

MEMORANDUM



JOINT BUDGET COMMITTEE

TO Members of the Joint Judiciary Committee
FROM Emily Hansen, JBC Staff (303-866-4961)
DATE January 24, 2024
SUBJECT Competency Services within the Colorado Department of Human Services

SUMMARY

- The Department of Human Services is responsible for court ordered competency evaluations and inpatient restoration services. Services are provided at the state mental health hospitals unless the court authorizes services in a jail or community based setting.
- In 2011, Disability Law Colorado brought legal action against the Department of Human Services to challenge the length of time pretrial detainees wait in Colorado jails to receive competency evaluations and restoration services. This legal action resulted in a consent decree, entered into in March 2019. The Department pays fines for noncompliance with the consent decree, capped at \$12.0 million General Fund in FY 2023-24.
- Recent Legislative action to increase resources for competency primarily includes ARPA funding for additional units and contracted competency beds, as well as targeted salary increases for state employees at the hospitals.
- The Executive Branch has requested an increase of \$58.0 million General Fund in FY 2023-24, and \$75.2 million in FY 2024-25, to maintain and increase inpatient competency beds.

BACKGROUND

The Office of Civil and Forensic Mental Health (OCFMH) within the Department of Human Services is responsible for evaluating the legal competency of individuals charged with a crime and providing competency restoration services when an individual is determined to be incompetent to proceed to trial. These services may be provided at the Colorado Mental Health Hospitals in Pueblo and Fort Logan (CMHHIP and CMHHIFL) unless the court authorizes the provision of services in a jail or community based setting. The state hospitals serve civil and forensic patients. All patients at Pueblo originate as forensic patients, while Fort Logan primarily serves civil patients.

Civil patients are voluntarily or involuntarily committed to the Department's care without a criminal charge. The Department must maintain 94 civil beds at Fort Logan as part of a consent decree described later in this memo. It is staff's understanding that a majority of voluntary civil patients originated as involuntary, but became voluntary during their stay. The Department estimates that 90.0 percent of civil patients at Fort Logan in December 2023 were involuntary. Involuntary commitments require a psychiatric evaluation and court certification for short- or long-term treatment (Section 27-65-106 (6)(a), C.R.S. and Section 27-65-109 (1), C.R.S.).

Forensic patients include individuals with pending criminal charges who have been court ordered for inpatient competency evaluations or competency restoration services, and patients

who have been found not guilty by reason of insanity. A patient may originate as forensic but remain in the Department's care as a civil patient after criminal proceedings resolve.

COMPETENCY EVALUATION

In legal proceedings, **competency refers to an individual's ability to aid and assist in their own trial.** Competency may be called into question at any point by the defense, prosecution, or court in a criminal case, but is most often raised by the defense in pre-trial hearings.¹ *Dusky v. United States* established a defendant's right to competency evaluation prior to a case moving to trial. When competency is raised, the court orders a forensic evaluation and legal proceedings are suspended until the evaluation is complete. The question of competency can therefore interrupt the right to a speedy trial.

Evaluations must be completed by a licensed psychiatrist or psychologist trained in forensic competency (Section 16-8.5-101 (3), C.R.S.). Evaluations consist of a review of case discovery, a brief client history, and a competency specific mental exam. The exam pertains specifically to the individual's factual knowledge of legal proceedings, and ability to make reasoned decisions to assist in their own defense rather than a comprehensive mental health exam.

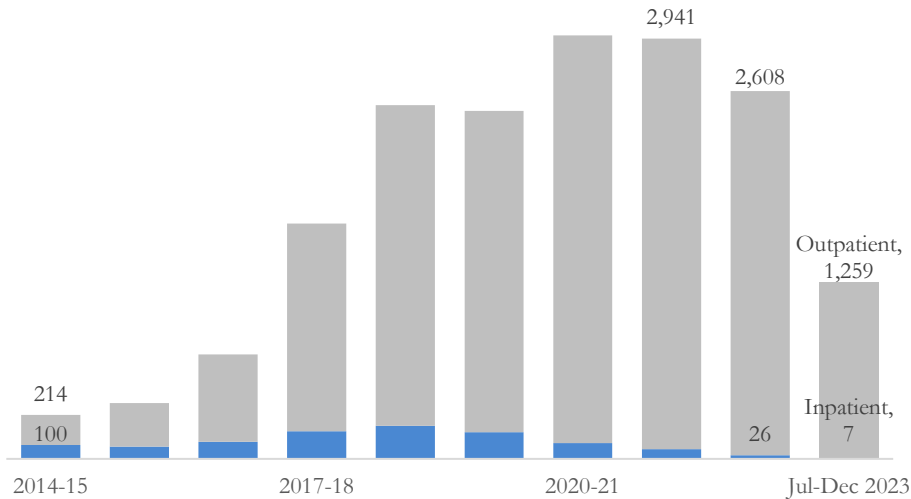
A defendant is determined to be "incompetent to proceed" if they have a mental disability or developmental disability that: (1) prevents them from having sufficient present ability to consult with the defense attorney with a reasonable degree of rational understanding in order to assist in the defense; or (2) prevents them from having a rational and factual understanding of the criminal proceedings (Section 16-8.5-101 (12), C.R.S.). The standard for competency is lower than the standard imposed for a sanity evaluation, in part because it only measures the defendant's "present" ability rather than the defendant's mental status at the time of the crime. Competency can change at any time based on factors such as whether the defendant is taking prescribed medication consistently.

The evaluator must make a report to the court once the evaluation is complete. The judge makes the final decision of whether the defendant is competent to proceed based on the evaluators report. Not all competency evaluation orders result in the completion of a competency report, as the competency examination order may be withdrawn for a variety of reasons (e.g., the charges were dropped or new orders were issued to change the evaluation location from inpatient and outpatient). The court may order additional evaluations, but second evaluations are not performed or paid for by the Department (Section 16-8.5-101 (18), C.R.S.).

Annual court orders for competency evaluations are provided in the chart on the following page. Only six months of data is available for FY 2023-24, but reported data is slightly lower than mid-year data in FY 2022-23. Inpatient services refer to evaluations provided at state or private hospitals. Outpatient refers to services conducted at a jail, prison, youth detention center, or in the community.

¹ Office of Behavioral Health. https://leg.colorado.gov/sites/default/files/images/understanding_competency_one-pager.pdf

Court ordered competency evaluations peaked in FY 2020-21.



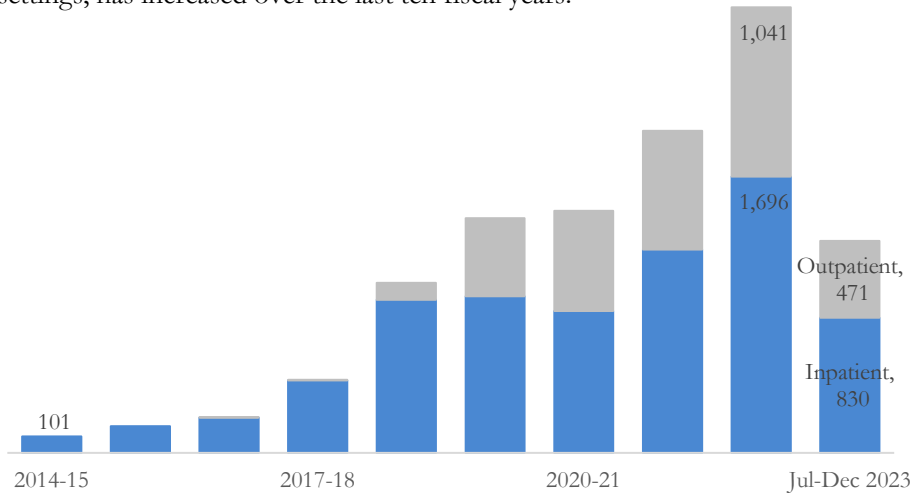
COMPETENCY RESTORATION SERVICES

If a defendant is determined competent to proceed, court proceedings may continue. If a defendant is determined to be incompetent to proceed, the court may pursue services to restore competency before proceeding with the trial. Restoration services focus on barriers to competency identified in the evaluation, including education or access to medication. Services may vary based on location, type of crime committed, need of the patient, and the judge. **Restoration services may or may not include mental health treatment, and do not include long-term comprehensive care.**

Once the defendant's treatment team determines that competency has been restored, the Department conducts a competency evaluation. If the Department evaluator agrees, the Department prepares a report to the court and the court determines whether the defendant is restored to competency. When the Department recommends to the court that the defendant is restored to competency, the defendant may be returned to custody of the county jail or to previous bond status and the case proceeds.

An individual may not be confined for purposes of receiving competency restoration treatment for a period in excess of the maximum term of confinement that could be imposed for the offenses with which the defendant is charged, less any earned time (Section 16-8.5-116 (1), C.R.S). The court is required to review the case at least every 91 days with regard to the probability that the defendant will eventually be restored to competency and the need for continued confinement. When the duration of restoration services exceeds the maximum term of confinement, the defendant will be released from treatment without competency being restored. The Department estimates that 41.0 percent of inpatient and 50.0 percent of outpatient individuals ordered to receive services are restored to competency. Annual court ordered restoration services are provided in the chart on the following page.

Court ordered restoration services, and the proportion addressed in outpatient settings, has increased over the last ten fiscal years.



CONSENT DECREE

The Department reached an agreement with plaintiffs in a federal lawsuit concerning the length of time that pre-trial detainees wait for court-ordered competency services in March 2019. The parties filed the agreement in federal court in the form of a consent decree. The consent decree is legally binding and judicially enforceable through December 1, 2027. However, the consent decree would be terminated if the Department sustained a two-year period of compliance. Until the consent decree is terminated, compliance is overseen by the Court and a Special Master (Groundswell Services, Inc., and its team of forensic mental health experts).

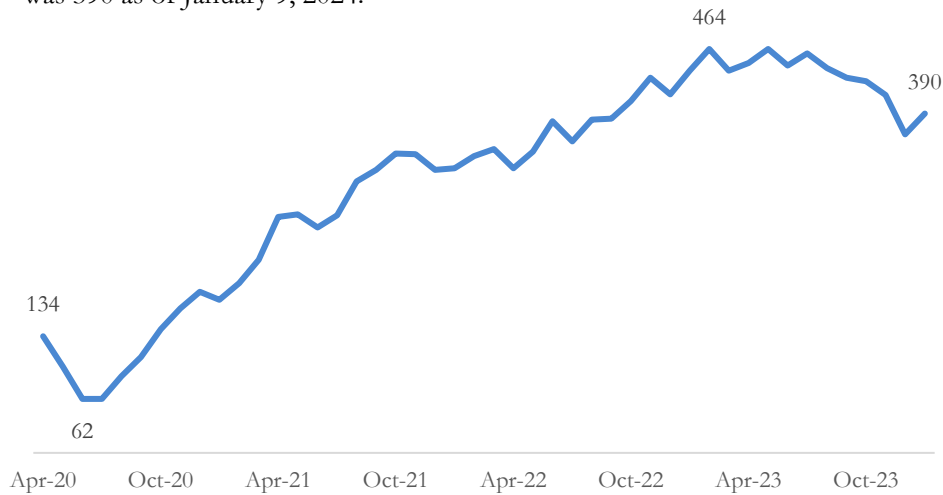
The consent decree establishes a set timeframe for competency evaluation and restoration services. The Department must pay fines for each day of violation for these timeframes, varying from \$100 to \$500 per day. However, fines are capped to an annual amount adjusted for inflation each year. **Fines were capped to \$12.0 million General Fund in FY 2023-24, but the Department estimates that fines would have totaled \$65.2 million in FY 2022-23 in absence of the cap.**

COMPETENCY EVALUATIONS: Admission for inpatient evaluation must occur within 14 days as of July 1, 2020. Evaluations conducted in a county jail are required within 21 days.

COMPETENCY RESTORATION SERVICES: Inpatient treatment must be offered within 7 days to pretrial detainees who have been ordered to receive inpatient treatment, and 1) appear to have a mental health disorder that results in the individual being a danger to other or themselves, or to be gravely disabled; or, 2) have a mental health disorder and delaying hospitalization would cause harm to the individual or others. Other pretrial detainees who have been ordered to receive inpatient services must be offered admission within 28 days.

The waitlist for competency restoration services varies on a daily basis. The Department reports that **391 individuals are on the waitlist as of January 9, 2024.** The average time on the waitlist is 105-115 days, but the range of time spent on the waitlist varied from 50-387 days in November of 2023.

The waitlist for restoration services peaked at 464 patients in February, 2023, and was 390 as of January 9, 2024.



Fines are awarded by the Colorado Fines Committee through a grant process to support behavioral health and competency services. Reporting indicates that a total of \$41.3 million in fines has been received by the Fines Committee. Of that amount, \$31.4 million has been allocated and \$16.2 million expended as of September 30, 2023. Fines have supported a range of programs, including competency dockets, housing, Sheriff's Offices, assisted living programs, community mental health centers, and Denver Health.² Awards have ranged from \$17,850 to \$3.5 million.

CONTRACT STAFFING

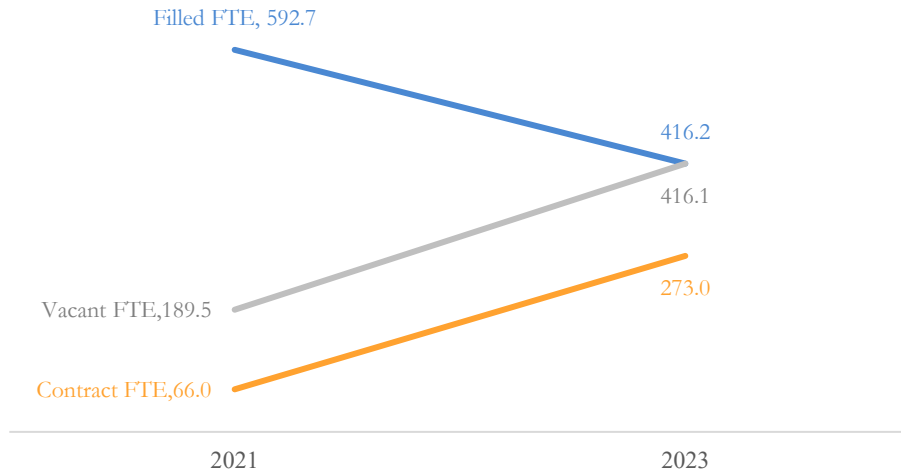
The Department has increasingly relied on contract staffing for direct care staff since the COVID-19 pandemic. Increasing vacancies for state FTE has forced the closure of units that are otherwise funded and operable. The Department states that **35.1 percent of direct care staff left Pueblo between July 2021 and April 2023**. Nationwide medical staff shortages, retirements, and compensation competition with private hospitals has only exacerbated hiring and retention challenges that pre-existed the COVID-19 pandemic.

Contract staff are paid at higher rates with more scheduling autonomy than state FTE. Therefore, the reliance on contract staffing comes at a higher General Fund cost and further contributes to lower staff morale and high turnover. The Department reported that the salary for a state Nurse I FTE was \$38.93 per hour in FY 2022-23 (\$50.61 with benefits), compared to \$109 per hour for a contract nurse.

The Department frequently notes that retirement benefits that used to incentivize state employment are no longer competitive with higher base compensation available through private companies. **Contract staffing positions have increased from 66.0 positions in 2021 to 273.0 in 2023**, while the state hospitals maintain a 50.0 percent vacancy rate for state FTE. Filled, vacant, and contracted FTE provided by the Department are included in the chart on the following page.

² [Fines Committee Awards, 2023.](#)

The state hospitals currently have a 50.0 percent vacancy rate, and increases in contract staff have increased at a similar rate as vacancies since 2021.



The Department has also provided recruitment and retention bonuses through American Rescue Plan Act (ARPA) funds. Incentive payments have varied over time and by job classification, but range up to a total of \$14,000 for nurses. Incentives were distributed at two points, first when an employee reached 180 days of employment, and a second payment after 270 days. The Department notes that even though other incentives have been utilized, hiring for nurses did not improve until \$14,000 bonuses were implemented. The Department anticipates that ARPA funds will be exhausted by March 2024. A timeline of incentive payments is provided below.

Sep-22	Nov-22	Jan-23	Mar-23	May-23	Jul-23	Sep-23	Nov-23	Jan-24	Mar-24
\$1,000 Referral Bonus for all Direct Care Staff									
\$3,250 Client Care Aid, Custodian, Dining Service, and Health Technician Recruitment Bonus									
\$2,000 Social Worker, Clinical Therapist, Psychologist, Teacher, and Facility Specialist Retention Bonus									
\$7,000 Nurse Recruitment Bonus			\$14,000 Nurse Recruitment Bonus						
			\$5,000 Nurse Retention Bonus						

RECENT LEGISLATIVE ACTION

The most significant investments related to competency in recent years have been through ARPA funded legislation and targeted compensation increases.

HOUSE BILL 22-1303 (INCREASE RESIDENTIAL BEHAVIORAL HEALTH BEDS)

The bill includes an appropriation of **\$57.8 million** from the Behavioral and Mental Health Cash Fund, which originates as ARPA funds, for several projects related to increasing residential behavioral health resources. Amounts include \$17.1 million to renovate and open a 16 bed unit at Fort Logan, \$3.8 million for 18 beds at group homes, and \$33.5 million for 107 contracted beds. The bill specifies that beds at Fort Logan may be used for competency services until the waitlist is eliminated, at which point the beds must serve civil patients.

HOUSE BILL 22-1386 (COMPETENCY TO PROCEED AND RESTORATION TO COMPETENCY)

The bill appropriated **\$29.4 million** from the Economic Recovery and Relief Cash Fund, which originates as ARPA funds, to contract with private hospitals for inpatient beds. Reports from the Executive Branch indicate that \$16.0 million has been expended, and 100.0 percent has been expended or encumbered. The Department reports that 61 private hospital beds were supported with ARPA funds in FY 2023-24, and an additional 8 beds were supported with General Fund. On average, the private hospital beds serve 3 patients per year. Therefore, the Department estimates that inpatient capacity will decrease by 203 patients per year if long-term funding is not established and the contracts end when ARPA funding expires in 2024.

BUDGET ACTIONS

The General Assembly has approved several targeted salary increases for positions at the state hospitals in recent years in an effort to improve the hiring and retention of state FTE at the hospitals. Targeted compensation increases over the last five fiscal years are detailed below.

- **FY 2017-18**, the General Assembly approved salary increases for nurse positions at Pueblo to the mid-point of the salary range, totaling **\$2.8 million** General Fund for partial year implementation in FY 2017-18 and \$6.0 million for full year implementation in FY 2018-19.
- **FY 2018-19**, the General Assembly approved salary increases for all “direct care” staff at Pueblo and Fort Logan through a Long Bill amendment, totaling **\$9.4 million** General Fund. The specific job classifications intended by direct care staff were not noted in the amendment, but the Department indicates that increases were implemented for client care aides, correctional officers, health care service trainees, health care technicians, mental health clinicians, mid-level providers, nurses, social workers, and therapy assistants.
- **FY 2018-19**, the General Assembly also approved a supplemental increase of **\$918,060** General Fund for contract physicians at Pueblo and Fort Logan.
- **FY 2020-21**, the General Assembly approved a **\$540,984** General Fund increase for psychologists at Pueblo and Fort Logan.
- **FY 2022-23**, the General Assembly approved targeted salary increases for all food service and housekeeping employees throughout the state. This included **\$593,760** total funds for the state hospitals.
- **FY 2023-24**, the General Assembly approved one-time, non-base building salary increases for direct care staff at 24/7 facilities across the state. This included an 8.0 percent increase for nurses and 3.7 percent for client care aides, totaling **\$1.7 million** General Fund.

While salary increases could improve the hiring and retention of state employees, targeted salary increases present many implementation challenges.

- 1 The General Assembly can appropriate additional funds to the personal services line items for the state hospitals. The General Assembly does not have authority over how that increase is implemented, or what classifications and employees actually receive increased compensation.
- 2 Funding for contract staff is supported through the personal service line items for the state hospitals. Therefore, any increase to the line for state employee compensation could be used to support additional contracts or higher cost contracts rather than higher salaries for state employees.

- 3 If compensation is increased for the state hospitals, similar increases will be requested and warranted for other 24/7 facilities, particularly in the Division of Youth Services and Department of Corrections.
- 4 The General Assembly has approved targeted salary increases for the state hospitals in four of the last five fiscal years, and vacancies have only persisted or increased.
- 5 Implementing a compensation change has a long-term, ongoing effect. It is possible that competition with contract staffing will be a short-term trend best addressed through continuing one-time bonuses on a term-limited basis to determine the effect.
- 6 Any increase approved by the General Assembly could quickly be surpassed by private hospitals and contract agencies.

BUDGET REQUEST

The Executive Branch budget request includes an increase of \$58.0 million General Fund in FY 2023-24 and \$75.2 million General Fund in FY 2024-25 to maintain and increase the number of inpatient competency beds. The Joint Budget Committee has approved the FY 2023-24 request, to be considered by the General Assembly as part of the Supplemental Package in February. The request is offset by anticipated vacancy savings and an assumption that the Department will be able to reduce vacancies in future years through salary increases in the State Pay Plan. Components of the request are outlined in the table below.

REQUEST COMPONENTS BY FISCAL YEAR			
	FY 2023-24	FY 2024-25	FY 2025-26
Maintain existing contract staffing	\$36,054,685	\$36,054,685	\$36,054,685
Maintain HB 22-1386 private hospital bed contracts (61 beds)	10,546,900	25,382,100	25,382,100
Add contract staff to re-open Pueblo RNRU unit (39 beds)	7,125,994	7,125,994	7,125,994
Add contract staff to re-open Pueblo E2 unit (21 beds)	4,818,576	7,656,853	7,656,853
Add contract staff to open and increase FL F3 unit (22 beds)	1,532,503	3,816,466	3,816,466
Add private hospital bed contracts (19 beds)	1,321,260	7,905,900	7,905,900
Decrease state vacancies	(3,432,539)	(12,696,327)	(17,798,670)
Total (162 beds)	\$57,967,379	\$75,245,671	\$70,143,328