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September 22, 2023

The Honorable Michael Day
Chair, Joint Committee on Judiciary
24 Beacon Street, Room 136
Boston, MA 02133

By email to michael.musto@mahouse.gov

The Honorable James Eldridge
Chair, Joint Committee on Judiciary
24 Beacon Street, Room 511-C
Boston, MA 02133

Dear Chair Day, Chair Eldridge, and Members of the Joint Committee on the Judiciary:

Re: Testimony in support of H.1460, An Act relative to reforming the competency to stand trial process

On behalf of the Massachusetts Association for Mental Health (MAMH), I write to respectfully submit this testimony in support of H.1460, An Act relative to reforming the competency to stand trial process, to be heard by your Committee on September 26, 2023.

Formed over a century ago, MAMH is dedicated to promoting mental health and well being, while preventing behavioral health conditions and associated disability. We are committed to advancing prevention, early intervention, effective treatment, and research for people of all ages. We seek to eliminate stigma and discrimination and advance full inclusion in all aspects of community life. This includes discrimination affecting not only people with behavioral health conditions, but also people who face unequal burdens and barriers to the protections and benefits of citizenship due to their race, ethnicity, gender identity, or disability status. MAMH has a demonstrated record of furthering its mission by convening stakeholders across the behavioral health and public health communities; disseminating emerging knowledge; and providing subject matter expertise to inform public policy, service delivery, and payment methodologies.

Commitments for evaluation of a criminal defendant's competency to stand trial (CST) are everyday occurrences in courts. These commitments profoundly impact the defendant, the administration of justice, and the mental health system. Defendants subject to competency evaluations, or who have been found incompetent to stand trial, often find themselves in mental health facilities, with their day in court delayed or, if competency is not restored, denied.

Massachusetts' practice regarding competency evaluations and restoration results in a curtailment of liberty

Once the possibility that a defendant may be incompetent to stand trial is raised, the legal process in Massachusetts usually results in a significant curtailment of liberty.

The prosecution, the defense, or the judge may raise an issue of competency to stand trial at any time. If the court doubts whether a defendant is competent to stand trial, it may order an examination to be conducted by one or more qualified physicians or psychologists – a so-called § 15(a) exam.[1] Section 15(a) examinations are typically brief and usually are conducted at the courthouse. They are designed mainly to identify those defendants for whom more extensive examinations are required.

If the § 15(a) examination is insufficient to make a finding as to whether the defendant is competent to stand trial, the judge may order a more comprehensive examination. Usually, this examination is conducted at an inpatient psychiatric facility or, if the defendant is male and requires "strict security," at Bridgewater State Hospital, a Department of Correction facility.[2] The defendant may be held for up to twenty days, and the court may extend the period for an additional twenty days at the request of the facility if additional time is needed.[3] The defendant is returned to court with a report from a qualified clinician including an opinion whether the defendant is competent to stand trial. If the judge finds the defendant is competent, the case proceeds.[4]

If the judge finds the defendant is not competent, the defendant may (but need not) be ordered to undergo a further 60-day examination at a Department of Mental Health (DMH) facility or Bridgewater — a § 16(a) examination.[5] Within sixty days of the incompetency finding, the prosecutor (or DMH or Bridgewater if the defendant had been sent to a facility for evaluation under § 16(a)) may file a petition

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[1] G.L. c. 123, § 15(a).
[2] G.L. c. 123, § 15(b). If the defendant is a convicted prisoner and the alleged crime happened in a prison or jail, the evaluation will likely be conducted at Old Colony Correctional Center, on one of its Bridgewater units as prisoners typically cannot be housed in DMH facilities or in the main Bridgewater State Hospital.
[3] G.L. c. 123, § 15(b).
[4] If the defendant's counsel disagrees with the clinician's opinion, the counsel may request a hearing. G.L. c. 123, § 15(d).
[5] G.L. c. 123, § 16(a).

for extended commitment.[6] The same standards that apply to civil commitments – that is, essentially, that the defendant has a mental illness, is dangerous to self or others, and that there is no less restrictive alternative – apply to forensic commitments of defendants found incompetent to stand trial. The first order of commitment is for six months, subsequent orders are for one year.[7]

Defendants found incompetent to stand trial will be returned to court to face their criminal charges if and when they are deemed by the court (as informed by the opinions of the forensic clinicians) to have regained or achieved competency.[8]

Massachusetts law provides for dismissal of the charges against an incompetent defendant on two grounds. Dismissal of the charges against incompetent defendants is mandatory when they have reached the parole eligibility date if they had received the maximum sentence for the most serious crimes with which they had been charged.[9] Discretionary dismissal may be available in the "interest of justice." This discretionary dismissal may be exercised when the judge concludes that the incompetent to stand trial defendant is unlikely to be restored to competency in the foreseeable future or ever.[10]

Competency process imposes serious burdens on defendants, on the mental health system, and on the courts

There is relatively little available data about the Massachusetts competency to stand trial system. However, from what is available, it is possible to draw some conclusions about the impact of the process on our defendants, courts, and the mental health system – particularly mental health facilities.

Impacts on the defendant

Inpatient competency evaluation and commitment are burdensome on all defendants. Defendants may spend months or even years confined in a hospital for evaluation and restoration. Such hospitalization is frequently unnecessarily restrictive of a defendant's liberty and stigmatizing. In misdemeanor cases – which may be the majority of cases in which competency evaluations and commitments are ordered --

[6] G.L. c. 123, § 16(b).
[7] G.L. c. 123, §§ 7, 8, 16(b).
[8] G.L. c. 123, § 17(a).
[9] G.L. c. 123, § 16(f).
[10] *Id.* Some defendants with, for instance, dementia, or some kinds of brain injuries, or, perhaps, an intellectual disability may be considered to be "non-restorable." In addition to the requirements of § 16(f), dismissal is required on constitutional due process grounds. See *Jackson v. Indiana*, 406 U.S. 715 (1972) (state may not hold an incompetent defendant indefinitely but must dismiss the charges "after a reasonable period of time necessary to determine whether there is a substantial probability that he will attain competency in the foreseeable future."); *Abbott A. v. Commonwealth*, 458 Mass. 24, 37 (2010).

defendants may spend significantly more time in an institution than they would have had their cases proceeded to trial, in which case they may not have spent any time in a locked facility.[11]

This outcome is true even for those defendants determined after examination to be competent. During the evaluation, the defendant cannot be released to the community on bail or conditions. Instead, defendants remain in custody separated from family, friends, work, and services and supports. Even defendants who are found competent may be confined for longer than they would have been had they been permitted to either enter into a plea agreement or stand trial at the outset.[12]

A defendant who is suspected or found to be incompetent also faces serious stigma. Involuntary hospitalization, particularly at Bridgewater, is stigmatizing.[13] There is evidence that stigma produced by incompetency labeling can be serious and long-lasting. As one researcher has explained,

> Both the strong social disadvantages suffered by those to whom the law attaches this label, and the effects on the individual's own cognition, motivation, performance, and mood, can be debilitating…
>
> Incompetency labeling not only damages individuals' reputation in the eyes of the community, but profoundly affects their own self-concept in ways that can be debilitating. Branding individuals as incompetent is a trespass and an assault on their psyche in ways that can leave a lasting imprint.[14]

Confinement for competency evaluation and restoration has additional impacts. It pulls people away from family and friends, jobs, housing, and community-based mental health services. Eliminating such supports may actually harm a defendant's mental health.

Impacts on the justice system

Delays caused by competency evaluations undermine the justice system. The court, the prosecution, and the defendant all have an interest in a speedy trial. Delays for evaluations and restoration can result in lost evidence, unavailable witnesses, and faded memories. Most defendants have interests in raising defenses, establishing their innocence, or otherwise resolving their case. Delays frustrate victims' interests in seeing justice done. The state's interest in addressing punishment and rehabilitation is impacted by delay as well.[15]

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[11] Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and A Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 579–82 (1995).
[12] *Id.*
[13] *Id.*
[14] Bruce J. Winick, *The Side Effects of Incompetency Labeling and the Implications for Mental Health Law*, 1 PSYCHOL. PUB. POL'Y & L. 6, 25 (1995) (footnotes omitted).
[15] Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and A Response to Professor Bonnie*, *supra* note 11, at 581-82 (1995).

Impacts on our mental health system and the availability of beds in continuing care hospitals

Massachusetts's reliance on inpatient settings for competency evaluations contributes to a range of serious problems in our mental health system.

First, Bridgewater State Hospital (BSH) is experiencing a rise of admissions of persons in need of competency determinations:

> In 2021, there were 774 commitments, for various reasons, to BSH, a 31% increase over the previous year.[16]

Second, DMH-operated psychiatric hospitals are using a majority their beds for forensic patients and forensic admissions re increasing with a corresponding decline in non-forensic admissions:

> Between December 2021 and December 2022, 1,042 admissions to DMH hospitals came from the courts (presumably either for evaluation or for restoration) and only 43 were transfers from acute hospital psychiatric care, according to data compiled by the Massachusetts Association of Behavioral Health Systems.[17]
>
> Most recently, in August 2023, DMH operated and contracted inpatient facilities admitted 91 adults from the courts and not one person from inpatient acute-care hospitals.[18]
>
> Arguments that DMH lacks sufficient long-term treatments beds ignore that most of the beds it does have are occupied by forensic patients.

Third, forensic patients using DMH beds prevent access by other patients waiting in acute-care units for longer-term care:

> As of April 3, 2023, there were 104 people in private psychiatric hospitals who had been approved for transfer to DMH continuing care facilities but who were stuck at an acute care facility because there were no open continuing care beds.[19]

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[16] Massachusetts Department of Correction, Population Trends 2021, 35 (2022), https://www.mass.gov/doc/prison-population-trends-2021/download.

[17] Editorial, Lack of Long-term Mental Health Beds is Harming Patients, THE BOSTON GLOBE (Apr. 2, 2023), https://www.bostonglobe.com/2023/04/09/opinion/mental-health-beds/. For raw data, see DMH, Section 114 Reports: Section 114 of Chapter 24 of Acts of 2021, at https://www.mass.gov/info-details/section-114-reports.

[18] DMH, DMH Section 114 Report – August 2023, https://www.mass.gov/doc/section-114-report-august-2023/download.

[19] DMH Admission Referral Tracking System, Continuing Care Referral List Summary (Apr. 3, 2023).

Fourth, the lack of movement of the non-forensic patients in acute care settings contributes to the emergency department (ED) boarding crisis because there are no available inpatient beds for people waiting in the ED.

Shifting more competency evaluations to the community will benefit the defendants, the courts, and the mental health system.

To help address the harms caused by our competency evaluation process, the Commonwealth could take proactive measures to shift more competency evaluations to outpatient settings.

As noted previously, we do not know much about where competency evaluations and restoration take place in Massachusetts. While the National Research Institute recently compiled data on location of competency evaluations, Massachusetts did not report data to the study.[20] While we know that most § 15(a) examinations are done at the courthouse, we do not know what percent of defendants assessed under § 15(a) are referred for § 15(b) evaluations or where those 15(b) evaluations take place.[21]

Some competency evaluations probably do occur in the community. DMH's guidelines for forensic evaluators contemplate that § 15(a) evaluations, after the initial assessment, might occur either on an inpatient basis or an outpatient basis, with these outpatient evaluations termed an "extended outpatient evaluation."[22] However, there are no DMH guidelines specifically for such "extended" § 15(a) evaluations.[23] Further, there is currently no DMH program to oversee and promote competency evaluations in the community. And, while the statute does not prohibit outpatient evaluations, it does not authorize them either.

Shifting competency evaluations to the community would be consistent with a national trend. Historically, competency evaluations were almost always performed in state psychiatric hospitals.[24] However, more recently, pilot projects across the country have demonstrated that "trained evaluators could perform outpatient competency evaluations comparable to evaluations conducted on inpatient

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[20] National Research Institute, Competency to Stand Trial: The Use of State Hospital, Community-Based, and Jail-Based Approaches (2021), https://www.nri-inc.org/media/qhadgyzj/nri_2020_profiles_-_competency_to_stand_trial_evaluations_-_use_of_state_hospitals-_community-based-_and_jail-based_approaches-_november_2021.pdf (the study found that, nationally, 39% of competency evaluations are conducted in jails, 31% in community-based settings, and 20% in inpatient settings). We know that very few, if any, competency evaluations are conducted in jails in Massachusetts.

[21] Moreover, we do not know how many defendants who are deemed to need restoration stay in the community for restoration.

[22] DMH, Mass. Dep't of Mental Health Forensic Services: M.G.L. c. 123, § 15 Report Writing Guidelines (rev. Sept. 18, 2008), https://www.mass.gov/doc/mgl-guidelinesdoc/download.

[23] *Id.* at 2.

[24] Daniel C. Murrie *et al.,* Evaluations of Competence to Stand Trial Are Evolving Amid a National "Competency Crisis," BEHAVIORAL SCIENCES AND THE LAW 5 (2023), https://onlinelibrary.wiley.com/doi/epdf/10.1002/bsl.2620.

status, but more efficiently and affordably.[25] Research has indicated that, nationwide, competency to stand trial evaluations are being conducted on an outpatient basis at an increasing rate.[26]

This bill would promote a shift of competency evaluations to the community and mandate related steps to address the overburdening of our inpatient system with forensic admissions

This bill offers several mechanisms to promote community-based competency evaluations and thereby begin to address the crushing impact of increasing numbers of forensic evaluations on our service system. The bill:

- Revises the mental health statute, Ch. 123, to require DMH to contract with providers so that individuals may receive competency and criminal responsibility determinations in designated community-based programs. [Sections 1 & 2]
- Requires a study to collect data regarding the competency and criminal responsibility determination processes in Massachusetts and to make recommendations for reform of those processes. [Section 3]
- Establishes a program of forensic navigators coordinated, funded, and overseen by DMH to assist people who are moving through the competency and criminal responsibility determination processes, to expedite those processes and protect individual rights. [Section 2] Forensic navigators are used in several states with marked success.

Conclusion

Moving competency evaluation to the community whenever appropriate allows people to remain with family and friends, retain their jobs and housing, and pursue mental health recovery in the least restrictive setting possible. Moreover, it will free up chronic care psychiatric hospital beds in DMH facilities, thereby helping to allow people stuck on acute-care units and in EDs to access needed care.

For all the reasons discussed above, MAMH urges the Committee to report H.1460 out favorably.

Thank you for your consideration.

Sincerely,

Danna Mauch, PhD
President and CEO

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[25] *Id.* at 5-6.
[26] Amanda Wik *et al*., National Association of State Mental Health Program Directors, Assessment #9: Forensic Patients in State Psychiatric Hospitals: 1999–2016 (Aug. 2017), https://www.nri-inc.org/media/1318/tac-paper-9-forensic-patients-in-state-hospitals-final-09-05-2017.pdf.

c: Honorable Marjorie Decker