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FISCAL IMPACT REPORT

SPONSOR Ortiz y Pino **LAST UPDATED** _____
ORIGINAL DATE 2/2/24
BILL
SHORT TITLE Criminal Competency Determination **NUMBER** Senate Bill 16
ANALYST Daly

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.

Duplicates HB 233

Sources of Information

LFC Files

Agency Analysis Received From

Administrative Office of the Courts (AOC)

Health Care Authority (HCA)

New Mexico Attorney General (NMAG)

New Mexico Sentencing Commission (NMSC)

University of New Mexico (UNM)

Agency Analysis was Solicited but Not Received From

Department of Health (DOH)

SUMMARY

Synopsis of Senate Bill 16

Senate Bill 16 substantially rewrites existing law on proceedings to determine competency to stand trial on criminal charges. A case must be suspended 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, unless a court orders the defendant be assessed for: 1) diversion to a treatment program, if available; or 2) civil commitment. Upon diversion, the dismissal or non-transfer of misdemeanors and non-felony offenses may occur.

Upon completion of a competency evaluation, the court must within 30 days conduct a same day hearing on competency and dangerousness of an incarcerated defendant charged with a felony. The court may issue a dismissal (without prejudice) or a stay and refer the defendant to a

competency restoration program in the least restrictive setting, be it outpatient (if it will not pose an unreasonable risk to the health and safety of the defendant or any other person), subject to certain reporting requirements, or inpatient, as defined. Upon 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. SB69 newly requires that within 30 days of a defendant's admission to an inpatient or outpatient facility, the treatment 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. As required by existing law, following a progress report by the treatment supervisor at least a week before, a court shall conduct a 90-day review hearing as to defendant's competency, progress under treatment and whether the defendant remains dangerous.

Existing law governing competency is amended to allow DOH, the state, the family, or the health care provider, in addition to the district court, upon that court's determination that there is not a substantial probability that the defendant will become competent within nine months, to refer the defendant to the district attorney for an assessment to determine if the defendant is eligible for civil commitment. SB69 also requires that, in the event the defendant is not committed, or the court in its two year review finds that 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 sections of new and amended law governing criminal competency determinations, and existing law governing payment for mental examinations of an indigent defendant clarifies that the state shall 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 reports 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, provide training for the competency evaluators on current practice, and complete reviews on evaluations to ensure quality standards are met.

Further, HCA advises 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 their 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 forensic evaluator scopes of work to ensure the new court timelines outlined in the bill are met. This would require 1 FTE at a pay band 70 and .5 of a supervisor position for a total of \$169.4 thousand for salary, fringe, and operating costs.

SIGNIFICANT ISSUES

SB16 provides a new alternative for criminal defendants who on the basis of a competency evaluation are 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 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.

AOC reports 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 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 explains SB16 appears to be based on similar statutes in other states and would help address concerns of a “revolving door:” 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.

HCA also points 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 notes 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 recommends the evaluative role be isolated from the treatment role.

A major issue all responding agencies raise is the lack of competency restoration programs across the state. As NMSC points out, 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, since New Mexico is chronically underserved

with treatment and service providers for those with behavioral health challenges. One example is UNM Hospital's Psychiatric Center, which reports it is not set up for forensic admissions to its general inpatient units. UNM Hospital 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.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Duplicates HB233.

TECHNICAL ISSUES

Page 4, line 7: the word “diagnostic” should be replaced with “competency.”

Page 19, line 21: “consistent with” should be “constituting.”

In addition, AOC suggests these technical changes:

- Page 2, Line 2 – strike “suspended” and replace with “stayed”
- Page 2, Line 3 – after “and the” add “court shall order a competency evaluation and the”
- Page 2, Line 4 – after “prior to” add “,”
- Page 2, Line 6 – strike “order that” and replace with “if the parties agree,” Page 2, Line 6 – strike “assess for” and replace with “may”
- Page 2, Line 7 – strike “suitability to”
- Page 2, Line 7 – strike “either by”
- Page 2, Line 8 – strike “agreement of the parties or at the courts discretion”
- Page 2, Line 11 – add after (2) “if agreed to by the parties”
- Page 2, Line 11 – strike “for an assessment”
- Page 2, Line 14 – strike “if agreed to by the parties” and replace with “If the parties agree they shall file a stipulated petition requesting defendant be considered for Assisted Outpatient Treatment”
- Page 2, Line 17 – after “six months” add “when a defendant is diverted to treatment in a”
- Page 2, Line 17 – after “misdemeanor case” add “in Magistrate Court” Page 2, Line 17 – strike “when a defendant”
- Page 2, Line 18 – strike “is diverted to treatment”
- Page 2, Line 19 – after “district court” add “a misdemeanor case in the Metropolitan Court, shall remain within the jurisdiction of the Metropolitan Court regardless of whether the defendant is diverted to a treatment program”
- Page 2, Line 20 – strike “the court may order”
- Page 2, Line 21 – strike “or”
- Page 2, Line 21 – after “may agree” add “with approval of the Court”
- Page 2, Line 21 – strike “assessed” and replace with “referred”
- Page 2, Line 23 – strike “Upon completion of the”
- Page 2, Line 24 – strike “program, a”
- Page 2, Line 24 – after “dismissed” add “after the time period for completion of the diversion program has elapsed”
- Page 3, Line 3 – strike section D “If a...Assisted Outpatient Treatment Act.” (line 3 –

10)

- Page 3, Line 21 – strike “district” Page 3, Line 21 – Capitalize “Court” Page 3, Line 24 – Capitalize “Court”
- Page 4, Line 20 – after “dangerous” add “. If the defendant is found competent, the case shall be scheduled for trial or any other type of hearing the Court deems appropriate. If the defendant is determined to be incompetent and not dangerous,”
- Page 4, Line 21 – strike “may” and replace with “shall”
- Page 4, Line 21 – strike “in the”
- Page 4, Line 22 – strike “interest of justice...date of” (line 22 – 25)
- Page 5, Line 1 – strike “referral” Page 5, Line 1 – before “the Court shall” add “If the defendant is determined by the Court to be incompetent and dangerous,”
- Page 5, Line 1 – Capitalize “Court”
- Page 5, Line 23 – strike “residential” and replace with “hospital”
- Page 6, Line 1 – strike “if” and capitalize “The”
- Page 6, Line 1 – strike “is initially” replace with “may be”
- Page 6, Line 9 – strike “and” and replace with “or”
- Page 6, Line 9 – after “refer” strike “for”
- Page 6, Line 10 – before “assessment” add “the defendant for eligibility determination for”
- Page 6, Line 10 – strike “assessment to” Page 6, Line 15 – after “...civil commitment.” Insert “Section 4. Section 31-9-1.2 NMSA 1978 (being laws 1988, chapter 107, section 3 and Laws 1988, chapter 108, Section 3, as amended) is repealed and new Section 31-9-1.2 NMSA 1978 is enacted to read: “31-9-1.2 [NEW MATERIAL] DETERMINATION OF COMPETENC - - DETERMINATION OF DANGEROUSNESS - - COMPETENCY RESTORATION PROGRAM - - COMMITMENT - - REPORT”
- Page 6, Line 15 – Change “C” to “A”
- Page 6, Line 19 – after “competency” add “restoration”
- Page 6, Line 19 – after “program” add “If the defendant is ineligible for outpatient competency restoration, the defendant shall be committed and”
- Page 6, Line 20 – strike “so”
- Page 6, Line 22 – after “(1)” add “if”
- Page 6, Line 22 – after “defendant” add “is committed to the state hospital, the defendant”
- Page 7, Line 2 – strike “treatment” and replace with “competency restoration”
- Page 7, Line 9 – Change “D” to “B”
- Page 7, Line 17 – Change “E” to “C”
- Page 8, Line 6 – after “Section” change “4” to “5”
- Page 8, Line 13 – after “restoration” strike “treatment”
- Page 8, Line 13 – after “the” strike “treatment” and replace with “competency restoration”
- Page 8, Line 17 – after “case” strike “or to proceed with”
- Page 8, Line 18 – strike “diversion, if available”
- Page 8, Line 19 – strike “treatment” and add “competency restoration”
- Page 8, Line 24 – strike “treatment” and add “competency restoration”
- Page 9, Line 5 – strike “under treatment”
- Page 11, Line 1 - strike “treatment” and add “competency restoration”

- Page 11, Line 16 – after “Section” change “5” to “6”
- Page 13, Line 2 – after “Section” change “6” to “7”
- Page 16, Line 21 – after “Section” change “7” to “8”
- Page 18, Line 14 – after “Section” change “8” to “9”
- Page 20, Line 17 – after “Section” change “9” to “10”

OTHER SUBSTANTIVE ISSUES

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

Both AOC and HCA report 16 states have formal community-based competency restoration programs, and 35 states mental health agencies report that they pay for these services.

NMSC reports:

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 suggests the phrase “if applicable,” since not all individuals who undergo an evaluation meet criteria for a behavioral health diagnosis.

The HCA advises that 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.

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