

MEMORANDUM

TO: Joint Budget Committee Members

FROM: Carolyn Kampman, JBC Staff

SUBJECT: Potential Legislation Concerning Competency Evaluations

DATE: March 2, 2016

Last September the Committee approved a request from the Department of Human Services for \$2.7 million General Fund to address continued increases in the number of court-ordered competency evaluations and restorations to competency. Ongoing funding of \$4.1 million General Fund is requested for FY 2016-17. The Committee discussed this issue with both the Department of Human Services and the Judicial Department to determine whether additional actions could be taken to improve the efficiency and effectiveness of competency evaluation and restoration service (this is item #20 on the list of potential JBC bills). This memorandum describes a proposal for potential legislation to address some of the issues that have been discussed.

The proposed legislation would include the following elements:

Court Discretion Concerning the Location of the Competency Evaluation

Limit the court's discretion to order that a competency evaluation be conducted at the Colorado Mental Health Institute at Pueblo (CMHIP). Specifically, require that all initial competency evaluations be conducted on an outpatient basis (*i.e.*, in a jail or any location other than CMHIP) unless:

- The court determines that the person whose competency is in question may be a danger to self or others as defined in Section 27-65-102, C.R.S.¹; or
- The CMHIP Court Services Evaluator determines that the evaluation should be conducted at CMHIP (*e.g.*, if the defendant has been uncooperative during an evaluation or there are clinical reasons to change the location to CMHIP); or
- The court determines that there have been one or more inadequate or conflicting forensic evaluations performed; or
- The court has reason to believe that an observation period is necessary in order to determine if a person is competent to stand trial; or

¹ "Danger to self or others" means:

(a) With respect to an individual, that the individual poses a substantial risk of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm to himself or herself; or

(b) With respect to other persons, that the individual poses a substantial risk of physical harm to another person or persons, as manifested by evidence of recent homicidal or other violent behavior by the person in question, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt, or threat to do serious physical harm by the person in question."

- The Executive Director of the Department of Services, or his/her designee, has provided written approval for the evaluation to be conducted at CMHIP.

Court Decision to Offer Bond

Include language to clarify that the court's decision about whether a defendant should remain in custody in the jail should not be based on the fact that the defendant needs a competency evaluation. The Judicial Department provided the following response to a hearing question confirming that the decision to offer bond is made separately from the decision concerning a competency evaluation:

"The decision to offer bond is made prior to, and independent of, the mental health evaluation decision. Changes in bond decisions will not impact the decision to use inpatient or outpatient evaluations. Colorado law already requires courts to use an empirically developed risk assessment instrument, if practicable and available, to make better bond decision. If the county has a pretrial services program, the program is required to make every reasonable effort to use an empirically developed risk assessment tool to provide information for judges when considering initial bond decisions. See sections 16-4-103 (3) (b) and 16-4-106 (4) (c), C.R.S. (2015)."

The existing statutory language concerning the court's decision about the location for a competency evaluation may be interpreted to mean that a defendant who would otherwise be released from custody should remain in jail based on the need for a competency evaluation (*emphasis added by staff*):

"The defendant *may* be released on bond, if otherwise eligible for bond, or referred or committed for a court-ordered competency evaluation to the department, or the court may direct that the evaluation be done at the place where the defendant is residing or is in custody. In determining the place where the evaluation is to be conducted, *the court shall give priority to the place where the defendant is in custody*, unless the nature and circumstances of the evaluation require designation of a different facility." [Section 16-8.5-105, C.R.S.]

It is staff's understanding that the last sentence above was intended to direct the court to limit the number of competency evaluations ordered at CMHIP. With the proposed limitations on the court ordering inpatient evaluations, this provision should be replaced with language that states that the court's decision about whether a defendant should remain in custody in jail or be released to the community should be based on the defendant's risk of reoffending (as delineated in Article 4) and not be affected by a defendant's need for a competency evaluation.

Judicial Department Payments to CMHIP

Repeal the requirement that CMHIP bill the Judicial Department for the cost of defendants for whom the court has ordered an inpatient competency evaluation. This would require an appropriation clause that adjusts the FY 2016-17 Long Bill, transferring \$368,000

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General Fund from the Judicial Department to CMHIP, and eliminating a duplicative appropriation that allows CMHIP to spend moneys received from the Judicial Department (\$368,000 reappropriated funds). The Judicial Department provided the following response to a hearing question concerning this billing process:

"Since the judge's primary obligation is to ensure that the defendant is provided due process, it is inappropriate for daily cost of evaluation to weigh into the legal decision regarding evaluation. Imposition of a fee will not result in decreased orders to inpatient evaluation but might only result in changing the allocation and accounting of state funds for CMHIP from the DHS budget to Judicial.

If this billing process was established to create a disincentive for judges to order inpatient competency evaluations, the Department's response indicates that it is not an effective or appropriate disincentive. This billing process does not appear to serve any meaningful purpose, and it should be repealed.

Transporting Defendants To/From CMHIP

Add statutory language that requires county sheriffs to make reasonable efforts to take custody of a defendant as quickly as possible once CMHIP has completed a court-ordered competency evaluation. Given the daily cost of conducting competency evaluations at CMHIP, the importance of CMHIP complying with the time frames of the 2012 Settlement Agreement concerning competency evaluations and restorations, and the significant need for psychiatric beds for civil patients, it is important that these defendants be transitioned back to the jails as quickly as possible.

In addition, to assist the Department in ensuring that CMHIP beds are being used efficiently and to assist law enforcement agencies that are challenged to transport defendants who require competency evaluations at CMHIP, appropriate funding for CMHIP to hire 2.0 FTE secure transport staff (\$143,566 General Fund for FY 2016-17). These staff would be available Monday through Friday to transport defendants from jail to CMHIP or from CMHIP back to jail. These staff would not be able to handle all the transportation needs of defendants who are ordered to receive a competency evaluation at CMHIP. These resources would be prioritized based on:

- Defendants with urgent clinical needs;
- Defendants for whom CMHIP is at risk of not meeting the Settlement Agreement time frames; and
- Local law enforcement agencies that are challenged to transport defendants due to their size (number of staff) or geographic location.