

Community Forensic Partnerships Division
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DEPARTMENT LETTER: 25-002

January 1, 2025

TO: ALL COUNTY ADMINISTRATIVE OFFICERS
ALL COUNTY BEHAVIORAL HEALTH DIRECTORS
ALL COUNTY CHIEF EXECUTIVE OFFICERS
ALL COUNTY COUNSELS
ALL COUNTY DISTRICT ATTORNEYS
ALL COUNTY HEALTH CARE DIRECTORS
ALL COUNTY PROBATION OFFICERS
ALL COUNTY PUBLIC HEALTH DIRECTORS
ALL COUNTY PUBLIC DEFENDERS
ALL COUNTY SHERIFFS
ALL COUNTY SUPERIOR COURTS

SUBJECT: INFORMATION REGARDING DSH DIVERSION PROGRAM
PARTICIPANTS ELIGIBLE FOR PROGRAM FUNDING

EXPIRES: RETAIN UNTIL RESCINDED

SUPERSEDES: DEPARTMENT LETTER 22-001

Purpose

The purpose of this Departmental Letter is to provide counties with guidance regarding recent statutory amendments to CA Penal Code (PC) §1001.36, PC §1368, §1369, §1370, §1370.1 and Welfare & Institutions Code (WIC) §4361 in accordance with the passage of Senate Bill (SB) 1323 (Menjivar, Chapter 646, Statutes of 2024) effective January 1, 2025, that impact the Department of State Hospitals' (DSH) Diversion Program. As a result of these statutory changes, this Departmental Letter clarifies eligible DSH diversion program participants for whom a county can receive funding when they have contracted with DSH to support the operation of a local pre-trial felony mental health diversion program pursuant to WIC §4361.

Background

The Legislature enacted PC §1001.36 and WIC §4361 and amended PC §1370 on June 27, 2018, to authorize courts to divert certain individuals with serious mental illness and allow DSH to contract with counties as a funding mechanism for the establishment of new or expansion of existing pre-trial mental health diversion programs. PC §1001.36 and PC §1370 establish the criteria by which a court can

divert an individual to a county pre-trial Felony Mental Health Diversion Program and WIC §4361 outlines the criteria for clients participating in a county program funded by DSH. DSH has authority to contract with counties for DSH-funded Diversion programs, and to provide funding as specified in WIC §4361.

SB 1323, effective January 1, 2025, amends PC §1001.36, PC §1368, §1369, §1370, §1370.1 and WIC §4361, and modifies incompetent to stand trial procedures by providing treatment-based options for felony IST defendants when a court finds that it is not in the interest of justice to restore the individual to competency. The amendments to PC §1370 require the court, after finding a defendant incompetent to stand trial, to first determine if restoring the IST defendant to competency is in the interest of justice and, if it is not, to conduct a hearing to determine if the IST defendant is eligible for diversion. If the court finds the IST defendant ineligible for diversion or if diversion is terminated unsuccessfully, the court may hold a hearing to consider the following alternatives:

- A. Order modification of the mental health diversion treatment plan in accordance with a recommendation from the treatment provider.
- B. Refer the IST defendant to assisted outpatient treatment, pursuant to WIC §5346 (also known as Laura's Law), if available.
- C. Refer the IST defendant to the county conservatorship investigator in the county of commitment for possible Lanterman-Petris-Short (LPS) conservatorship proceedings for the defendant, as specified, pursuant to WIC §5350.
- D. Refer the IST defendant to the CARE program pursuant to WIC §5978.
- E. Reinstate competency proceedings.

SB 1323 revised WIC §4361 removing the requirement for a felony IST individual to be committed to DSH in order to participate in the DSH-funded Mental Health Diversion Program. As such, felony IST individuals who, in the interest of justice, are diverted by the court prior to commitment to DSH and who meet all other requirements outlined in WIC §4361, are eligible to participate in a DSH-funded Mental Health Diversion Program. Individuals diverted after commitment to DSH also continue to be eligible to participate a DSH-funded Mental Health Diversion program.

Consistent with the law prior to January 1, 2025, if the court finds it is in the interest of justice to restore the individual to competence, and the court ultimately commits the individual to DSH, diversion still continues to be an alternative after commitment to DSH and before transportation to a DSH facility pursuant to PC 1370 (a)(1)(C)(v)(I) or when considering placement locations pursuant to PC 1370 (a)(2)(A)(i).

Definitions

Felony Mental Health Diversion Clients: Qualified defendants treated in a DSH-funded Diversion program who meet the general or specific eligibility requirements pursuant to PC §1001.36, PC §1370 and WIC §4361.

Instant Offense: The current offense that the defendant is charged with and that led to their arrest.

Specific Requirements for Counties with Permanent Program Contracts beginning in FY 2024-25 authorized in the 2022 Budget Act

Regardless of commitment to DSH, all eligible felony IST individuals can participate in a DSH-funded Diversion Program. However, counties must enter into a contract with DSH to receive funding. To establish a contract for DSH-funded Diversion programs, counties are required to submit a Letter of Interest (LOI) and obtain approval from DSH to initiate the process. DSH funding can be used to support Felony Mental Health Diversion Clients who meet the following requirements:

- A. The instant offense is a felony with the exception of certain statutorily excluded crimes (PC §1001.36(d)(1-8)) (Attachment B).
- B. A guilty plea has not been entered in the case for which DSH-funded Diversion is being recommended.
- C. Client was evaluated and found IST by the court. (WIC §4361(j)(1)(A-B))
- D. Client suffers from a mental disorder with a primary diagnosis from the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), or current edition, excluding antisocial personality disorder, borderline personality disorder, pedophilia and substance-induced psychosis pursuant to PC §1001.36 (b)(1) and WIC §4361(c)(1)(A).
- E. Be able to demonstrate that the defendant does not pose an unreasonable risk to public safety if treated in the community pursuant to WIC §4361(c)(1)(C).
- F. Restoration of competency services have not previously been provided for the instant offense by another DSH program, including but not limited to a State Hospital, Jail-Based Competency Treatment program, Community-Based Restoration program, or the Admission Evaluation Stabilization Center unless the defendant is arrested on a new felony charge.
 - i. A client may however be served in a DSH contracted facility as described in WIC §4361.6 and PC 1370 (a)(1)(C)(v)(I). A client may also have been treated through the Early Access and Stabilization Services (EASS) as described in WIC § 4361.7 in a county jail prior to being transitioned to DSH-funded Diversion.
 - ii. A client who received restoration services in the past from DSH related to being found IST for a prior felony charge is eligible for diversion if the individual has been charged with a new felony.

- G. Has not been found competent or malingering, and there is no unlikely to be restored recommendation pending before a court related to the instant offense.

Admission into the DSH-funded Mental Health Diversion Program requires meeting the eligibility criteria above and being suitable for this treatment option. Counties shall evaluate candidates for the program using a multidisciplinary approach to determine treatment needs prior to placement within the program. An empirically validated violence risk assessment tool must be used to assess eligibility.

For DSH-Funded Diversion Programs operating under active contracts with funding initially authorized in fiscal years 2018-19 and 2021-22, also known as DSH Diversion Pilot and New/Expansion Programs, refer to Attachment A for specific requirements.

If you have any questions or require additional information, please contact the DSH Diversion team by email at DSHDiversion@dsh.ca.gov.

Original Signed By



Stacey Camacho
Deputy Director
Community Forensic Partnerships Division

Attachment(s):

Attachment A: 2018-19 and 2021-22 Original DSH-Diversion Program Guidance
Attachment B: References

ATTACHMENT A: 2018-19 AND 2021-22 ORIGINAL DSH-DIVERSION PROGRAM GUIDANCE

The information below is for counties who currently have active contracts with DSH to support Pre-Trial Felony Mental Health Diversion Programs that are supported with funds initially authorized in Fiscal Years 2018-19 and 2021-22. Referred to as DSH Diversion Pilot and New/Expansion Programs, the guidance below is consistent with current contract provisions and prior departmental letters issued.

SB1323, effective January 1, 2025, removes the requirement that individuals for a felony IST individual to be committed to DSH in order to participate in the DSH Diversion Pilot and New/Expansion Programs. As such, in addition to felony IST defendants diverted after commitment to DSH, felony IST defendants who, in the interest of justice are diverted by the court prior to commitment to DSH and who meet all other requirements of these two programs described below are eligible to participate in a DSH-funded Mental Health Diversion Program.

1. Specific Requirements for Original Pilot Programs as Authorized in the 2018-19 Budget Act and Additional New County Programs as Authorized in the 2021-22 Budget Act

Pilot diversion programs established and funded under the initial authority in FY 2018-19 and additional new county programs funded through the 2021 Budget Act will be funded for Felony Mental Health Diversion Clients when all the following are true:

- A. The instant offense is a felony with the exception of certain statutorily excluded crimes (PC §1001.36(d)(1-8)) (Attachment A).
- B. A guilty plea has not been entered in the case for which DSH-funded Diversion is being recommended.
- C. Restoration of competency services have not previously been provided for the instant offense by another DSH program, including but not limited to a State Hospital, Jail-Based Competency Treatment program, Community-Based Restoration program, or the Admission Evaluation Stabilization Center unless the defendant is arrested on a new felony charge.
 - i. A client may however be served in a DSH contracted facility as described in WIC §4361.6. PC 1370 (a)(1)(C)(v)(I) has been amended to allow for these specific placements. A client may also have been treated through the Early Access and Stabilization Services (EASS) as described in WIC § 4361.7 in a county jail prior to being transitioned to DSH-funded Diversion.
 - ii. A client who received restoration services in the past from DSH related to being found IST for a prior felony charge is eligible for diversion if the individual has been charged with a new felony.

- D. Has not previously participated in the DSH-funded Diversion Program for more than thirty (30) days and the county has not previously been funded for the client under the current offense.
 - i. While clients may enter the program as often as the county is willing to admit them, only unduplicated clients entering the program for the first time will be counted towards the county population target and next funding installment.
- E. Client has a primary diagnosis of schizophrenia, schizoaffective disorder, or bipolar disorder (WIC §4361(n)).
- F. Client was evaluated and found IST by the court or is deemed “Likely to be IST.” In order for a client to be diverted as “Likely to be IST” the following must also be true:
 - i. Client displays psychotic or manic symptoms as a result of a diagnosed mental health disorder that prevent the defendant from participating in their legal proceedings and, as a result of these symptoms, doubt has been raised but a competency evaluation has not yet been completed.
- G. A court competency evaluation has not yet been completed but may be in process simultaneously with the diversion evaluation.
 - i. If doubt is raised a second time after a candidate has been restored to competency, that defendant is not eligible.

2. *Specific Requirements for Counties with Amended Contracts to Expand Existing Diversion Pilot Programs beginning in FY 2021-22*

Beginning in July 2021, established DSH-funded Diversion Programs had an opportunity to expand their DSH-funded Diversion contracts. Counties with amended contracts under this FY 2021-22 expansion program will be funded for clients when all the following are true:

- A. Client meets the requirements in sections A-D listed above in the specific requirements for original programs funded under the FY 2018-19 Pilot Program.
- B. Client was evaluated and found IST by the court. WIC 4361(j)(1)(A-B).
- C. Client suffers from a mental disorder excluding antisocial personality disorder, borderline personality disorder, and pedophilia pursuant to PC section 1001.36 subdivision (b)(1).

ATTACHMENT B: REFERENCES

Listed are the exclusionary crimes from Penal Code 1001.36. (d)(1-8), referenced in Department Letter 25-002.

1001.36. (d)(1-8):

- (a) On an accusatory pleading alleging the commission of a misdemeanor or felony offense not set forth in subdivision (d), the court may, in its discretion, and after considering the positions of the defense and prosecution, grant pretrial diversion to a defendant pursuant to this section if the defendant satisfies the eligibility requirements for pretrial diversion set forth in subdivision (b) and the court determines that the defendant is suitable for that diversion under the factors set forth in subdivision (c).
- (d) A defendant may not be placed into a diversion program, pursuant to this section, for the following current charged offenses:
 - (1) Murder or voluntary manslaughter.
 - (2) An offense for which a person, if convicted, would be required to register pursuant to Section 290, except for a violation of Section 314.
 - (3) Rape.
 - (4) Lewd or lascivious act on a child under 14 years of age.
 - (5) Assault with intent to commit rape, sodomy, or oral copulation, in violation of Section 220.
 - (6) Commission of rape or sexual penetration in concert with another person, in violation of Section 264.1.
 - (7) Continuous sexual abuse of a child, in violation of Section 288.5.
 - (8) A violation of subdivision (b) or (c) of Section 11418.