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DEPARTMENT LETTER: 23-003 (Supersedes DL 22-003) **REVISED**

**January 31, 2024**

TO: ALL COUNTY CHIEF ADMINISTRATIVE/EXECUTIVE OFFICERS

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

EXPIRES: When Noticed

### **Purpose**

**This revised department letter reflects an update to the version dated October 27, 2023, and any changes are reflected in red font.**

In December 2022 the Department of State Hospitals (DSH) released Departmental Letter (DL) 22-003 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. The DL outlined the methodology for the IST determination counts and the rate that would be applied for potential penalty payments and the fiscal year (FY) 2021-22 baseline felony IST determination counts for each county were provided at that time.

Also, during the course of 2022-23, DSH provided unreconciled data for each county's IST determination counts for the first two quarters of the fiscal year. Following the release of this information, DSH received multiple inquiries regarding the methodology applied for IST determination counts and requests to support a dispute process. In response to these inquiries, DSH opened a collaborative dialogue with a coalition of county representatives between April and June 2023. Following the discussions, DSH has updated three primary components of the growth cap program: the methodology utilized for IST determination counts applied to the 2021-22 baseline year and subsequent fiscal years; the penalty rate a county would be potentially charged for the number of IST determinations that exceed the baseline; and implementation of a dispute process for IST determination counts reported by DSH to each county. DL 23-003 supersedes DL 22-003 and makes specific the IST growth cap and penalty payment.

### **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 DSH to convene an 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 are 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 remit the penalty payment to DSH for deposit 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 expenditure plan by October 31, 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:

1. 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.
2. 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.
3. 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.

### Growth Cap Data Provided to Counties

Summarized Data: 2021-22 Baseline and 2022-23	<p>This letter includes a revised report identifying for each county its reconciled 2021-22 IST determination counts (Attachment A) in accordance with the updates outlined in the <i>IST Determination Methodology</i> section below. This revised report supersedes any prior reports provided. This will serve as each county's baseline number of IST determinations for future penalty calculations.</p> <p>Also included in this letter is a report of each county's unreconciled IST determination data for the first, second and third quarter of FY 2022-23 (Attachment B). This data is provided to help a county assess how FY 2022-23 IST determinations are trending in comparison to the county's FY 2021-22 baseline numbers to determine whether the county may be subject to a potential Growth Cap penalty.</p>
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<p>Future Year Summary Data</p>	<p>Moving forward, 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. Additionally, reference to the FY 2021-22 baseline felony IST counts will be provided as a comparison to monitor trends.</p> <p>On an annual basis and by statute, DSH is required to do a final reconciliation of IST determination data by September 30<sup>th</sup> each year. In order to meet this deadline, DSH will include all IST commitment records received by DSH by August 31<sup>st</sup> each year. By the end of October, DSH will then provide counties with a final report summarizing the four quarters of reconciled IST determination data from the prior fiscal year.</p> <p>Please refer to Attachment C for details regarding the new IST determination methodology.</p>
<p>Individual Level Data</p>	<p>Individual level data that supports the IST determination numbers tabulated by DSH will be made available to each county for review and analysis. As this data represents sensitive patient-specific information, distribution shall be limited to a representative who is authorized to receive this data on behalf of the county.</p> <p>Counties will need to designate an authorized representative who will serve as a primary point of contact to receive the individual level data in accordance with DSH guidance. Please refer to Attachment D for more information on how to designate a county representative to receive the detailed individual-level data.</p>
<p>Dispute of IST Determination Count</p>	<p>If a county believes the IST determination numbers identified for the FY 2021-22 baseline levels and subsequent years is incorrect due to missing and/or updated individual IST commitment records, the county may seek resolution through a dispute process with DSH. Please refer to Attachment E for more information on the process for disputing IST determination numbers.</p>

**Growth Cap Penalty Rates, Payment and Required County Reports**

For counties subject to penalty payments under the IST Growth Cap, the invoicing process, timeline, and distribution of funds from the MHD Fund is outlined below.

Penalty Rates: DSH has established a tiered rate structure to calculate potential penalty payments which takes into account, a county’s participation in a DSH-funded IST treatment program. The initial basis for the rate supports the average annual cost of IST treatment. Please refer to Attachment F for more information on the rates established for 2022-23 penalties.

Invoices: Annually from February to May, invoices will be sent out 30 days following the dispute outcome or, if no dispute is filed, following the termination of the dispute window.

1. County payments are due 90 days following receipt of invoice (per statute).
2. Money will be issued back to counties 45 days after receipt and approval of expenditure plan.

Required County Reports: 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.

**Timelines**

Below is a summary of important milestones regarding the implementation of WIC 4336. All items reflected shaded in light blue denote responsibilities of the county to submit information to DSH. All other items denote DSH action. **Changes are reflected in RED.**

<b>Timeline</b>	<b>Action</b>	<b>Process</b>
August 2023	Revised Report Issued by DSH	Updated 2021-22 IST Determination Baseline provided (Attachment A)  New Report of unreconciled data for the first, second & third quarters of 2022-23 provided (Attachment B)
<b>August 1, 2023, through October 31, 2023</b> (or through November 30, 2023, if 30-day extension requested)	<b>County Baseline Dispute Window – One Time</b>	<b>County window to submit a dispute regarding 2021-22 IST determination baseline</b>  County may request a one-time extension of up to 30 days
November 1, 2023, through January 31, 2024 (or through February 29, 2024, if extension requested)	DSH Review Period – One Time	DSH window to review 2021-22 IST baseline disputes and provide response to county
Quarterly	Report Issued by DSH	Unreconciled 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>

		<i>DSH will also share individual level details of each IST determination with County representatives authorized to receive such information.</i>
<del>February 1, 2024</del> <b>March 1, 2024</b>	Notice Issued by DSH	Expenditure plan format and required contents will be provided to counties.
By the end of October 2023 and ongoing annually	Report Issued by DSH	Annual report issued of four quarters of reconciled IST determination data from the prior FY and notice of any change in methodology related to the calculation of the bed rate for the upcoming year. <i>Authorized county representatives will also receive individual level details of each IST determination accounted for and reconciled by DSH.</i>
<b>November 1, 2023, through January 31, 2024</b>	<b>County Dispute Window</b>	<b>County annual window to submit a dispute regarding reconciled IST determination data for the prior FY to DSH.</b>
February 1 to April 30, 2024	DSH Review Period	DSH window to review disputes and provide response to county.
February to May annually	DSH Issues Penalty Invoices	Following the DSH Review Period, Invoices will be sent to 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>

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



Chris Edens  
Chief Deputy Director Program Services  
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

Attachment(s):

Attachment A – FY 2021-22 IST Baseline Determination Data  
Attachment B - FY 2022-23 unreconciled IST Determination Data  
Attachment C - IST Determination Methodology  
Attachment D – Designation of Authorized Representative  
Attachment E – Dispute Process  
Attachment F – Penalty Rates