BHC Behavioral Health Commission



Commission Meeting
December 2022

December 13, 2022

Briefing

In this presentation

Competency restoration for misdemeanors

2023 legislative agenda and session

BHC electronic meeting policy

Competency restoration for defendant charged with misdemeanors

December 2022

Staff study

Study request

BHC staff directed to examine:

- Issues SB 198 was intended to address
  - Scope, impact, root causes
- How other states address those issues
- Use and implementation of SB 198

Primary research activities

- Structured interviews with staff at CSBs, DBHDS Office of Forensic Services, state hospitals, and OES*; defense attorneys and judges; and legal experts
- Analysis of data on state hospital admissions and census, competency restoration services, and SB 198 orders
- Analysis of Virginia statutes
- Review of other states' practices and statutes
- Review of the research literature

*OES: Office of the Executive Secretary of the Supreme Court of Virginia

In brief

- The forensic population has increased significantly in several state hospitals, crowding out civil patients and partly contributing to current wait lists
  - Driven primarily by increases in competency restoration patients
- Majority of competency restoration services are delivered in state facilities, despite high cost and frequent readmissions
- Virginia has adopted many of the strategies used by other states to curb the impact of competency restoration, but certain states divert a broader set of defendants charged with misdemeanors
- 15 orders have been issued pursuant to SB 198 so far, partly due to implementation challenges

In this presentation

Background

Trends in forensic population and competency restoration

Response from Virginia and other states

Implementation of SB 198

Competency restoration services may be necessary to ensure defendants can stand trial

- Criminal defendants must be competent to be tried for a criminal offense
  - Defendants must be able to understand the proceedings against them and participate in their own defense
  - Incompetent defendants must be restored prior to trial proceeding
- Prior to SB 198, courts were generally required to order restoration services for defendants not competent to stand trial
  - Services may include medication and legal education
- Services can be provided in state facilities, jails, or the community
- Goal is for defendants to participate in their trial, not to treat underlying behavioral health or other conditions

SB 198 allows certain incompetent defendants to be diverted to civil system in lieu of competency restoration

- Evaluators may recommend in their report that incompetent defendants charged with certain misdemeanors be referred to a CSB for a TDO evaluation rather than ordered to receive competency restoration services
- Court may dismiss criminal charges without prejudice and order CSB to
  - Conduct TDO evaluation, and
  - File a petition for a TDO if defendant meets criteria

SB 198 available to incompetent defendants charged with certain misdemeanors

Included	Excluded
✓ Destruction of property	✗ Traffic violations
✓ Larceny or receipt of stolen goods	✗ Drug or alcohol possession
✓ Public intoxication	✗ Driving while intoxicated
✓ Trespassing	✗ Assault/threat
✓ Disorderly conduct	✗ Indecent exposure
✓ Failure to appear	✗ Failure to pay child or spousal support

In this presentation

Background

Trends in forensic population and competency restoration

Response from Virginia and other states

Implementation of SB 198

SB 198 enacted to address several challenges faced by state facilities and incompetent defendants

- State facilities unable to fully meet demand for inpatient services due to census pressures
- Inpatient competency restoration requires extensive resources that may be disproportionate for low-level offenses

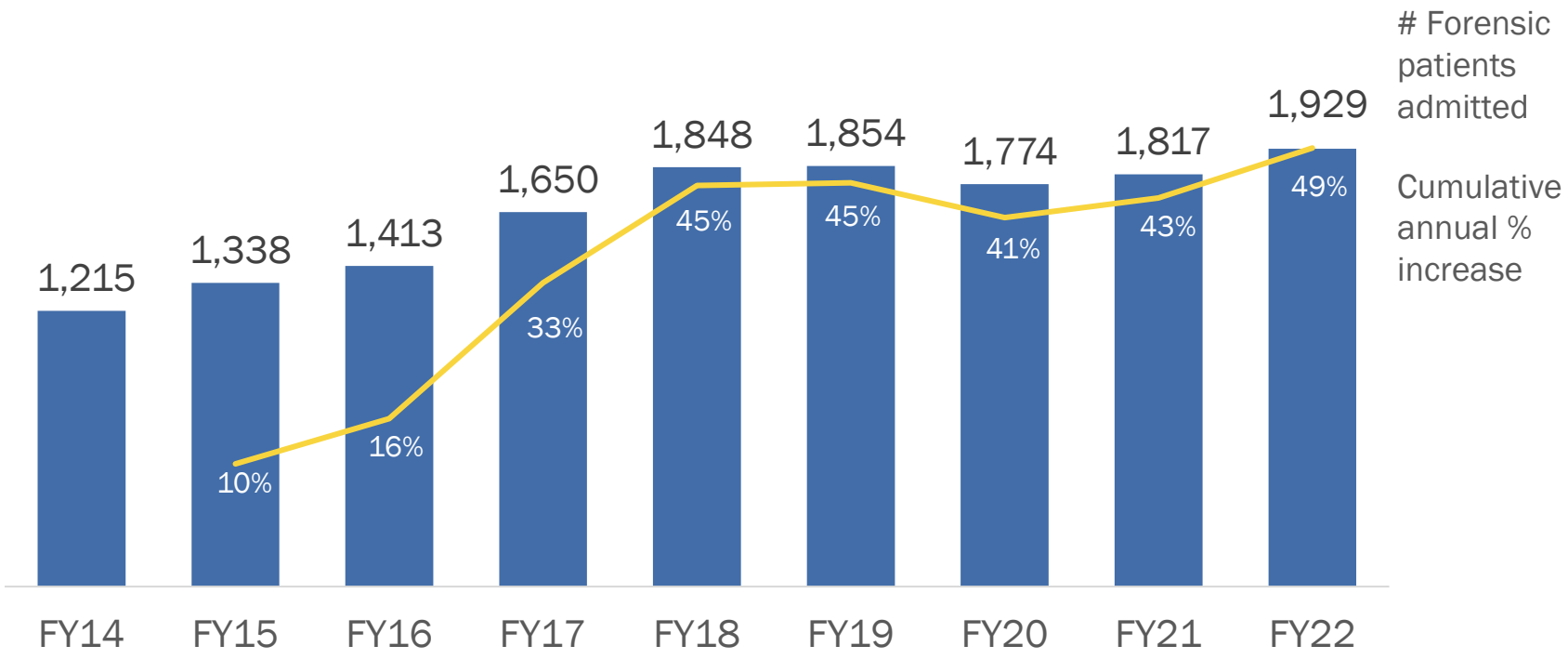
Findings

The forensic population in state facilities has increased significantly, absorbed primarily by Eastern State and Western State Hospitals.

Competency restoration has been the primary driver of the increase in the forensic patient population in state facilities.

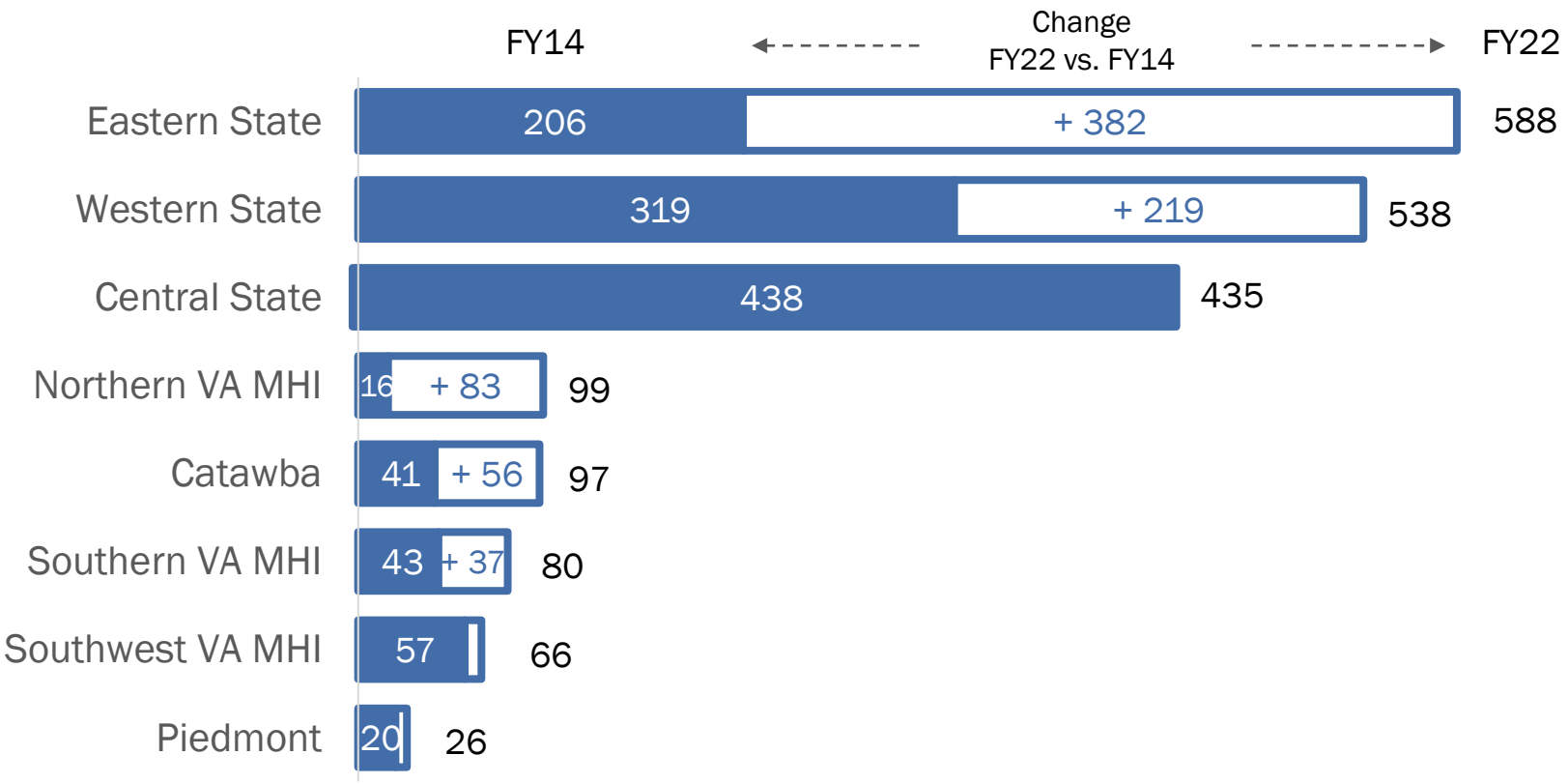
The rising forensic population is crowding out civil TDO patients and contributing to current wait lists.

Forensic admissions in state facilities increased by nearly 50% between FY14 and FY22



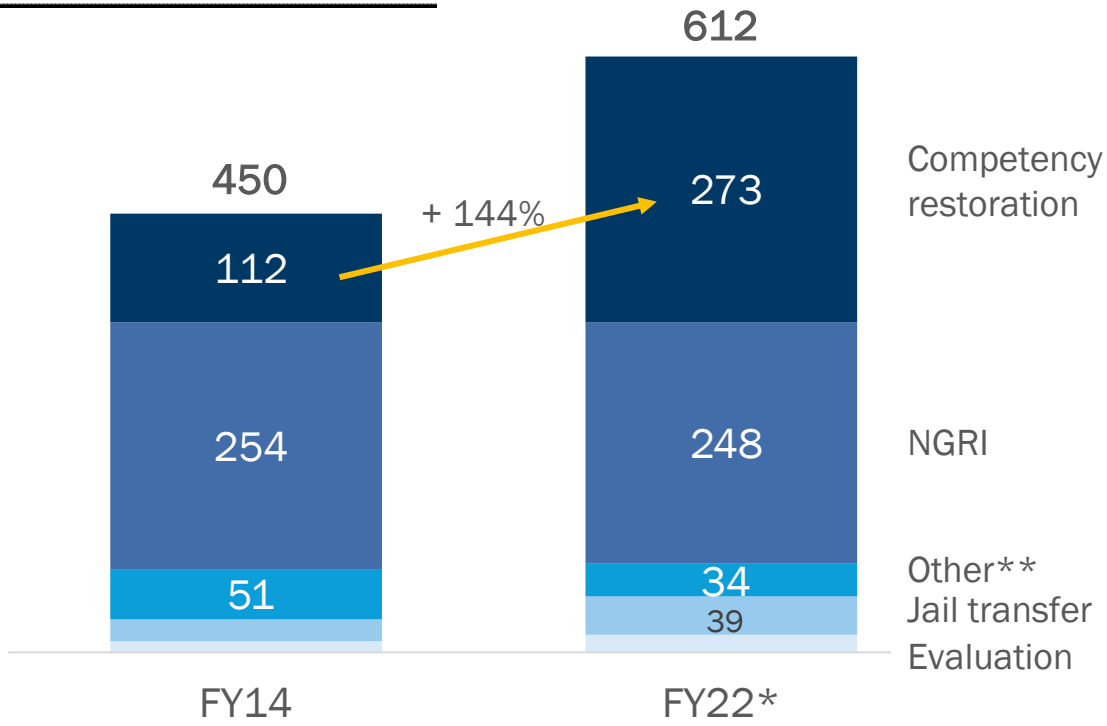
Increase in forensic admissions absorbed primarily by Eastern and Western State Hospitals

Number of forensic admissions by facility, FY14 vs. FY22



Competency restoration cases are primary driver of higher forensic population in state facilities

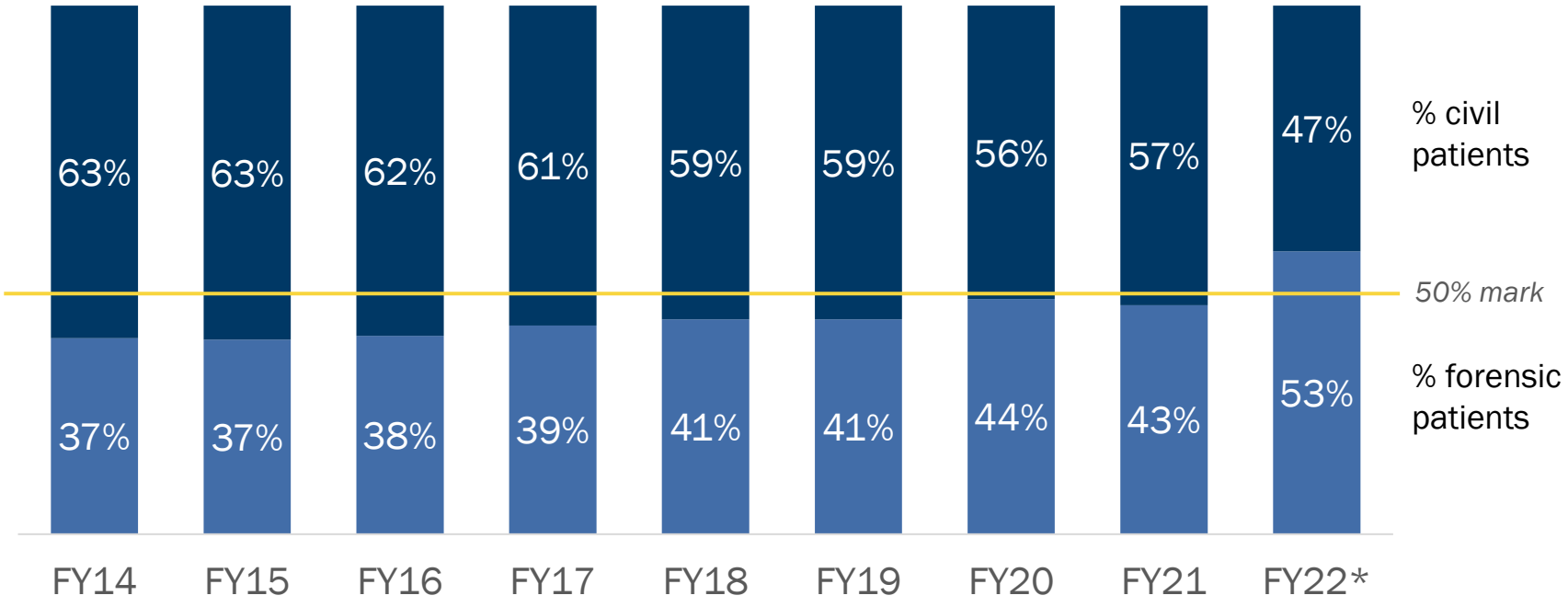
Change in avg. annual patient census in state facilities FY14 vs. FY22, by forensic category



*Average annual census in 2022 based on 9 rather than 12 monthly points-in-time census (July 2021 – March 2022)
**Other: prison transfer; NGRI revocation; unrestorably incompetent; other forensic.

Forensic patients occupied more than half of beds in state facilities in FY22, up from 37% in FY14

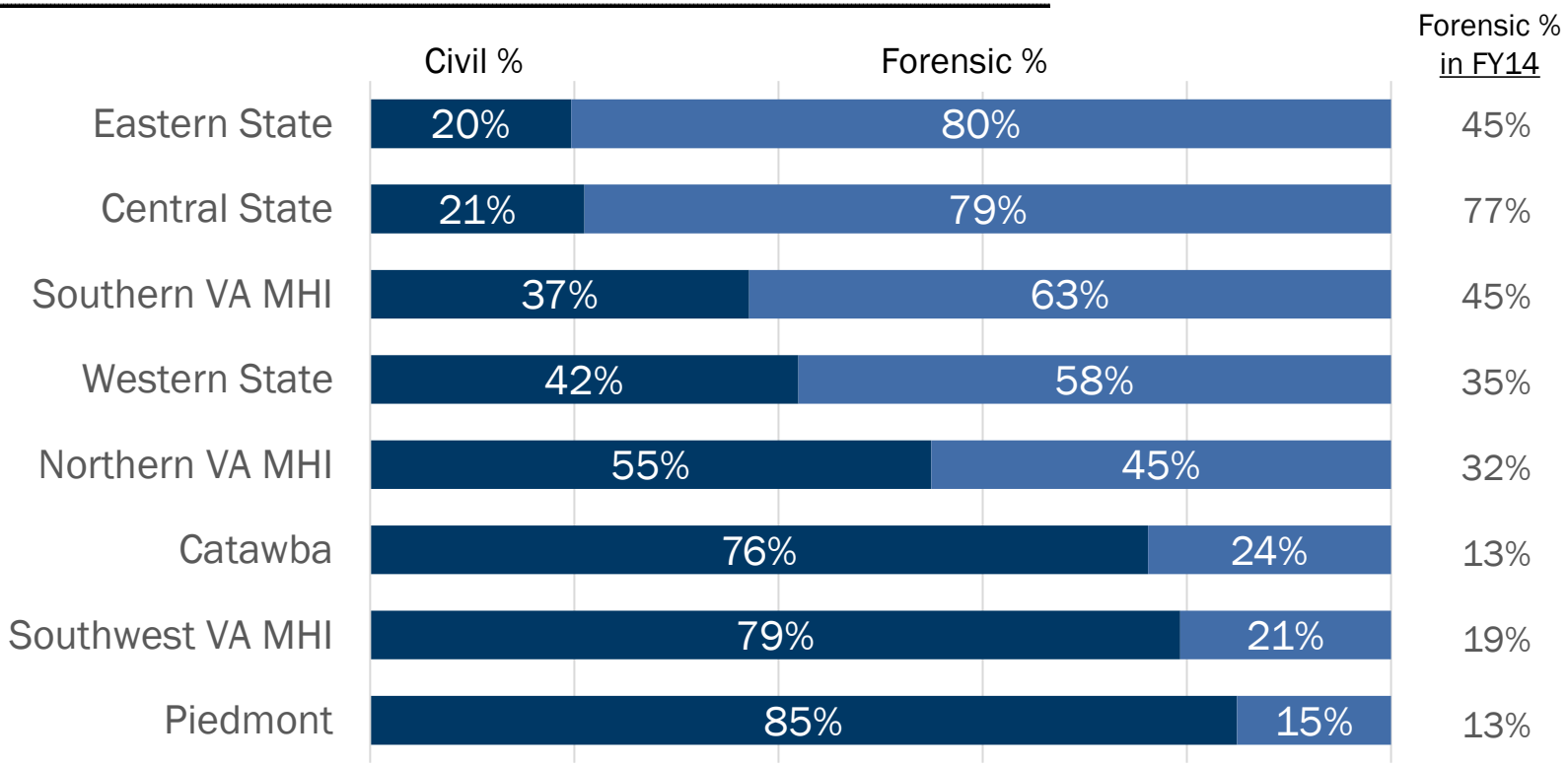
Split between civil and forensic patient census



*Average annual census in 2022 based on 9 monthly points-in-time census (July 2021 – March 2022) rather than 12 for FY14-FY21

Highest concentrations of forensic patients at Eastern and Central State, rising at Western State

Split between civil and forensic patient census by state facility, FY22

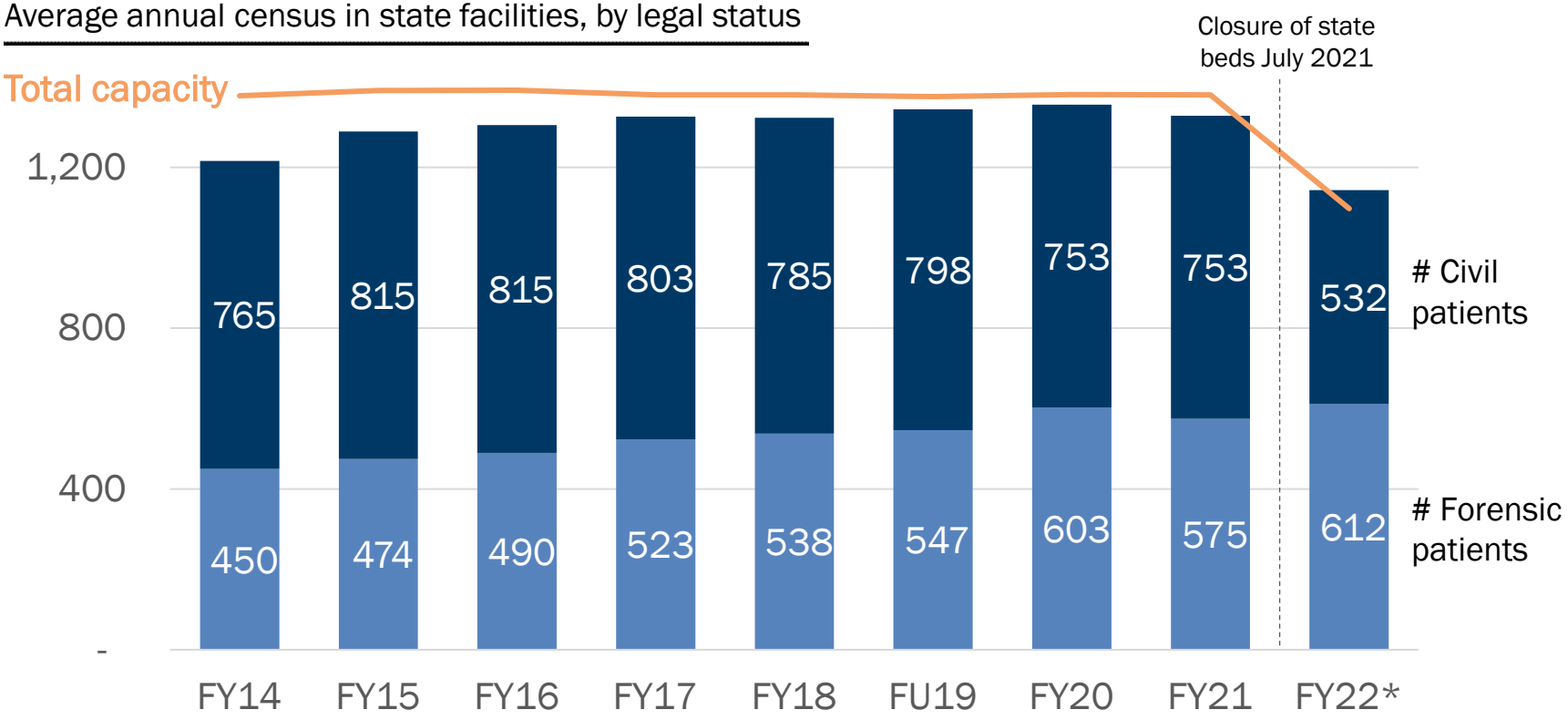


Rising forensic admissions impacting access to inpatient care for civil patients and working conditions for facility staff

- State facilities unable to meet demand for inpatient services, particularly since start of FY22
  - Wait list for patients under TDO started in September 2021
  - 120+ individuals under TDO order left ED before a bed could be found (10/2021-10/2022)
- Operating at or above capacity can create dangerous conditions for patients and staff
  - >95% capacity since FY17
- Shift toward forensic population has changed nature of services needed, impacting job satisfaction
  - Population with different needs
  - Fewer opportunities to provide treatment

Forensic census continued to climb after state beds went offline, forcing reduction in civil beds

Average annual census in state facilities, by legal status



*Average annual census in 2022 based on 9 rather than 12 monthly points-in-time census (July 2021 – March 2022)

Findings

Heavy reliance on inpatient competency restoration is very costly and may not be the most efficient use of resources.

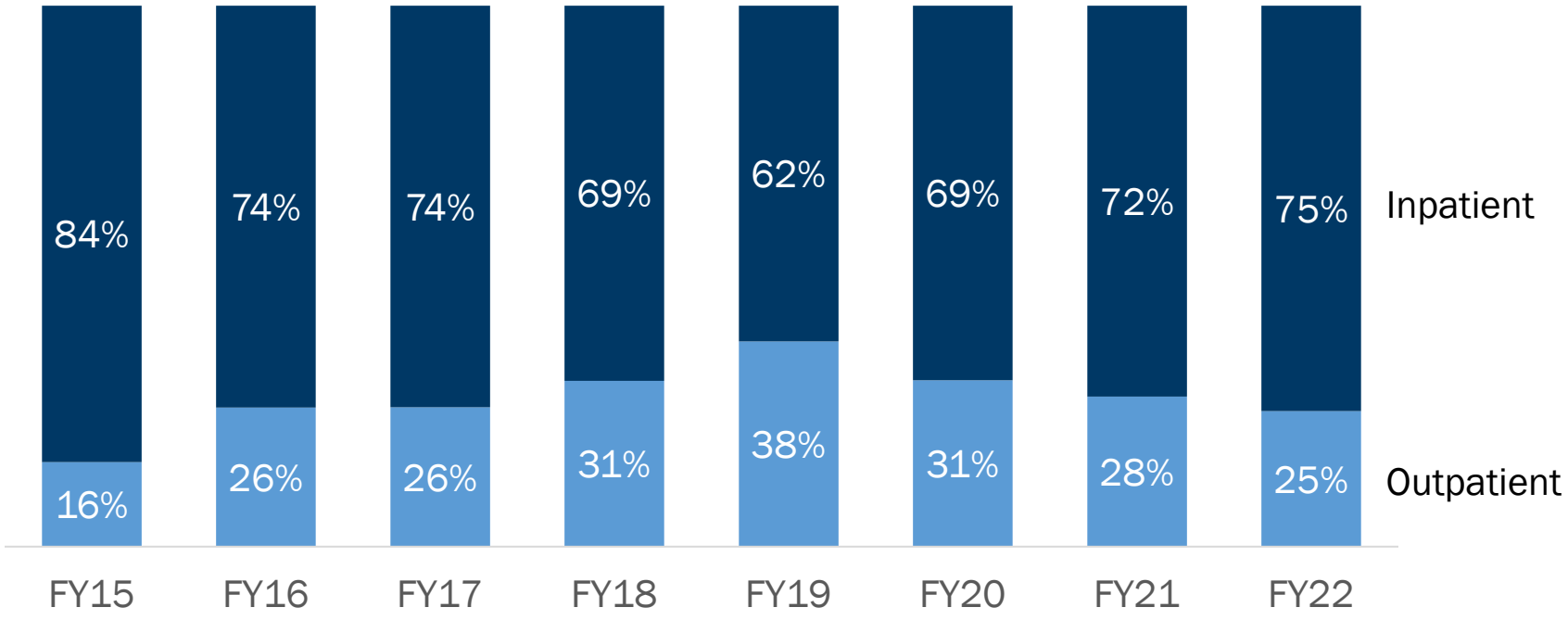
Inpatient competency restoration is costly and does not support long-term positive outcomes

- Restoring 1 defendant to competence in a state facility costs nearly $110K and takes 14 weeks*
  - Outpatient restoration: $1,190 per person
- 25% of patients who received inpatient competency restoration services in FY19 were readmitted within 3 years
  - 7% readmitted in same year
- Removing individuals from community can have negative effects on housing, benefits, jobs, connections to family and providers, etc.

*Inpatient cost: average cost = $1,076/day (06/22), average length of stay for patients admitted for competency restoration services = 101 days (FY18-FY23); outpatient cost: $50/hour, 9.8 hours of services, and $700 outcome competency evaluation (FY22).

More than 70% of competency restoration services are provided in state facilities

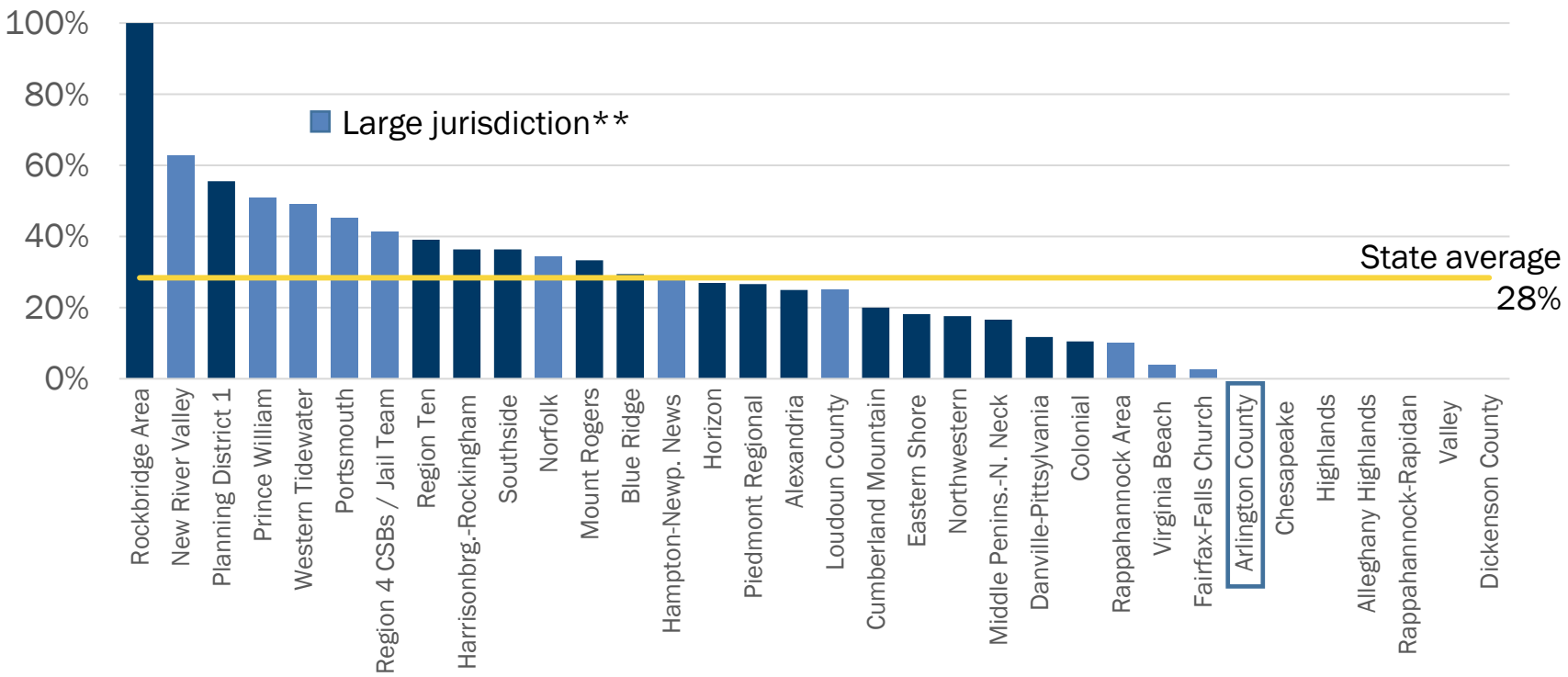
Proportion of patients receiving competency restoration services, by setting



Note: Outpatient data is based on payment requests from CSBs and may not reflect complete outpatient counts

Large jurisdictions tend to use outpatient competency restoration to a greater degree, with exceptions

Proportion of patients receiving outpatient competency restoration services in 2021, by CSB*



Note: Outpatient data is based on payment requests from CSBs and may not reflect complete outpatient counts
*Region 4 CSBs / Jail team aggregates all Region 4 CSBs and the region's jail team due to data limitations
**Large jurisdictions: 30 or more competency restoration orders issued, either inpatient or outpatient

Findings

The increase in competency restoration cases in Virginia is consistent with national trends.

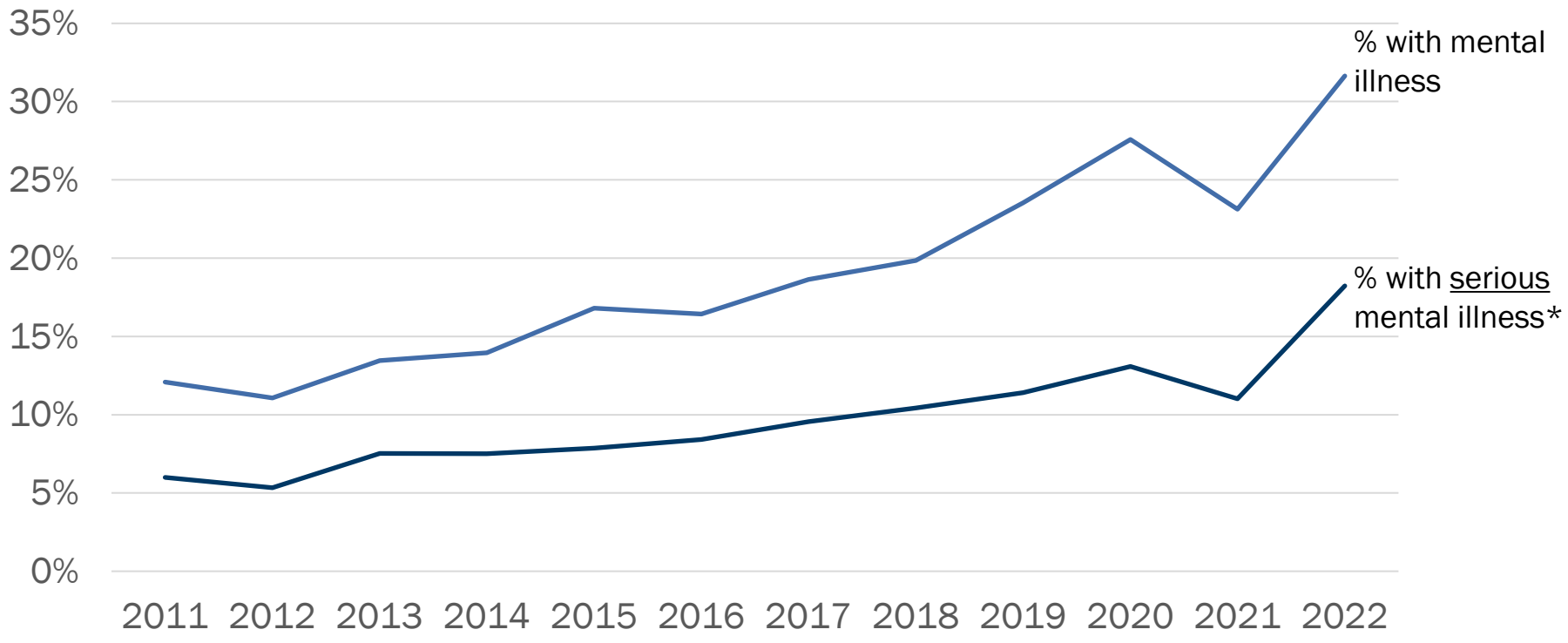
This increase may reflect a higher prevalence of mental illness among criminal defendants, as observed in jails. Inpatient restorations may be preferred by the court and evaluators due to considerations about duration of services, medication, and environment.

Widespread increase in competency restoration nationally characterized as “competency crisis”

- Jurisdiction-level data from around the U.S. shows
  - Significant increases in competency evaluations since the early 2000s
  - An increasing proportion of defendants evaluated are found incompetent
- 76% increase nationally in the number of forensic patients in state psychiatric hospitals between 1999 and 2014
- Causes may include increases in substance use, inadequate availability of public psychiatric services, and homelessness

Increasing share of jail inmates are reported to suffer from mental illness

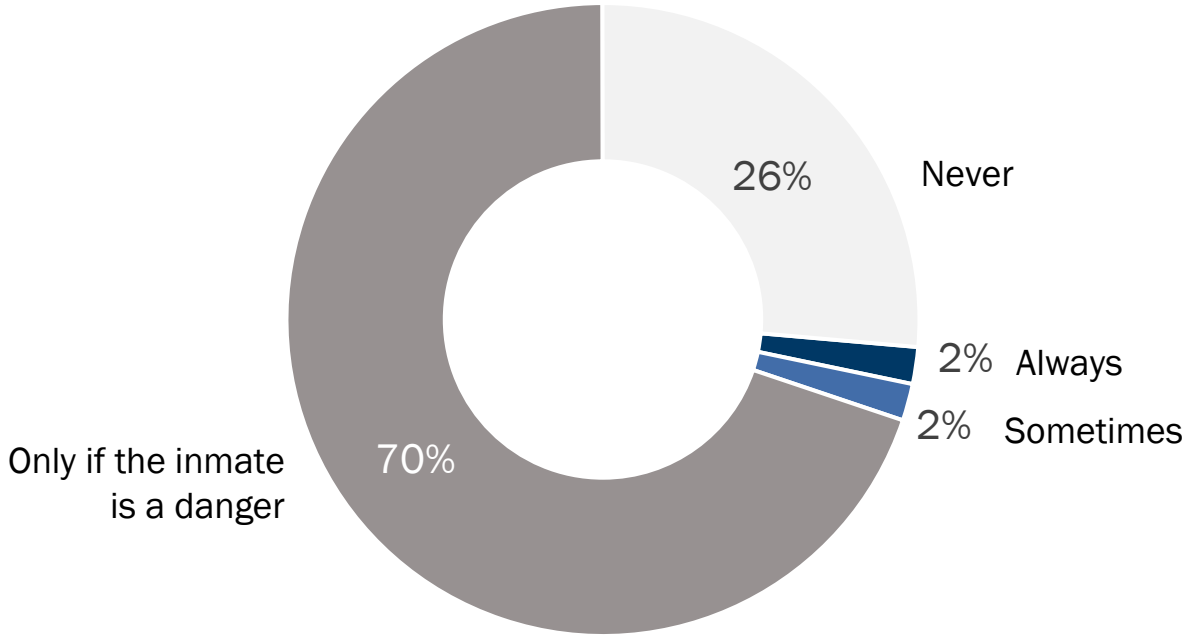
% jail inmates with mental illness (diagnosed or suspected) in a single month, by year



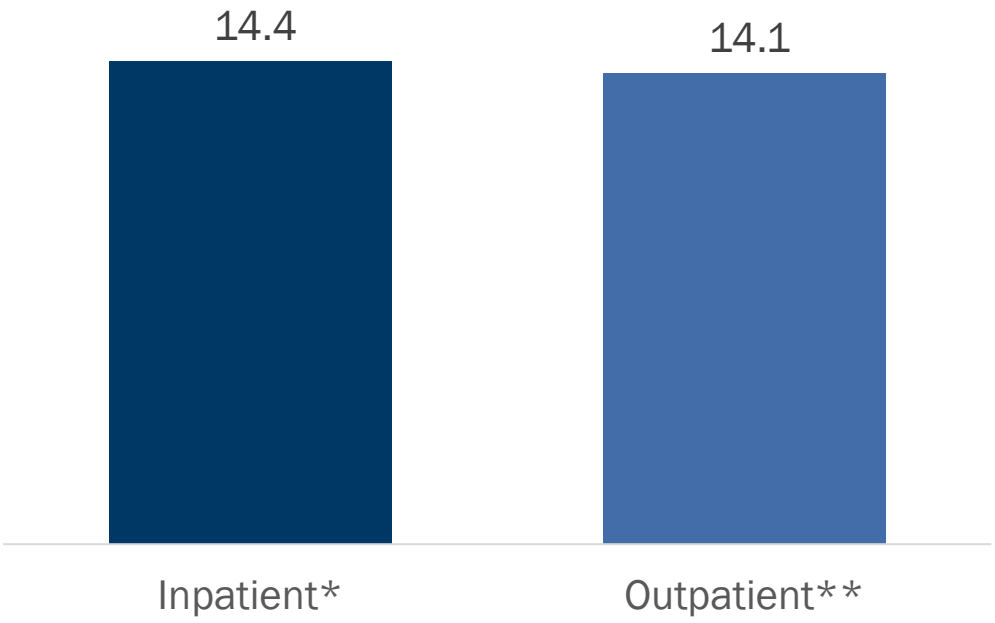
*Serious mental illness includes schizophrenia/delusional, bipolar, major depressive, and post-traumatic stress disorders

Majority of Virginia jails seek judicial approval for involuntary treatment only if inmate is a danger

% jails seeking judicial approval for involuntary treatment of inmates refusing medication (2022)



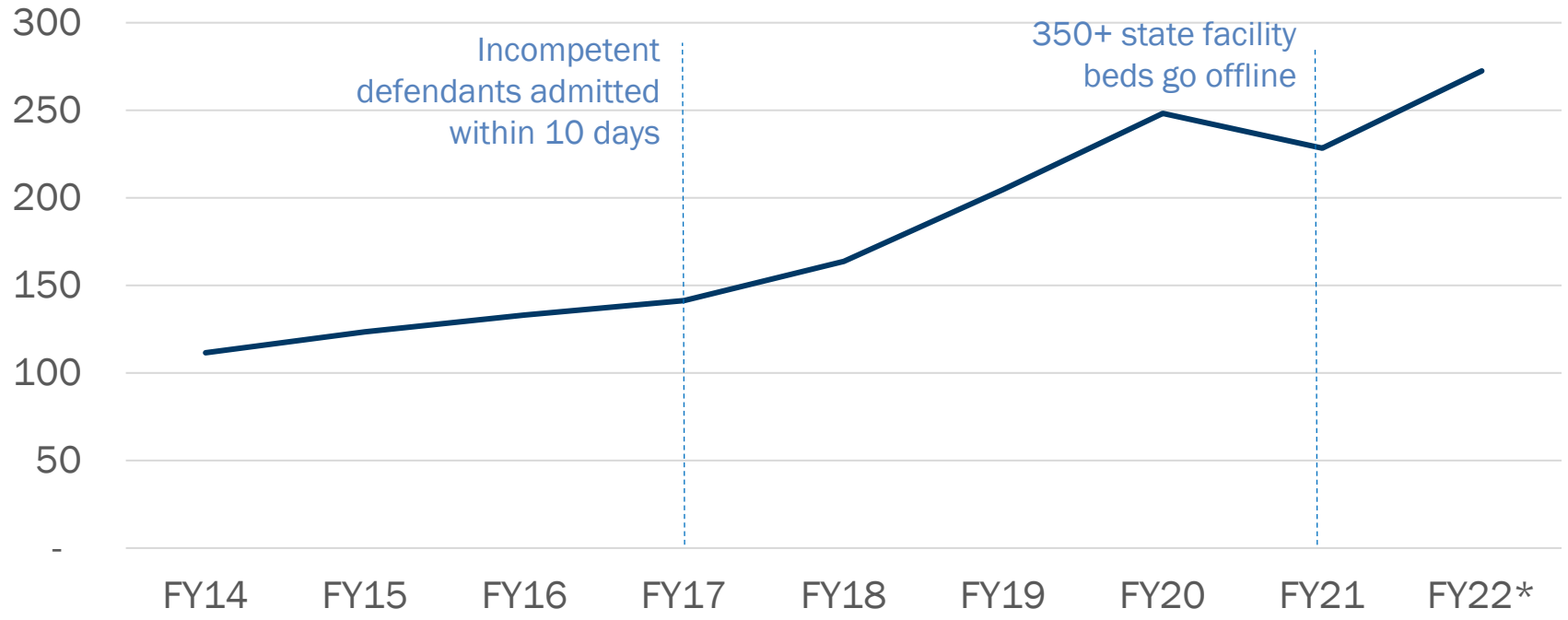
Duration of competency restoration services is comparable for both inpatient and outpatient



*Inpatient: Average length of stay for patients who entered state hospitals with a restoration status (FY18 – FY23)
**Outpatient: Average weeks of service for outpatient competency restorations (FY18 – FY22)

Admission deadline for incompetent defendants may have contributed to higher inpatient utilization

Avg. annual patient census receiving competency restoration services



*Average annual census in 2022 based on 9 monthly points-in-time census (July 2021 – March 2022) rather than 12 for FY14-FY21

In this presentation

Background

Trends in forensic population and competency restoration

Response from Virginia and other states

Implementation of SB 198

Virginia has implemented strategies to reduce the impact of competency restoration cases

- Pretrial diversion programs
- Dismissal of charges and diversion of defendants charged with certain misdemeanors to the civil system (SB 198)
- Limited duration of competency restoration services for misdemeanors (45 days)
- Outpatient and jail-based competency restoration services

Finding

Virginia has already implemented many of the strategies used by other states to reduce the impact of competency restoration cases on the behavioral health system, but to varying degrees.

Other states have adopted various strategies to reduce the impact of competency restoration cases

Pretrial diversion

Divert individuals from criminal justice system, some of whom might otherwise require competency restoration services

Most states

Some lesser offenses not subject to restoration

Restrict competency restoration to felonies or serious offenses, dismiss charges, and divert to the civil system

Examples

- California
- Florida
- Minnesota
- New York

Limit duration of restoration for some offenses

Limit the duration of competency restoration services for misdemeanors or less serious offenses

Examples

- Minnesota
- Tennessee
- Texas
- Utah

Outpatient restoration services

Offer outpatient or jail-based restoration services

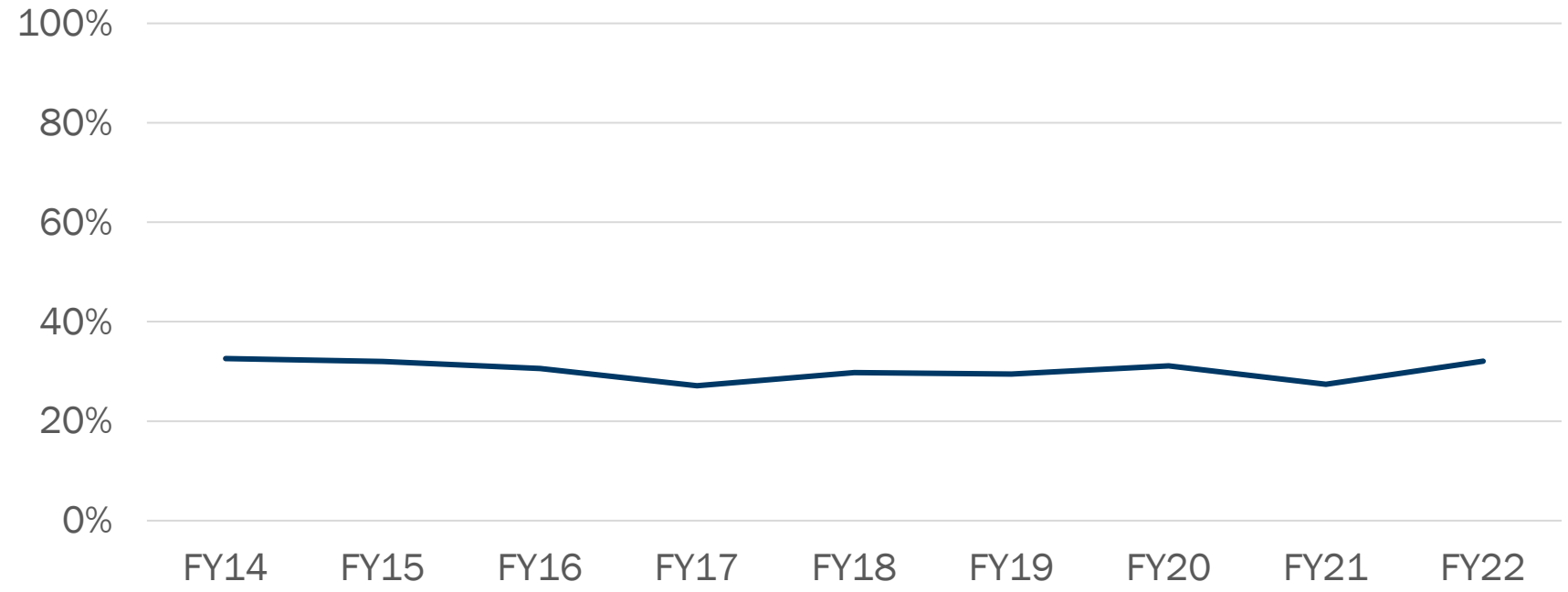
Most states

Certain states exempt more misdemeanors from competency restoration and criminal proceedings

- Wider array of lesser offenses can be dismissed in lieu of competency restoration
  - All misdemeanors (e.g., Florida, New York)
  - All misdemeanors other than "targeted misdemeanors" and gross misdemeanors (e.g., Minnesota)
- Dismissal of misdemeanor charges can be mandatory
  - E.g., Florida, Minnesota, New York
- Other requirements may need to be fulfilled prior to dismissal
  - California may require participation in diversion programming
  - Minnesota requires completion of bridge plan for housing and services

~30% of competency restoration patients in state facilities are charged with misdemeanor-only offenses

% patients admitted for restoration services related to misdemeanor-only charges



In this presentation

Background

Trends in forensic population and competency restoration

Response from Virginia and other states

Implementation of SB 198

Finding

SB 198 could help mitigate the impact of competency restoration on state facilities and their staff, but implementation challenges appear to be limiting its usage and effectiveness.

~15 orders were issued pursuant to SB 198 since its implementation

Locality	Cases*
Richmond	4
Virginia Beach	4
Chesapeake	2
Newport News	2
Arlington	1
Chesterfield	1
Lynchburg	1

*General district court orders for dismissal of an incompetent defendant issued between 7/1/22 and 11/15/22, as captured in imaging system maintained by court clerks.

Multiple implementation challenges reported to limit the usefulness of SB 198

- Diversion cannot be ordered without a recommendation from an evaluator, but evaluators are not required to consider whether diversion is appropriate during the evaluation
- Charges may be dismissed and defendant released before the TDO evaluation is conducted
- No process specified for enforcing the evaluation order if defendant fails to cooperate

Option 1

The General Assembly may wish to consider amending 19.2-169.1 to require evaluators to include a recommendation on whether a defendant should be evaluated for TDO eligibility.

Option 2

The General Assembly may wish to consider amending 19.2-169.2 to provide that if a competency report recommends a defendant be evaluated for a TDO, the Court may (i) issue an order for TDO evaluation, and (ii) dismiss the charges without prejudice only after receiving written notice from the CSB that the evaluation has been completed and (if appropriate) a TDO petition has been filed.

Option 3

The General Assembly may wish to consider amending 19.2-169.2 to provide that if a defendant for whom a TDO evaluation is ordered fails or refuses to appear, the CSB will notify the court, and the court may issue a mandatory examination order directing law enforcement to transport the person to the examination.

Staff for this study

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Nathalie Molliet-Ribet, Executive Director

Sarah Stanton, Chief Policy Analyst

In this presentation

Competency restoration for misdemeanors

2023 legislative agenda and session

BHC electronic meeting policy

Legislative actions for BHC consideration

JLARC study of CSB Behavioral Health Services

Review of CSB funding, staffing, outcomes, and services for individuals experiencing behavioral health emergencies

Recommendations	Action needed
A. Direct DBHDS to report annually on CSB performance in improving consumer's functioning level	Budget language
B. Fund salary increases for CSB direct care staff	Budget amendment
C. Direct DBHDS to report annually on CSB staffing salaries, turnover, and vacancy	Budget language
D. Direct DBHDS to ensure that General Assembly funding for CSB compensation is used only for that purpose	Budget language
E. Direct DBHDS to eliminate administrative requirements that are duplicative, conflicting, or not essential.	Budget language
F. Direct DBHDS to partner with universities to provide pre-screening training and offer technical assistance	Budget language

Legislative actions for BHC consideration

JLARC study of CSB Behavioral Health Services (continued)

Review of CSB funding, staffing, outcomes, and services for individuals experiencing behavioral health emergencies

Recommendations		Action needed
G.	Fund assistance for CSBs to hire staff for residential CSUs that are not fully used due to staffing shortages	Budget amendment
H.	Fund CSUs for children and adolescents, Southside region, and underserved areas; require detailed plan from DBHDS	Budget amendment and language
I.	Repeal participation in bed registry	Legislation
J.	Direct DBHDS and DMAS to work with CSBs to maximize Medicaid funding	Budget language
K.	Direct DMAS to work with MCOs to standardize policies, procedures, and requirements that CSBs must follow	Budget language
L.	Articulate purpose of CSBs and direct DBHDS to develop goals and objectives to hold CSBs accountable for achieving purpose	Legislation

Legislative actions for BHC consideration

JLARC study of CSB Behavioral Health Services (continued)

Review of CSB funding, staffing, outcomes, and services for individuals experiencing behavioral health emergencies

Recommendations	Action needed
M. Direct DBHDS to develop requirements and processes for monitoring CSB performance	Budget language
N. Direct DBHDS to regularly monitor CSB compliance with performance contracts and use enforcement mechanisms	Legislation
O. Direct DBHDS to report CSB performance to CSB boards, the BHC, and the State Board of Behavioral Health and Developmental Services.	Budget language

Legislative actions for BHC consideration

JLARC study of pandemic impact on public K-12 education

Impact on student behavior and mental health

Options / recommendations	Action needed
1. Provide additional funding to train staff at more schools about student behavior and classroom management (option)	Budget amendment
2. Codify definition of direct counseling and exclude administrative or support activities	Legislation
3. Allow qualified, licensed psychologists to be provisionally licensed as a school psychologist	Legislation

Legislative actions for BHC consideration

BHC study of HB 2047/SB 1315

Services for individuals found "not guilty" after presentation of evidence of a mental condition during the guilt phase of a criminal trial

Options	Action needed
4. Create new civil process using "substantial deterioration" criteria for individuals found "not guilty" under new rules of evidence	Legislation
5. Make available information about CSB services to help link individuals found "not guilty" under new rules of evidence to services on voluntary basis	Legislation
6. Clarify whether new rules of evidence apply to general intent as well as specific intent crimes	Legislation

Legislative actions for BHC consideration

BHC study of SB 198

Competency restoration for defendants charged with certain misdemeanors

Options	Action needed
7. Require evaluators to consider whether incompetent defendants should be evaluated for TDO	Legislation
8. Dismiss charges after TDO evaluation has been completed to ensure CSBs have access to defendant	Legislation
9. Adopt mechanism for mandatory TDO evaluation if defendant fails to cooperate	Legislation

Legislative actions for BHC consideration

Behavioral Health Commission

Effectiveness and scope of staff work

Options	Action needed
10. Remove unnecessary contingent effective date	Legislation
11. Strengthen authority to request data and information	Legislation
12. Add to list of entities exempt from releasing sensitive working papers during a study to protect anonymity	Legislation
13. Provide additional funding to hire one staff in order to conduct monitoring and oversight of program implementation	Budget amendment

Next steps and staff support during 2023 session

- Identify House and Senate patrons for each bill
- Convene meeting to review drafts Monday/Tuesday prior to start of session
- Provide patrons with talking points, supporting information, and research
- Track all behavioral health legislation and notify patrons about similar / conflicting bills

In this presentation

Competency restoration for misdemeanors

2023 legislative agenda and session

BHC electronic meeting policy

FOIA statutes regarding remote participation and all-virtual meetings has changed

- Changes to FOIA statutes went into effect on September 1, 2022
- Relevant changes to the BHC include:
  - Remote participation permitted for members living 60+ miles from meeting location
  - Members participating remotely may vote
  - Remote participation allowed only if quorum is physically present at the meeting site
  - Permits up to two all-virtual meetings (or 25% of all meetings) each year

Statute requires BHC to adopt a policy before before using new authorities

- BHC policy must comply with the statute, but can be more restrictive
- Draft policy provided with meeting materials follows the statute and FOIA Council guidance
  - No additional restrictions

Member discussion and questions

- Circumstances allowed
  - Member disability or medical condition
  - Member's family medical condition
  - Personal matter
  - Residence 60+ miles away from meeting
- Number allowed
  - 2 or 25% of all meetings per year for personal matter and all-virtual meetings
  - No limits on other circumstances
- Process for requests

BHC Behavioral Health Commission

See you next in 2023!

Visit bhc.virginia.gov for meeting materials