Contra Costa
Health Services

CONTRA COSTA COUNTY
MENTAL HEALTH
COMMISSION

1220 Morello Ave, Suite 100
Martinez, California 94553
Ph (925) 957-2619
cchealth.org/mentalhealth/mhc

To work through families and interagency collaborations to ensure that individuals, with mental illness in the justice system, are given respect, dignity and human rights.

Justice Systems Committee Meeting

Tuesday, October 22, 2019 ♦ 2pm to 3:30pm

At: 1220 Morello Ave, Suite 100 Conference Room, Martinez

AGENDA

I. **Call to Order / Introductions- Chair**

II. **Public Comments**

III. **Commissioner Comments**

IV. **Announcements**

V. **APPROVE minutes from the August 27, 2019 meeting**

VI. **RECEIVE Presentation from Lieutenant Brian Bonthron on the Office of the Sheriff's Crisis Intervention Training provided to Contra Costa law enforcement agencies**

VII. **DISCUSS September 24 site visit to the West County Detention Facility and lessons learned**

VIII. **DISCUSS and identify agenda items for upcoming Justice Committee meetings, potential guest speakers and site visits**

IX. **Adjourn**

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Policy Brief

Shifting the Paradigm for Mental Health Diversion: The Impact & Opportunity of AB 1810 and SB 215

May 2019

The enactment of AB 1810 and SB 215[1] (2018) creates the opportunity for a fundamental paradigm shift that could dramatically improve care and reduce homelessness for Californians who have a mental illness and are arrested and prosecuted in the criminal justice system. These new laws establish a process for diversion by placing them into mental health treatment programs in lieu of prosecution. The new law incorporates three unique processes into the early stages of a criminal case:

- **Targeting.** People who have mental disorders identified in the Diagnostic and Statistical Manual of Mental Disorders whose illnesses were a significant factor in the commission of a felony or misdemeanor offense may be diverted into treatment. Charges of intentional homicide and certain sex crimes are excluded from diversion.

- **Public Safety Risk Assessment.** If the accused is not an unreasonable risk to public safety and with his or her consent, it allows the criminal case judge to postpone the prosecution for up to two years while the accused voluntarily engages in an assigned and supervised program of inpatient or outpatient mental health treatment.

- **Disposition Tied to Treatment Success.** If the defendant is successful in the treatment program, the court must dismiss the criminal case. If he or she is unsuccessful, criminal proceedings are reinstated.

Diversion is not a new criminal justice concept, and people who have mental illnesses have never been barred from existing diversion laws. However, the new statute specifically targets

[1] California Penal Code sections 1001.35 and 1001.36

these individuals with mental illness for treatment in lieu of punishment. At a fundamental level, it shifts the onus of care from the ill-equipped criminal justice system to community systems of care. This is a clear and unequivocal policy shift in California for which neither county behavioral health care nor criminal justice systems are prepared. The potential benefits of the new law include more effective treatment, better outcomes and reduced homelessness.

This policy brief highlights the implementation issues presented for both the criminal justice and mental health systems.

I. Background and Legislative History

The mental health diversion statute (AB 1810) was a product of negotiations related to the 2018-19 state budget. The budget proposal included $100 million to address a bed space crisis at the Department of State Hospitals (DSH). This crisis stemmed from an increase in the number of incompetence to stand trial (IST) filings, and a growing waitlist for DSH placements. Moreover, the state also recognized the value of connecting individuals with serious mental health issues to community treatment.

The mental health diversion statute (AB 1810) was incorporated into a broader "budget trailer bill and authored by the Committee on the Budget. It was signed into law on June 27, 2018. The language received a mixed reception from some judges and prosecutors. However, that statute was effective only during the limited period of July 1, 2018 to December 31, 2018. Subsequent legislation, SB 215 (Beall) was enacted in August to address some of these concerns. For example, those charged with homicide crimes and sex crimes were barred from diversion. In addition, provision was made for hearings to determine whether restitution to the crime victim would be ordered.

II. Why is the New Diversion Law a "Paradigm Shift?

Existing diversion and deferred entry of judgment statutes are sparingly used in California courts. Generally, they are "plea bargain" vehicles used when both prosecutors and defenders conclude, from their disparate views, that litigation will yield suboptimal results. These existing statutes, however, are strictly procedural devices and are not statements of policy. They do not of themselves promote the use of diversion.

The new mental health diversion statute is different. The new law specifies its purpose as promoting the following:

a) *"Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety.*

b) *Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings.*

c) *Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders."*[2]

The purpose set forth in the law is indeed a call to action. It promotes the increased the use of criminal justice system diversion, encourages counties to develop continuum of care settings for diverted individuals, and recommends specifically tailored diversion programs to the unique treatment and support needs of mentally ill offenders.

The immediacy and size of this policy transformation is a product of the rapid growth during the last decade of mentally ill individuals in the criminal justice system. This growth has significantly burdened all elements of that system. The criminal justice system is not designed or equipped to deal with mental illness; it lacks both the flexibility and resources to address the treatment needs for justice-involved individuals. This is especially so because offenders who have a mental illness are disproportionately treatment resistant and homeless. Whatever the causes and effects, no one anticipated that courts and jails would become a primary venue for mental health treatment and housing. Consequently, the criminal justice system has had few safety valves with which to cope with the growing problem of offenders who have mental illnesses. The palpable result has been an immense pressure within the criminal justice system to somehow deal with people who do not fit a punishment paradigm.

For community mental health, the policy transfer also promises to become a major entry point to services and a significant addition to the scope and costs of care for counties. As experience with diversion and the growth in the availability of programs increase, these pressures could easily overwhelm both the courts and community treatment resources.

III. The Challenge of Implementation

The mental health diversion statute works in broad strokes. While the statute's objectives are clear, many operational details are undefined or vague. Consequently, as courts, local criminal justice agencies and county behavioral health providers plan for implementation, they must address the many operational gaps apparent in the statute. These ambiguities and gaps include:

- Unclear linkages between the courts and mental health treatment providers.
- Unknown access to funding from existing public mental health funding sources.

[2]California Penal Code sections 1001.35

California Health Policy Strategies, L.L.C. www.calhps.com 916.842.0715 d.panush@calhps.com

- Questions related to consents by participants who are competent to stand trial but have impaired capacity.
- The role of law enforcement and probation in oversight of persons diverted.
- The nature and extent of oversight of the person diverted.
- The role and application of short-term "5150" holds in diversion pursuant to the Lanterman Petris Short Act.
- The application of due process principles in findings of unsatisfactory performance or failed success in diversion programs.

There are, however, promising models that support mental health interventions in criminal justice proceedings. California's collaborative courts, including dedicated mental health courts, reduce the role of adversary processes and encourage coordination among various entities working with the defendant. These mental health courts include judges, lawyers, care providers and a variety of government agencies that work with criminal defendants. The legal, health care and public safety entities involved in these courts collaborate on potential solutions to the underlying issues and problems that brought the defendant into the criminal justice system. Collaborative justice is a relatively new addition to the justice system, and, by design, its processes continue to evolve. But it is uniquely prepared to accommodate the requirements of mental health diversion. It is likely, however, that the limited number of California collaborative courts would have to be increased to meet the need for diversion services.

Mental health diversion under Penal Code §1001.36 is a process that occurs after a criminal case is filed by the prosecuting agency. However, highly successful pre-filing diversion exists in many places across California and the entire nation. A primary resource that can be used to emulate success with respect to diversion is the Stepping Up initiative sponsored by the Council on State Governments. This national resource has been highly successful in its California implementation and the techniques of its projects and programs offer a rich source of planning information.

Implementation challenges of the new diversion law can be anticipated by considering the issues related to Los Angeles County's experience with its misdemeanor incompetence to stand trial (MIST) project. Initiated as a pilot project in 2015, MIST experimented with the effectiveness and costs of community treatment of incompetent to stand trial defendants as opposed to hospital or jail treatment. It also tested the notion that release to community treatment would ameliorate jail overcrowding. Led by a courageous and creative judge, an amalgam of county and non-profit agencies initially dedicated existing resources to reduce a jail-based MIST treatment backlog of thirty jail inmates. Results validated improvements in both treatment outcomes and costs. However, the results also had an unanticipated and unintended outcome. Judges and lawyers quickly learned that MIST was an effective tool to divert individuals from criminal justice to community care. It also gave them the promise of long-term care from community mental health agencies once the criminal case terminated. Referrals for MIST proceedings increased rapidly as a consequence. The criminal justice players learned that

MIST would, effectively, transfer mentally ill offenders to community mental health care. Due to its success, by 2017 MIST evolved from a project to a permanent program that continues to grow rapidly.

The experience with the Los Angeles County MIST program suggests that community treatment services may experience dramatic increases in demand for services for individuals participating in the diversion program. There is also a reinforcing cycle of success if the treatment system effectively engages the diversion population. As the criminal courts, law enforcement and community players learn that mental health diversion effectively provides mental health care for treatment resistant and homeless individuals, demand will grow.

In the short term, however, an intense planning effort must be undertaken to coordinate community treatment resources with elements of the criminal justice system.

The mental health diversion law creates the opportunity for a fundamental policy shift, but implementation will be challenging, and will require an "all hands-on deck" approach to do so. But the results may be worth it.

To begin the process, we suggest that the following issues should be addressed first.

- **Coordination & Integration with County-based Agencies.** Probation services, community mental health, law enforcement and the court system will need to work together actively to find ways to rationalize their respective strengths to service a mental health diversion population. Without collaborative efforts, conflicting goals, cultures and methods will inhibit program development. For example, existing county behavioral health programs tend to encompass only treatment and prevention interventions. Direct involvement with the criminal justice system is relatively rare for them. By contrast and by design, the courts operate with an adversarial model, and with the notable exception of collaborative courts, the litigants do legal battle as a matter of course. In addition, courts largely employ punitive approaches to behavior modification. Each of these features is fundamentally incompatible with modern approaches to mental health care. The new diversion statute challenges the various agencies to develop and consistently apply new methods to identify, oversee and shift persons diverted into community care. An example would be the permanent attachment of mental health clinicians to the judicial proceedings, in the fashion of probation officers and child protection personnel in juvenile courts. Another would be the hiring or designation of clinicians to act as "diversion officers" to assure program effectiveness and oversight.

- **Gauging the Demand.** Studies of jails and prisons show that roughly 30 percent of prisoners and 20 percent of jail inmates have a mental illness. As noted above, during the past decade coping with this population of offenders has become a crisis for the

courts and custody institutions. One product of this crisis has been legal action initiated by both private and governmental entities based on deprivations of civil rights. Actions taken by the United States Department of Justice under the Civil Rights of Incarcerated People Act have capped the populations of many jails and prisons and have forced the initiation of custodial mental health treatment programs. Mental health diversion is among the potential solutions to these pressures. Undetermined, however, is the size of the population that may be eligible for diversion. This estimate is based on an assessment of mental health acuity and public safety risk. It also is contingent on the capacity of the treatment system and the rapidity with which diversion services can be established to meet the demand.

- **Divining Qualified Mental Health Expertise**. The mental health diversion statute is in part dependent on clinical interventions and analysis. For this purpose, the statute creates a new clinical entity called a qualified mental health expert (QMHE) who has multiple responsibilities in the diversion process. For the defendant to qualify for diversion, QMHEs must provide the court with a recent mental illness diagnosis. In addition, the QMHE must opine whether the defendant's mental disorder would respond to mental health treatment. Other specified roles for the QMHE are to opine whether the defendant would be an unreasonable risk of danger to public safety if treated in the community, whether he or she is performing unsatisfactorily in the treatment program and whether or not he or she is gravely disabled and eligible for mental health conservatorship. Presumably, in addition, the QMHE will have to assess the quality and effectiveness of the treatment provider and whether or not there are suitable alternatives to conservatorship. It's a broad set of tasks for this new resource in both the criminal justice and clinical worlds and it is unclear how issues of training and scope of practice might impact a given putative expert.

  While, the statute does not specify which disciplines meet the requirements for a QMHE. This ambiguity allows for creative approaches to the subject. It also comports with the broad experience within the criminal court system that insufficient numbers of forensic psychiatrists and psychologists exist to service even traditional criminal case mental issues (e.g. insanity, incompetency, unconsciousness and sentence mitigation).

  The statutory vagueness regarding QMHEs allows courts latitude to identify which professionals and what procedures might fulfill the need. For example, ancillary providers such as psychiatric nurses, certified nurse practitioners and licensed clinical social workers might fulfill some limited aspects of QMHE responsibilities. Psychiatrists and psychologists already employed or contracted to local mental health departments to provide treatment might be used for limited parts of QMHE responsibilities. Medical residents and psychology trainees might be engaged, as well. As suggested above, while scope of practice limitations may restrain some providers, combinations of profession skills and innovative procedures could fill the gap. A detailed analysis of this challenge

supported by data is necessary before large-scale diversion implementation is started. Careful analyses of potential processes and assignment of personnel may permit the various QMHE tasks specified in the statute to be broken out among a variety of clinicians and paraprofessionals. The results of these tasks would then be aggregated before the judge who, from among the various assessments and opinions submitted, would determine the issues specified in the statute.

- **Competence to be Diverted.** In the 1950s, California forwent the use of the term "incompetence" in civil law proceedings and replaced it with the term "incapacity." The term incompetence in California, therefore, is limited to criminal cases and it has a special meaning related to the defendant's mental state. Incompetence is the inability of the defendant, due to a mental condition, to understand the nature of the criminal proceedings taken against him or her or to meaningfully cooperate with his or her attorney in defending the case. Because civil capacity and criminal incompetence can coexist, a variety of problems have arisen in criminal cases. Among them is the fact that once incompetence proceedings are initiated by the judge "declaring a doubt," those proceedings must continue and be completed, notwithstanding months-long delays before treatment or a defendant's positive response to short-term care. Further, if the defendant is "unrestorable" to competence, he or she can remain in some form of involuntary custodial treatment for their entire life.

  The new statute stretches to solve these and other long-standing problems by permitting mental health diversion for defendants found incompetent to stand trial prior to his or her being transported to a treatment facility for restoration of competence. Once removed from incompetence status in this fashion, the defendant's suitability for diversion is determined in the same way as other individuals to be diverted. Hence, individuals who are both incompetent and have capacity to volunteer for diversion and who also waive some statutory rights can be treated in the community and transitioned into long-term mental health care.

- **Integrating the Courts into Care & Treatment**. Criminal courts and criminal proceedings usually are fundamentally incompatible with a modern approach to mental health care. The recovery model, mobile crisis response, wrap-around care, assisted living and supported decision-making are a tough sell to criminal case participants. Most criminal case judges and litigators vigorously apply the adversary model of determining guilt or innocence and punishment. In addition, court personnel generally lack knowledge and experience with mentally ill individuals and mental health programs.

  The traditional criminal case mental issues referenced above allow judges and lawyers to simply hand-off care to treatment providers. However, in mental health diversion cases, the judge and the lawyers remain tightly engaged in the process. Progress and success or failure while individuals are diverted will remain a feature of the criminal

case. For example, the diverted person's progress under care is subject to review hearings that can be initiated by virtually anyone involved. These features require special knowledge of the substance of clinical care and the symptoms of mental illness needed by legal specialists. A few such legal specialists exist in dedicated courts such as collaborative mental health courts. The mental health diversion procedures will, however, be available in all California criminal courts. There is an immediate need to train judges and criminal lawyers on pertinent subjects related to mental illness and its impact on criminal cases.

IV. Conclusion

California's bold new diversion laws are an opportunity to shift responsibility for care and oversight from criminal courts and penal institutions to mental health treatment providers. For too long, law enforcement and criminal justice have been the default mechanisms for dealing with mentally ill individuals who get into trouble. Once through that entryway they suffer confinement in lieu of care. That begins a cycle of homelessness, recidivism and re-offense, frequently resulting in mentally ill individuals becoming long-term wards of penal institutions. The diversion laws are aimed at foreclosing that cycle and creating a gateway to the separate civil system of mental health care. While the new statutes have operation gaps and funding must be sought to achieve their legislative goals, they should help remove individuals from the criminal justice system who should not be there.

About the Authors

- **Dave Meyer** is a Clinical Professor and Research Scholar at the Institute of Psychiatry, Law and Behavioral Sciences of the University of Southern California Keck School of Medicine where he is responsible for the criminal law and the Lanterman, Petris, Short Act curricula. Mr. Meyer previously served as Chief Deputy Director and Counsel of the Los Angeles County (LAC) Department of Mental Health, and as Interim Public Defender and Chief Deputy of the LAC Public Defender.

- **David Panush** is the President of CalHPS. He has over thirty-five years of experience in the California State Legislature, serving as a policy and fiscal advisor to five state senate leaders, and as External Affairs Director for Covered California.

About the Reentry Health Policy Project

- This brief is part of the Reentry Health Policy Project, which seeks to identify state and county level policies and practices that impede the delivery of effective health and behavioral health care services for formerly incarcerated individuals who are medically fragile (MF) and living with serious mental illness (SMI), as they return to the community. The report also offers specific recommendations and best practices for addressing these barriers. The Reentry Health Policy Project was managed by California Health Policy Strategies LLC with support provided by the California Health Care Foundation.

About California Health Policy Strategies (CalHPS), LLC

- CalHPS is a mission-driven health policy consulting group based in Sacramento. For more information, visit www.calhps.com.

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- **Integrating the Courts into Care & Treatment**. Criminal courts and criminal proceedings usually are fundamentally incompatible with a modern approach to mental health care. The recovery model, mobile crisis response, wrap-around care, assisted living and supported decision-making are a tough sell to criminal case participants. Most criminal case judges and litigators vigorously apply the adversary model of determining guilt or innocence and punishment. In addition, court personnel generally lack knowledge and experience with mentally ill individuals and mental health programs.

  The traditional criminal case mental issues referenced above allow judges and lawyers to simply hand-off care to treatment providers. However, in mental health diversion cases, the judge and the lawyers remain tightly engaged in the process. Progress and success or failure while individuals are diverted will remain a feature of the criminal

case. For example, the diverted person's progress under care is subject to review hearings that can be initiated by virtually anyone involved. These features require special knowledge of the substance of clinical care and the symptoms of mental illness needed by legal specialists. A few such legal specialists exist in dedicated courts such as collaborative mental health courts. The mental health diversion procedures will, however, be available in all California criminal courts. There is an immediate need to train judges and criminal lawyers on pertinent subjects related to mental illness and its impact on criminal cases.

IV. Conclusion

California's bold new diversion laws are an opportunity to shift responsibility for care and oversight from criminal courts and penal institutions to mental health treatment providers. For too long, law enforcement and criminal justice have been the default mechanisms for dealing with mentally ill individuals who get into trouble. Once through that entryway they suffer confinement in lieu of care. That begins a cycle of homelessness, recidivism and re-offense, frequently resulting in mentally ill individuals becoming long-term wards of penal institutions. The diversion laws are aimed at foreclosing that cycle and creating a gateway to the separate civil system of mental health care. While the new statutes have operation gaps and funding must be sought to achieve their legislative goals, they should help remove individuals from the criminal justice system who should not be there.

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About the Reentry Health Policy Project

- This brief is part of the Reentry Health Policy Project, which seeks to identify state and county level policies and practices that impede the delivery of effective health and behavioral health care services for formerly incarcerated individuals who are medically fragile (MF) and living with serious mental illness (SMI), as they return to the community. The report also offers specific recommendations and best practices for addressing these barriers. The Reentry Health Policy Project was managed by California Health Policy Strategies LLC with support provided by the California Health Care Foundation.

About California Health Policy Strategies (CalHPS), LLC

- CalHPS is a mission-driven health policy consulting group based in Sacramento. For more information, visit www.calhps.com.