effectiveness. Currently, very limited data is available about the number of individuals restored to competency through CBR.[22] The State should mandate data tracking that includes, at minimum, a disaggregated and anonymized list of people restored per month per program, the length of stay in the program, the race/ethnicity of the person in the program, the charge(s) of the criminal case in question, and whether the individual returned to the program after the resolution of their criminal case. This data should be made publicly available on the DSH website.

3. DSH Should Place a Moratorium on New JBCT Beds and End its Reliance on Jail-Based Programs

DSH should not continue to prioritize the scaling up of jail-based competency treatment units ("JBCT") and DSH inpatient beds, which are designed to restore individuals found IST to competency for subsequent prosecution. DSH should not direct its focus narrowly on competency restoration to facilitate prosecution. If individuals found IST are restored to competency and subsequently prosecuted, the effect will be to continue and exacerbate California's longstanding over-incarceration of people with significant psychiatric disabilities. Despite decades of effort, the State has not managed to provide constitutionally sufficient care to the tens of thousands of people with significant psychiatric disabilities languishing in California prison cells.[23] Diversion and community-based treatment should be the primary means of responding to people with significant psychiatric disabilities in the criminal legal system, including those deemed IST.

In the Governor's May Revision Budget proposal, DSH proposes to drastically increase the number of JBCT beds providing restoration services to people found IST, raising the number of beds by 41% to 615 beds.[24] At least nine new counties would open up JBCTs under DSH's proposal, with many existing programs increasing their bed counts as well.[25]

This is a mistake. These beds are costly, provide poor care, and do nothing to end the incarceration of people with significant psychiatric disabilities.[26] As experts have found, diverting IST patients from jail-based treatment to community-based treatment saves $60,000 per person.[27] JBCTs keep people with significant psychiatric disabilities in austere, inhumane environments, shortchanging their well-being for a quick restoration.

---

[22] *See* DSH May Revise at 247-253.

[23] For instance, the *Coleman* Special Master recently found in a report on CDCR inpatient programs that incarcerated people in CDCR's programs "uniformly receive less treatment than would be expected in functioning inpatient programs," partially due to "the lack of a sufficient number of inpatient beds" in CDCR. *See* January 28, 2021 Special Master Report on CDCR Inpatient Programs, ECF No. 7039 at 21. These problems will only increase if DSH takes a narrow approach to the IST crisis, pushing people with significant psychiatric disabilities downstream.

[24] DSH May Budget Revision at 204-226.

[25] *Id*.

[26] *See, e.g.*, Alexandra Douglas, "Caging the Incompetent: Why Jail-Based Competency Restoration Programs Violate the Americans with Disabilities Act under Olmstead v. LC.," Georgetown Journal of Legal Ethics, 32 (2019), 525– 575.

[27] *See* Gowensmith, *supra* note 19, at 9.

DSH should discontinue JBCT funding and redirect the planned JBCT funding requests towards diversion programs. As the California Legislature declared with the passage of AB 720 (Eggman) in 2017: "Jails are not therapeutic environments and were not intended or designed to be mental health facilities."[28] California should not provide any further funding for these programs.

Conclusion. The state must act quickly to end the unnecessary, costly, constitutionally inadequate, and counterproductive incarceration of people with significant psychiatric disabilities. Mental health diversion and community-based treatment should be central to the State's response. Further institutionalization and incarceration of people with significant psychiatric disabilities, including those deemed IST, must be rejected.

Sincerely,

Kevin Baker, Director of State Governmental Relations
ACLU California Action

Andrew J. Imparto, Executive Director
Disability Rights California

Claudia Center, Legal Director
Disability Rights and Education Fund

Elisa Della-Piana, Legal Director
Lawyers Committee for Civil Rights of the San Francisco Bay Area

cc. Mark Ghaly, Secretary, Health and Human Services Agency
Stephanie Clendenin, Director, Department of State Hospitals

[28] AB 720 section 1(c) (2017).