

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the Legislature. LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

## FISCAL IMPACT REPORT

<b>SPONSOR</b> <u>HHHC</u>	<b>LAST UPDATED</b> _____
	<b>ORIGINAL DATE</b> <u>2/8/24</u>
	<b>BILL</b> <u>CS/House Bill</u>
<b>SHORT TITLE</b> <u>Criminal Competency Determination</u>	<b>NUMBER</b> <u>233/HHCS</u>
	<b>ANALYST</b> <u>Daly</u>

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT\* (dollars in thousands)

Agency/Program	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
		\$169.4	\$169.4	\$338.8	Recurring	General Fund

Parentheses ( ) indicate expenditure decreases.  
 \*Amounts reflect most recent analysis of this legislation.

Near duplicate of the committee substitute for Senate Bill 16

### Sources of Information

LFC Files

Agency Analysis Received From

- Administrative Office of the Courts (AOC)\*
- Health Care Authority (HCA)\*
- Law Offices of the Public Defender (LOPD)\*
- New Mexico Attorney General (NMAG)
- New Mexico Sentencing Commission (NMSC)\*
- University of New Mexico (UNM)

\*On original bill

Agency Analysis was Solicited but Not Received From

Department of Health (DOH)

## SUMMARY

### Synopsis of HHHC Substitute for House Bill 233

The Health and Human Services Committee substitute for House Bill 233 (CS/HB233) substantially rewrites existing law on proceedings to determine competency to stand trial on criminal charges. A case must be stayed if one of the parties or the court has a good-faith basis for raising a concern about a defendant’s competency, and a competency evaluation shall be performed. Alternatively, in misdemeanor cases, the court may order the defendant (1) diverted to a treatment program, if available; or (2) considered for assisted outpatient treatment. On diversion, misdemeanors shall not transfer to district court. Metropolitan Court retains jurisdiction of a misdemeanor whether or not a defendant is diverted. Nonviolent felony cases,

with the parties' agreement and court approval, may also be diverted. The case shall be dismissed after the specified time for completion of treatment has elapsed or on a defendant's acceptance into assisted outpatient treatment.

When a court determines a defendant should be evaluated for competency, within 30 days of completion of that evaluation, the court must conduct a same-day hearing on competency and dangerousness of a defendant charged with a felony. If found competent, the stay must be lifted, and the case shall proceed to trial or other hearing. If the defendant is incompetent but not dangerous, the court shall dismiss the case without prejudice, and the defendant may be referred to determine if the defendant is eligible for civil commitment.

If the court determines a defendant is incompetent and dangerous, the court shall order treatment in the least restrictive setting consistent with the goal of restoration to competency, including referral to an outpatient or residential community competency restoration program at an institution or facility authorized by the Department of Health (DOH) or Health Care Authority (HCA), but only if the placement will not pose an unreasonable risk to the health and safety of the defendant, any person, or the community. On a finding of dangerousness, defendant shall be detained in a secure, locked facility by DOH until completion of treatment. In the event DOH certifies it is unable to meet the medical needs of the defendant, the court shall conduct a hearing on further disposition of the criminal case.

Within 30 days of a defendant's admission to an inpatient or outpatient facility, the competency restoration supervisor must provide an initial assessment and treatment plan and other specified information to the court, the state, and the defense, including the probability of the defendant attaining competency within nine months. When a defendant is committed to the state hospital to undergo competency restoration, following a progress report by the treatment provider, a court shall conduct a 90-day review hearing as to defendant's competency, progress under treatment and whether the defendant remains dangerous.

On a court's determination that there is not a substantial probability that a defendant will become competent within nine months, existing law is amended to allow DOH, the state, the family, or the healthcare provider, in addition to the district court, to refer the defendant to the district attorney for an assessment to determine if the defendant is eligible for civil commitment. CS/HB233 also requires that, in the event the defendant is not committed, or the court in its two-year review finds the defendant is no longer dangerous, the defendant shall be released with a treatment plan and case management services in place.

A new definitions section is added for terms used in these new and amended sections governing criminal competency determinations, and existing law governing payment for mental examinations of an indigent defendant is modified to direct the state pay those costs using funds available to the court.

This bill does not contain an effective date and, as a result, would go into effect 90 days after the Legislature adjourns, or May 15, 2024, if enacted.

## **FISCAL IMPLICATIONS**

HCA reported in its earlier analysis that it provides the structure, quality control, training, and funding for all court-ordered competency evaluations when a defendant is found to be indigent.

These activities include contracting with forensic evaluators statewide to ensure competency evaluations are assigned and completed, providing training for the competency evaluators on current practices, and completing reviews on evaluations to ensure quality standards are met.

Further, HCA advised the Behavioral Health Services Division (BHSD) would need to collaborate with DOH, which oversees the competency restoration program to expand its competency restoration program beyond New Mexico Behavioral Health Institute. BHSD could also assist DOH in identifying providers in the counties as DOH expands its competency restoration programs, to ensure that behavioral health needs are met for those who are identified as needing treatment. BHSD would also need to update the scope of work for forensic evaluators to ensure the new court timelines outlined in the bill are met. HCA reported these new responsibilities would require 1 FTE at a pay band 70 and 0.5 of a supervisor position, for a total of \$169.4 thousand for salary, fringe benefits, and operating costs.

## SIGNIFICANT ISSUES

CS/HB233 provides a new alternative for a criminal defendant who, on the basis of a competency evaluation, is determined to be not competent to stand trial. While existing law allows for diversion prior to such a determination, under this bill a defendant who has been found to be incompetent may be ordered into an in-patient or outpatient competency restoration program. AOC explains the difference between these two approaches: With *diversion*, a court connects the defendant with services. The case is dismissed, and the defendant does not need to wait for an evaluation, with its potential associated delays, to be completed. Instead of additional involvement with the courts, a defendant begins to receive services right away, which may include housing. *Community competency restoration*, on the other hand, occurs after an evaluation determines the defendant is incompetent, and perhaps found to be dangerous as well. If appropriate, a court does not have to involuntarily commit the defendant; instead, the court can order the defendant to participate in a competency restoration program which may occur outside of the state hospital.

In its earlier analysis, AOC reported the benefits of community-based competency restoration are as summarized by the National Alliance on Mental Illness (NAMI):

Community-based competency restoration is a promising practice that allows some defendants, who may not require hospital level care, to receive competency restoration services while living in the community, instead of an institutional setting like a jail or hospital. This model has been shown to be less expensive than traditional competency restoration services and has favorable restoration rates. More importantly, it allows some defendants to remain in the community where they can continue to receive support from friends and family and connect with community mental health services to support long-term recovery. By allowing those who do not require hospital level care to stay in their community, these programs also help to reserve institutional based care for people with the most significant needs.

HCA in its earlier analysis explained CS/HB233 appears to be based on similar statutes in other states and would help address “revolving door” issues: Currently, a defendant with major behavioral health concerns who is facing criminal charges is likely to be found incompetent to stand trial, and if not deemed dangerous, the charges are dropped and there is no incentive or mechanism to encourage or supply treatment. Without behavioral health treatment, these persons have repeated encounters with law enforcement and the courts and may end up incarcerated repeatedly while awaiting new competency determinations.

Similarly, LOPD commented in its analysis of the original bill:

This bill proposes some positive changes. The attempt to remove non-violent mentally ill offenders from the criminal justice system is commendable. If New Mexico had the treatment programs this bill imagines, this would be beneficial to LOPD's mentally ill clients. The desire to divert people with mental health issues to alternative treatment programs, rather than being prosecuted and imprisoned, is laudable.

HCA also pointed out that while the hearing to determine competency must occur on the same day as a hearing on dangerousness, generally mental health professionals who assess for competency do not assess for dangerousness during an evaluation. Risk assessment for dangerousness is a different evaluative approach. Additionally, HCA noted that Section 4 requirements that a "treatment supervisor" file reports 30 days and 90 days following a defendant's admission to an inpatient or outpatient program is unclear and questions whether this is the treating clinician or the competency evaluator. HCA recommended the evaluative role be isolated from the treatment role.

A major issue raised by all responding agencies is the lack of competency restoration programs across the state. LOPD expressed concern that, without available programs, this bill is unworkable and may only confuse matters when no alternative to New Mexico Behavioral Health Institute exists. As the New Mexico Sentencing Commission points out in its earlier analysis, the Section 6 requirement that a defendant can be released after the two-year review hearing only "with a treatment plan and case management services in place" could cause delays in release because New Mexico is chronically underserved by treatment and service providers for those with behavioral health challenges. One example is the University of New Mexico Hospital (UNMH), which reports its Psychiatric Center is not set up for forensic admissions to its general inpatient units. UNMH also advises that inpatient competency restoration would require admission to what is typically an inpatient forensic unit; it does not believe it is possible to provide this treatment in a residential, community level of care as outlined in the bill.

Further, LOPD pointed out an outpatient competency restoration program raises issues of voluntary compliance. It advised that many incompetent defendants are unable to remember court dates and appointments with their attorneys or understand and comply with court orders. The bill does not address the manner in which these challenges may be overcome to ensure this treatment is successful.

## **PERFORMANCE IMPLICATIONS**

UNMH reports it does not provide outpatient competency restoration or competency examinations. It does determine decisional capacity normally in the context of treatment decisions but advises that competency examinations typically require a forensic psychiatrist or psychologist.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

This bill is a near duplicate of CS/SB16 in all respects except two relatively minor differences: (1) In this bill, the phrase "if the parties agree" is added on page 2, line 13 (as to misdemeanor defendants being diverted). (2) The definition of "nonviolent felony" is different between the two bills.

## TECHNICAL ISSUES

Page 4, line 4: the word “diagnostic” should be replaced with “competency.”

Page 9, lines 5, 8 and 10; page 11, line 7; and page 12, line 7: consistent with the language appearing on page 8 at line 7, the phrase “treatment supervisor” should read “competency restoration supervisor”.

Page 10, line 18: the court review being required here is a second nine month review, and the phrase “original determination of incompetency” should be replaced with language requiring review nine months from the date of the first nine month review.

Page 19, line 16: “consistent with” should be “constituting.”

Page 20 lines 5-11: As NMSC previously noted, Section 8(L) provides a definition of “violent felony” more limited than that used for defining “serious violent offense” in other statutes. See NMSA 1978, Section 33-2-34(L). In addition, rather than using either of these definitions when a violent offense is being addressed throughout the bill, a third listing of specific violent offenses is set out. See Section 5(A) and Section 6(A),(B) and (D). Further, the term “violent felony” itself does not appear anywhere in the bill other than in the definition section. The definition of “violent felony” should be revised to reflect the listing of crimes set out in Section (A) and Sections 6(A), (B) and (D), and the defined term used in those subsections.

## OTHER SUBSTANTIVE ISSUES

In its earlier analysis, NMAG pointed out that there is at least one other existing statute that applies to determining competency of a defendant in a criminal case, see Section 43-1-1, NMSA 1978, as well as Supreme Court rules of procedure that are applicable.

Both the Administrative Office of the Courts and HCA reported 16 states have formal community-based competency restoration programs, and 35 states mental health agencies report that they pay for these services.

In its earlier analysis, the Sentencing Commission reported:

In August 2020, the NMSC published the report “Competency Assessment Results for FY 2019”. Working with New Mexico Counties, the NMSC designed a study to examine the competency process in New Mexico. NMSC received competency related events filed with the courts as well as competency evaluations from the New Mexico Behavioral Health Collaborative’s database. The report summarizes the results of NMSC’s analyses of those evaluations. The report examined metrics such as the number of competency cases by judicial district, the time it took for a competency report to be generated, custody status, types of crimes, and demographic factors. The report is available at <https://nmsc.unm.edu/reports/2020/nmcompetency-assessment-results-fy19.pdf>.

## AMENDMENTS

As to Section 2's new requirement that competency evaluations "shall include a provisional diagnosis or full diagnosis when possible," HCA suggested adding the phrase "if applicable," because not all individuals who undergo an evaluation meet criteria for a behavioral health diagnosis.

HCA advised it is the funding agency for all court-ordered competency evaluations when a defendant is indigent. The language in Section 16 may need to be updated.

LOPD questions the phrase "if the parties agree" in the new Section 1(D) concerning a defendant assigned to diversion who refuses or is unable to comply with the court-ordered treatment, and the meaning of "parties" who might agree to a referral to determine the eligibility of such a defendant for civil commitment. Agreement of the parties may create a conflict of interest between the defendant and his counsel and may not be an appropriate mechanism in this instance.

MD/al/hg