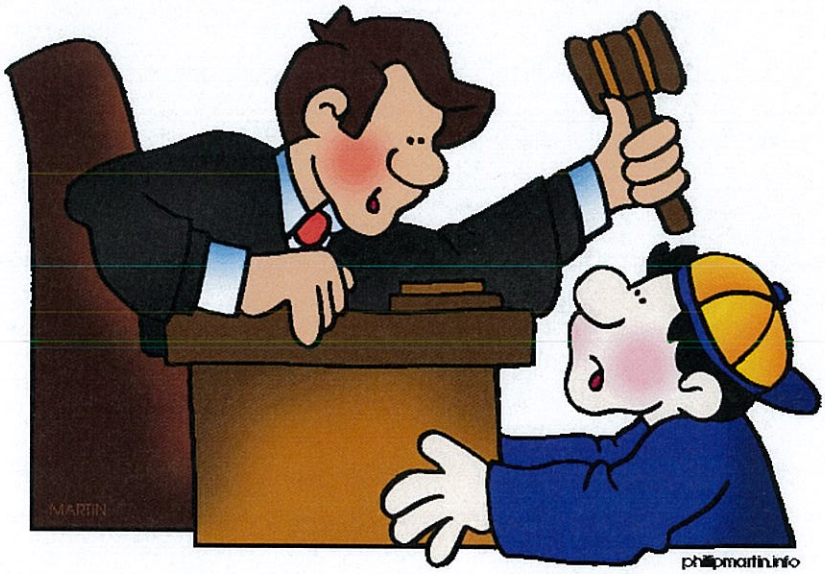
REASONS TO PASS AND FUND THIS BILL

# HB 2836 (2013)

## Juvenile Aid and Assist

## (Juvenile Fitness to Proceed)




**Prepared by the Oregon Law Commission**

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*The Oregon Law Commission is housed at the Willamette University College of Law, which also provides executive, administrative and research support for the Commission.*

## ONE PAGE SUMMARY OF HB 2836

### How this Bill Changes Current Law

Under current Oregon law there are no statutory provisions regarding fitness to proceed (also called "aid and assist") in juvenile delinquency cases. Like adult criminal defendants, juveniles have a constitutional right to raise the issue of fitness to proceed. There are no clear substantive guidelines for juvenile courts to determine whether a youth is fit to proceed. Moreover, there are no procedures in place to direct a court once a juvenile is found unfit, and there are no provisions regarding restorative services. Not surprisingly, juveniles receive inconsistent treatment and many juveniles are not restored to fitness so that they can be properly adjudicated.

This bill sets out standards to determine whether a juvenile is fit to proceed and provides procedures to raise the issue of fitness and, if necessary, obtain restorative services.

### Key Points of Bill

- Provides substantive standards for courts to determine whether a youth is fit to proceed. **(Section 1)**
- Establishes procedures for raising the issue of fitness. **(Section 1 (3))**
- Sets out guidelines for obtaining, administering, and filing evaluations to determine fitness. **(Section 2)**
- Requires Oregon Health Authority to develop standards for psychiatrists, licensed psychologists and regulated social workers who conduct evaluations. **(Section 3)**
- Provides that youth may not be removed from current placement to have evaluation done unless certain findings are made. **(Section 4)**
- Provides for evaluation report requirements. **(Section 5)**
- Establishes procedures for parties to object to an evaluation report and hold a hearing. **(Section 6)**
- Establishes court procedure for review of the evaluator's opinion and timelines for court to make decisions regarding the youth's fitness to proceed **(Sections 7-8)**
- Sets out guidelines for the Oregon Health Authority to administer restorative services to youths found unfit to proceed. **(Sections 9-11)**

# House Bill 2836

Sponsored by COMMITTEE ON JUDICIARY (at the request of Oregon Law Commission)


## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced.**

Establishes standards and procedures for determining fitness of youth to proceed on delinquency petition.

Requires Oregon Health Authority to develop guidelines for conduct of evaluation of fitness of youth to proceed and to administer program to provide restorative services to youths who are determined unfit to proceed and who present substantial probability of gaining or regaining fitness to proceed.

Declares emergency, effective on passage.


## A BILL FOR AN ACT

Relating to fitness of youth to proceed on delinquency petition; creating new provisions; amending ORS 419C.150; and declaring an emergency.

**Be It Enacted by the People of the State of Oregon:**

**SECTION 1. (1) A court may find that a youth is unfit to proceed in a proceeding initiated by a petition alleging jurisdiction under ORS 419C.005 if, as a result of mental disease or defect or another condition, the youth is unable:**

**(a) To understand the nature of the proceedings against the youth;**

**(b) To assist and cooperate with the counsel for the youth; or**

**(c) To participate in the defense of the youth.**

**(2) A court may not find that a youth is unfit to proceed in a proceeding solely because:**

**(a) Of the age of the youth;**

**(b) Of the current inability of the youth to remember the acts alleged in the petition; or**

**(c) Evidence exists that the youth committed the acts alleged in the petition while the youth was under the influence of intoxicants or medication.**

**(3) The issue of fitness to proceed must be raised by written motion filed by a party to the proceeding or by the court on its own motion. The motion may be made at any time after the filing of the petition. The court shall stay the proceedings on the petition after the motion is made and may order the youth to participate in an evaluation under section 2 of this 2013 Act to determine the youth's fitness to proceed if the court determines that:**

**(a) There is reason to doubt the youth's fitness to proceed; and**

**(b) There is probable cause to believe that the factual allegations contained in the petition are true.**

**(4) The fact that the youth is unfit to proceed does not preclude any objection through counsel and without the personal participation of the youth on the grounds that the petition is insufficient, that the statute of limitations has run, that double jeopardy principles apply or upon any other ground at the discretion of the court that the court deems susceptible of fair determination prior to trial.**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

**SECTION 2.** (1) An evaluation ordered under section 1 of this 2013 Act must be conducted by a psychiatrist, a licensed psychologist or a regulated social worker. If an evaluation is requested, the party at whose request the evaluation was ordered shall notify the court and other parties of the date, time and location of the evaluation and the name of the evaluator chosen by the party. A party or the court may submit written information to the evaluator for consideration. When written information that has not been provided to the court or an opposing party is submitted to the evaluator, the party submitting the written information to the evaluator shall provide the written information to the court and the opposing party.

(2)(a) Upon motion of the youth, or upon the court's own motion, a court shall determine whether the youth is financially eligible under the policies, procedures, standards and guidelines of the Public Defense Services Commission.

(b) If a county court or justice court determines that the youth is financially eligible, the court shall order the county to pay the fees and costs described in subsection (3) of this section from funds available for that purpose.

(c) If a circuit court determines that the youth is financially eligible, the court shall order the public defense services executive director to pay the fees and costs described in subsection (3) of this section from funds available for that purpose.

(3) If a court determines that a youth is financially eligible under subsection (2) of this section, the court shall order that:

(a) A reasonable fee be paid to a psychiatrist, licensed psychologist or regulated social worker in private practice who conducts the evaluation; and

(b) All costs, including transportation of the youth, be paid if the evaluation is conducted by a psychiatrist, licensed psychologist or regulated social worker employed by the Department of Human Services or is conducted by a community mental health program or community developmental disabilities program established under ORS 430.610 to 430.695.

(4) If an evaluation is ordered under section 1 of this 2013 Act at the request of or with the acquiescence of a youth, and the youth is determined not to be financially eligible under subsection (2) of this section, the evaluation shall be performed at the youth's expense.

(5) If an evaluation is ordered under section 1 of this 2013 Act at the request of the district attorney or juvenile department, the county shall pay for the expense of the evaluation.

(6) After a motion is made by the court or the youth under section 1 (3) of this 2013 Act, the state shall have the right to seek an independent evaluation at its own expense.

**SECTION 3.** (1) The Oregon Health Authority shall:

(a) Develop training standards for psychiatrists, licensed psychologists and regulated social workers conducting evaluations under section 2 of this 2013 Act;

(b) Develop guidelines for the conduct of evaluations; and

(c) Provide courts with a current list of qualified evaluators from which an evaluator may be selected. Neither the parties nor the court is required to choose an evaluator from the list provided by the authority, provided that the evaluator chosen is otherwise qualified.

(2) The authority shall adopt rules necessary to implement this section.

**SECTION 4.** (1) A youth may not be removed from the youth's current placement for the purpose of an evaluation under section 2 of this 2013 Act unless the court finds:

(a) That removal is necessary for the evaluation;

(b) That removal is in the best interest of the youth; and

(c) If the Department of Human Services has custody of the youth, that:

**(A) The department made reasonable efforts to prevent or eliminate the need for removal and make it possible for the youth to safely return to the youth's current placement; or**

**(B) Reasonable efforts have not been made by the department but reasonable efforts would not have eliminated the need for removal under paragraphs (a) and (b) of this subsection.**

**(2) A youth may not be removed from the youth's current placement to a hospital or residential facility solely for the purpose of an evaluation.**

**(3) If the court finds that the youth must be removed from the youth's current placement for the purpose of an evaluation under section 2 of this 2013 Act, the court must make written findings that the requirements of this section have been met.**

**(4) Unless ordered by the court upon a finding of good cause, a removal under this section may not exceed 10 days.**

**(5) If a youth is removed for the purpose of an evaluation under section 2 of this 2013 Act, the youth shall be returned to the youth's current placement immediately upon conclusion of the evaluation.**

**SECTION 5. (1)(a) If a party to a proceeding under section 1 of this 2013 Act raises the issue of fitness to proceed, the party shall file the original report on the evaluation conducted under section 2 of this 2013 Act with the clerk of the court and deliver copies of the report to all parties to the proceeding.**

**(b) If the court raises the issue of fitness to proceed under section 1 of this 2013 Act, the person conducting the evaluation under section 2 of this 2013 Act shall file with the clerk of the court the original report on the evaluation and two copies of the report. The clerk of the court shall deliver the copies to the district attorney and to counsel for the youth.**

**(c) The report must be filed with the clerk of the court within 30 days after the order for evaluation is issued, unless the deadline is extended by written court order for good cause. An extension under this paragraph may not exceed 30 days.**

**(2) A report filed under this section must include:**

**(a) A description of the evaluation;**

**(b) A list of information that the evaluator reviewed as part of the evaluation;**

**(c) The evaluator's opinion as to whether the youth is unfit to proceed as described in section 1 of this 2013 Act, including the evaluator's opinion as to whether the youth suffers from a mental disease or defect or another condition; and**

**(d) If the evaluator is of the opinion that the youth is unfit to proceed, the evaluator's opinion regarding whether there is a substantial probability that the youth will gain or regain fitness to proceed and, if there is a substantial probability that the youth will gain or regain fitness to proceed, the specific restorative services under section 10 of this 2013 Act that are needed and the anticipated duration of those services.**

**(3) A report filed under this section may not include statements made by the youth about the acts alleged in the petition alleging jurisdiction under ORS 419C.005.**

**(4) Statements made to an evaluator by a youth during an evaluation, or made to persons involved in the evaluation, about the acts alleged in the petition are not admissible against the youth in any proceeding relating to the petition.**

**(5) Notwithstanding ORS 419A.255, the clerk of the court shall provide the Oregon Health Authority with copies of the petition and the report on the evaluation upon request of the authority.**

**SECTION 6.** (1) Any party to a proceeding initiated by a petition alleging jurisdiction under ORS 419C.005 may file written objection to an evaluation report filed under section 5 of this 2013 Act within 14 days after the report is received by the party. The objection must state whether the party seeks another evaluation. If a party files an objection, the court shall hold a hearing within 21 days after the objection is filed with the court.

(2) If a written objection is not filed under this section, and the court does not adopt the evaluator's opinion regarding the youth's fitness to proceed, the court shall hold a hearing within 21 days after the report is filed with the court. The court may postpone the hearing for good cause shown.

(3) The court shall decide whether a youth is unfit to proceed by a preponderance of the competent evidence introduced at a hearing under this section. The order must set forth findings on the youth's fitness to proceed.

**SECTION 7.** (1) If a written objection is not filed under section 6 of this 2013 Act and the court adopts the evaluator's opinion regarding the youth's fitness to proceed, the court shall issue a written order within 24 days after the report is filed with the court. The order must set forth the findings on the youth's fitness to proceed.

(2) If a hearing is held under section 6 of this 2013 Act, the court shall make a decision and issue a written order within 10 days after the hearing. The order must set forth the findings on the youth's fitness to proceed.

**SECTION 8.** (1) If the court finds that the youth is fit to proceed, the court shall vacate the stay under section 1 of this 2013 Act.

(2) If the court finds that the youth is unfit to proceed and that there is not a substantial probability that the youth will gain or regain fitness to proceed in the foreseeable future if provided restorative services under section 10 of this 2013 Act, the court shall:

(a) Immediately enter a judgment that dismisses the petition alleging jurisdiction under ORS 419C.005 without prejudice; or

(b) If necessary for planning or instituting an alternative proceeding, then not more than five days after the findings are made enter a judgment that dismisses the petition without prejudice.

(3)(a) If the court finds that the youth is unfit to proceed and that there is a substantial probability that the youth will gain or regain fitness to proceed in the foreseeable future if provided restorative services under section 10 of this 2013 Act, the court shall continue the order under section 1 of this 2013 Act staying the proceedings and order that the youth receive restorative services under section 10 of this 2013 Act.

(b) The court shall forward the order for restorative services to the Oregon Health Authority.

**SECTION 9.** (1) The Oregon Health Authority shall administer a program to provide restorative services under section 10 of this 2013 Act to youths who:

(a) Are determined unfit to proceed as described in section 1 of this 2013 Act; and

(b) Present a substantial probability of gaining or regaining fitness to proceed in the foreseeable future.

(2) The authority shall develop qualifications and standards for persons who provide restorative services under section 10 of this 2013 Act and shall solicit qualified applicants to provide those services.

**SECTION 10.** (1) The Oregon Health Authority shall arrange for the provision of or begin

**providing restorative services within 30 days after receiving a court order under section 8 (3) of this 2013 Act. The authority shall send a report to the court, with copies to the parties to the proceeding initiated by a petition alleging jurisdiction under ORS 419C.005, no later than 90 days after receipt of the order. The report must describe the nature and duration of restorative services provided, indicate whether the youth is fit to proceed or presents a substantial probability of gaining or regaining fitness to proceed and recommend whether restorative services should be continued and, if so, the type and duration of the services.**

**(2) Within 14 days after receiving a report under subsection (1) of this section, the court shall determine the youth's fitness to proceed.**

**(3) Upon the recommendation of the authority, the request of a party or the court's own motion, the court may hold a review hearing concerning the evaluation of the youth's fitness to proceed at any time during which restorative services are provided pursuant to an order under section 8 (3) of this 2013 Act. After a review hearing, the court shall determine the youth's fitness to proceed.**

**(4) If the court finds that a youth is fit to proceed, the court shall vacate the stay under section 1 of this 2013 Act.**

**(5) If the court finds that the youth remains unfit to proceed and that there is not a substantial probability that the youth will gain or regain fitness to proceed in the foreseeable future, the court shall:**

**(a) Immediately enter a judgment that dismisses the petition alleging jurisdiction under ORS 419C.005 without prejudice; or**

**(b) If necessary for planning or instituting an alternative proceeding, then not more than five days after the findings are made enter a judgment that dismisses the petition without prejudice.**

**(6) If the court finds under subsection (2) or (3) of this section that the youth remains unfit to proceed, but that the youth presents a substantial probability of gaining or regaining fitness to proceed, the court shall order that restorative services be continued. The court shall order the authority to send a report to the court, with copies to the parties, within a specified time, not to exceed 90 days from the time the order is filed.**

**(7) If the court finds under subsection (2) or (3) of this section that a youth remains unfit to proceed, the youth shall be discharged within a period of time that is reasonable for making a determination whether the youth presents a substantial probability of gaining or regaining fitness to proceed. Regardless of the number of acts the petition alleging jurisdiction under ORS 419C.005 alleges that the youth committed, the youth may not be continued in restorative services for longer than whichever of the following, measured from the date the petition is filed, is shorter:**

**(a) Three years; or**

**(b) The period of time that is equal to the maximum commitment the court could have imposed if the petition had been adjudicated.**

**(8) If the court orders placement for restorative services, the court may specify the type of care, supervision, security or services to be provided by the authority to any youth placed in the custody of the Department of Human Services and to the parents or guardians of the youth. The authority, in consultation with the department, may place the youth in any facility authorized to accept the youth and provide the necessary services and care.**

**SECTION 11. (1) A youth may not be removed from the youth's current placement solely**

**for the purpose of receiving restorative services pursuant to a court order under section 8 of this 2013 Act unless the court finds:**

**(a) That removal is necessary to provide restorative services under section 10 of this 2013 Act;**

**(b) That removal is in the best interest of the youth; and**

**(c) If the Department of Human Services has custody of the youth, that:**

**(A) The department made reasonable efforts to prevent or eliminate the need for removal and make it possible for the youth to safely return to the youth's current placement; or**

**(B) Reasonable efforts have not been made by the department but reasonable efforts would not have eliminated the need for removal under paragraphs (a) and (b) of this subsection.**

**(2) If a youth is removed for the purpose of receiving restorative services, the youth shall be returned to the youth's current placement immediately upon conclusion of the provision of the restorative services.**

**SECTION 12.** ORS 419C.150 is amended to read:

419C.150. (1) **Except as provided in subsection (3) of this section,** a youth may be held in detention under this section and ORS 419C.145, 419C.153 and 419C.156 for a maximum of 28 days except for good cause shown prior to the expiration of the 28-day period. If good cause for continued detention is shown, the period of detention may be extended for no more than an additional 28 days unless the adjudication is continued with the express consent of the youth.

(2) Subsection (1) of this section does not apply to a youth alleged to be within the jurisdiction of the juvenile court for having committed an act that would be murder, attempted murder, conspiracy to commit murder or treason if committed by an adult and if proof of the act is evident or the presumption strong that the youth committed the act. The juvenile court may conduct such hearing as the court considers necessary to determine whether the proof is evident or the presumption strong.

**(3)(a) The time limits described in subsection (1) of this section do not apply if:**

**(A) The court has stayed the proceedings on the petition alleging jurisdiction under ORS 419C.005 pursuant to section 1 of this 2013 Act;**

**(B) The court has not entered an order determining the youth's fitness to proceed pursuant to a motion made under section 1 of this 2013 Act or the motion has not otherwise been resolved; and**

**(C) The court holds the review hearings required by ORS 419C.153 and determines that detention of the youth under ORS 419C.145 should continue.**

**(b)(A) Except as provided in subparagraph (B) of this paragraph, the detention of the youth whose detention has been continued under subsection (3)(a) of this section may be extended for no more than 28 days upon entry of an order determining the youth's fitness to proceed pursuant to a motion made under section 1 of this 2013 Act or upon other resolution of the motion, and if the court holds the review hearings required by ORS 419C.153 and determines that detention of the youth under ORS 419C.145 should continue.**

**(B) The detention of the youth may be extended for more than 28 days under this paragraph if expressly agreed to by the youth, and if the court holds the review hearings required by ORS 419C.153 and determines that detention of the youth under ORS 419C.145 should continue.**

**SECTION 13. Sections 1, 2, 4 to 8, 10 and 11 of this 2013 Act and the amendments to ORS**

**419C.150 by section 12 of this 2013 Act become operative on January 1, 2014.**

**SECTION 14. This 2013 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect on its passage.**

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**Juvenile Code Revision Work Group:**

**Juvenile Aid and Assist Report**

**HB 2836**

Prepared by Wendy J. Johnson
Oregon Law Commission
Deputy Director and General Counsel

From the Offices of the Executive Director
Jeffrey C. Dobbins

Approved by the
Oregon Law Commission on
December 12, 2012

## I. Introductory Summary

Like an adult criminal defendant, a youth in a delinquency proceeding has a constitutional right to raise the issue of fitness to proceed and to stand trial before he or she can be adjudicated in juvenile court. The Oregon Juvenile Code, however, is silent on the subject of fitness. No procedure is set out in the Code for the determination of fitness, and no options for the court are specified when a youth is found unfit. As a result, courts are left to fashion an outcome for the youth with no guidance in the law. Clear options are needed to help ensure that both the best interests of the youth and the best interests of victims and the community are protected. This draft provides a statutory structure that best fits juvenile court delinquency proceedings when youth may be unfit to proceed.

In order for a criminal defendant to stand trial he or she must be "fit to proceed" (i.e. able to aid and assist in his or her defense). This means that the defendant must be able to understand the nature of the proceeding and assist and cooperate with his or her counsel. If a defendant is not able to aid and assist, the defendant undergoes restorative services until the defendant regains fitness. Restorative services are generally instructional with a focus on educating defendants about the nature of their crimes and the process and results of the trial or proceeding. These services, however, may also include medication or treatment for mental disabilities. Currently, there are statutory provisions codifying fitness to proceed requirements and procedures that govern adult aid and assist proceedings, but there are no similar statutes for juveniles.

Generally, when counsel raises issues regarding fitness to proceed in juvenile court, the courts proceed similarly to how they would proceed in adult court. This, however, is not preferable because in some instances there are specific reasons that juvenile cases should be handled differently. In addition, with no statutory guidance, courts deal with aid and assist proceedings inconsistently. Significantly, some judges have not allowed counsel to raise the issue in juvenile proceedings because it is not provided for in statute. The Oregon Law Commission's Aid and Assist Sub Work Group was convened to develop a statutory framework to govern fitness proceedings in order to provide guidance to the courts, ensure consistent application for the litigants, and account for differences between the juvenile and adult system.

## II. History of the Project

In December 2003, the Oregon Law Commission's Juvenile Code Revision Work Group proposed and the Oregon Law Commission approved the juvenile aid and assist project. The project was deferred to the 2007 Legislative Session. The Aid and Assist Sub Work Group first met on April 14, 2006. The members of the Sub Work Group included judges, district attorneys, defense attorneys, and other stakeholders who represent or work with juveniles.[1] The group

[1] **Juvenile Aid and Assist Sub Work Group members:** Julie McFarlane, Juvenile Rights Project (co-chair); Thomas Cleary, Multnomah County District Attorney's Office (co-chair); Karen Andall, Oregon Youth Authority; Bill Bouska, Office of Mental Health & Addiction Services; Mary Claire Buckley, Psychiatric Security Review Board; Michael Clancy, Clancy & Slininger; Daniel Cross, Law Office of Daniel Cross; Judge Deanne Darling,

conducted work in monthly meetings until October, 2006 where it met five times between October 3 and November 9 in order to complete its work and present a final draft to the Law Commission's Juvenile Code Revision Work Group. The Juvenile Code Revision Work Group approved the draft with some minor amendments and forwarded the recommended bill to the Oregon Law Commission for consideration and approval. The Oregon Law Commission approved the draft for recommendation to the 2007 Legislative Assembly during its meeting on December 4, 2006.

The Work Group's proposal was introduced to the Legislative Assembly as Senate Bill 320 on January 12, 2007. Following a hearing on February 19, 2007 in the Senate Judiciary Committee, the bill was referred to the Senate Ways and Means Committee where it remained until the legislature adjourned in June.

The Juvenile Code Revision Work Group voted at its meeting on January 16, 2009 to reintroduce the bill during the 2009 Legislative Session. The original intention of the Work Group was to reintroduce the bill in the same form as it appeared during the 2007 session; however, during the interim, Legislative Counsel made a considerable number of organizational changes as well as some amendments to conform to Legislative Counsel's style and form guidelines. The Work Group felt that more careful review was needed before forwarding the proposal to the Commission and voted to reconvene the Aid and Assist Sub Work Group to examine the new draft, HB 3220. The Aid and Assist Sub Work Group met on January 28, 2009 and proposed several minor changes to HB 3220. Further amendments were agreed to by email. The Oregon Law Commission approved the draft for recommendation to the Legislative Assembly at its meeting on February 11, 2009. HB 3220 passed out of the House Judiciary Committee, but died in the Ways and Means Committee during the 2009 legislative session.

On February 25, 2010, Linn County Judge Carl Brumund issued a written letter opinion relating to the issue of whether youths may raise an aid and assist issue at all in a juvenile delinquency proceeding in Oregon. The opinion addressed motions filed on behalf of several youths in Linn County as Judge Brumund had requested that the motions be consolidated for argument purposes. Brandan Kane of the Linn County District Attorney's Office argued the matter on behalf of the state, and Jody Meeker and Mark Taleff argued the matter on behalf of the youths. The parties agreed that the concept of "aid and assist" is not addressed in the Oregon juvenile code nor the Oregon Constitution. The court looked to the U.S. Constitution as the only relevant source of law for the issue. The court cited a line of U.S. Supreme Court cases that held that a criminal defendant is protected by the Due Process Clause of the 14th Amendment and as such cannot be compelled to stand trial if the defendant lacks the capacity to understand the nature and object of the proceedings against him, lacks the capacity to consult with counsel, or lacks the

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Clackamas County; Summer Gleason, Clackamas County District Attorney's Office; Judge Kip Leonard, Lane County; Tim Loewen, Yamhill County Juvenile Department; Bob Joondeph, Oregon Advocacy Center; Patricia O'Sullivan, Department of Human Services; Andrea Poole, Marion County District Attorney's Office; Mickey Serice, Department of Human Services; Karen Stenard Sabitt, Attorney in private practice; Ingrid Swenson, Office of Public Defense Services; Timothy Travis, State Court Administrator's Office; Janette Williams, Department of Human Services; Dr. Laura Zorich, Licensed Clinical Psychologist. Throughout the years additional people reviewed and provided edits, including but not limited to, Markus Fant, Clackamas County Juvenile Dept.; Leah Craft, Oregon Health Authority; Michael Livingston, Oregon Judicial Dept.; Christina McMann, Douglas Co. Juvenile Dept.; Kurt Miller, Marion Co. DA's Office.

capacity to assist counsel in preparing a defense. (Citing Dusky v. United States, 362 US 402 (1960); Drope v. Missouri, 420 US 162 (1975), and Godingey v. Moran, 509 US 389 (1993)). Judge Brumund's opinion goes on to explain that the 14th Amendment protections associated with adult criminal prosecutions do extend to juvenile delinquency proceedings. The opinion concludes that a youth must meet the Dusky standards of competency before the youth can be compelled to be adjudicated in an Oregon juvenile delinquency proceeding for conduct which, if the youth were an adult, would constitute a crime. Judge Brumund relied also on the Oregon Court of Appeals decision of State v. LJ, 26 Or App 461 (1976), to bolster the conclusion that fundamental fairness rooted in the 14th Amendment's Due Process Clause requires applicability of the Dusky competency test to juvenile delinquency proceedings. In LJ, the Oregon Court of Appeals concluded that the defense of mental disease or defect (i.e. insanity defense) made available by statute to adults, was also available to juveniles under essentially a fairness theory. At the end of the opinion, Judge Brumund states that the adult "aid and assist" statutes, ORS 161.360-161.370, are applicable to juveniles. The opinion is not binding on other Oregon courts and there was no appeal.

The Juvenile Code Revision Work Group submitted the bill again to the Commission for recommendation to the 2011 Legislative Assembly, and the Commission recommended the bill on November 29, 2010. The Commission noted that the recent Linn County opinion points out further the immediate need for a juvenile "aid and assist" law because application of the adult standards and procedures for "aid and assist" is inappropriate for juvenile court. This bill is identical to the 2009 bill except for references made to the Department of Human Services (department) which underwent a re-organization recently. The legislature created a new agency, the Oregon Health Authority (authority) and some of the duties in this bill belong with the authority and not the department. LC has made these changes throughout the new bill draft. SB 411(2011) passed out of the Senate Judiciary Committee and made progress in the Ways and Means Committee, but it too remained in the Committee upon adjournment.

## III. Statement of Problem Area

Although parties currently raise fitness to proceed issues in juvenile delinquency proceedings, the Oregon statutes provide no guidance for courts or parties. This has led to confusion and inconsistency. In fact, some Oregon circuit court judges have denied a fitness to proceed challenge due to lack of statutory authority, while others courts have allowed a challenge and found that it is indeed the responsibility of the court to ascertain the capacity of the youth to aid an assist once that capacity is placed in doubt. Some Oregon courts have found that if the youth lacks capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense, the youth may not be subject to trial. Some courts are creating their own process while other courts are applying the adult procedures from ORS 161.360 to 161.370. Some defense attorneys are reluctant to raise or may be ignorant of the defense because there are no juvenile aid and assist statutes. Some counties take custody of youth when they are alleged to have committed a crime and wait to adjudicate until the youth can assist, while other counties simply dismiss cases when the youth cannot assist. Routine dismissal of such cases in some counties has led to repeat offenses, frustration, and a general public safety problem. In some counties, the Oregon Health Authority also has been required to provide restorative in cases where aid and assist issues are raised despite a statutory procedure. A

consistent structure for the state to follow is simply not in place. Not only does this raise issues of fairness, but it implicates constitutional due process rights. In short, Oregon's gap in the law makes it necessary to establish statutory procedures and guidelines for aid and assist challenges in order to provide direction, ensure consistency, guarantee that constitutional rights are not violated, ensure public safety and develop a procedure to administer restorative services.

## IV. Objective of the Proposal

The objective of this proposal is to establish substantive and procedural guidelines for juvenile aid and assist cases. The draft defines when a youth is unfit to proceed and sets out procedures and substantive rules regarding raising the issue of fitness to proceed, obtaining evaluations, challenging evaluations, and administering restorative services. Setting out statutory standards will protect youths by ensuring that they will not be adjudicated without being able to assist and cooperate with counsel. In addition, it will protect the public by ensuring that youths who are capable of being restored to fitness will be properly adjudicated and held accountable for their actions. Other states, such as Virginia and Connecticut, have developed juvenile aid and assist statutes. The Aid and Assist Sub Work Group used statutes from these and other states as well as Oregon's own adult aid and assist statutes to develop this bill.

Typically, aid and assist challenges are made by the youth, but the draft provides that any party or the court may raise the issue of fitness. If a party raises the issue, the court is required to order an evaluation to determine whether the youth is able to aid and assist. The evaluation is to be administered by a medical professional and consists of questions and tests to determine whether the youth understands the nature and consequences of the delinquency proceedings and to determine whether the youth suffers from a mental disease or defect. After the evaluation is provided to the parties and the court, the court makes a fitness determination and, if necessary, orders restorative services. The non-moving party may object to any part of the evaluation and have another evaluation administered. The delinquency proceedings continue once the youth is restored. If the youth is incapable of restoration – that is, cannot be treated so that the youth is able to aid and assist – the delinquency proceedings are dismissed and, most likely, the district attorney will initiate dependency proceedings.

Under the provisions of this proposal, the Oregon Health Authority (OHA) is required to administer restorative services to youths who are unfit to proceed. Usually, that will consist of educational type services to teach youths about the nature of the alleged offense and the juvenile process. In some instances, restorative services will include medication or other treatment to address a mental disease or defect. Accordingly, this proposal will have a fiscal impact. The cost to OHA for 2011-2013 has not yet been determined, but if Oregon is consistent with other states, there will be about 35 to 40 youths per year who require restorative services.[2]

The draft is silent on the issue of involuntary medication. In some instances, a youth will be unfit to proceed, but able to achieve fitness with the administration of psychiatric medication. The work group was unable to agree as to whether or under what circumstances a court should order involuntary medication to an unwilling youth. Some work group members proposed a

[2] This prediction is based on the number of youths who are provided restorative services in Virginia and recent records of fitness to proceed cases from Oregon counties.

section that would allow courts to order medication upon clear and convincing findings that: 1) the medication would render the youth fit to proceed; 2) there are no less intrusive means; 3) the medication is narrowly tailored to minimize intrusion on the youth's liberty and privacy interests; 4) it is not an unnecessary risk to the youth's health; and 5) the seriousness of the allegations are such that the state's interests outweigh the youth's interest in self-determination. Ultimately, the work group voted not to include that section on involuntary medication arguing that it would not sufficiently protect the interests of youths, there are no similar provisions in the adult aid and assist statute, and the section would be unconstitutional. Proponents argued that the section would be constitutional, could provide sufficient safeguards to protect youths, and is necessary because courts currently order involuntary medication so there should be statutory procedure in place. This is an issue that is not essential to the workability of the bill and thus the work group recommends that it not be addressed in statute.

## V. Section Analysis

Section 1

This section sets out the standards for courts to determine whether a youth is fit to proceed. It largely mirrors the adult statute except that it provides that a youth may raise the issue of fitness based on other conditions such as severe immaturity. The adult statute provides that a defendant may be unfit to proceed if as a result of *mental disease or defect* the defendant is unable to aid and assist in his or her defense. This proposal is broader because it allows a youth to raise the issue of fitness if he or she is unable to assist as a result of a "*mental disease or defect or another condition.*"

In addition, this section provides that a court may not base a finding of unfitness solely on the inability of the youth to remember the acts alleged in the petition, evidence that the youth was under the influence of intoxicants, or the age of the youth (as distinguished from the youth's maturity level).

Section 1 also provides that any party or the court can raise the issue of fitness any time after the filing of the petition. It requires the court to stay the delinquency proceedings and order the youth to participate in an evaluation to determine whether the youth is fit to proceed if the court finds: 1) there is reason to doubt the youth's fitness to proceed; and 2) there is probable cause to believe that the factual allegations contained in the petition are true. Section 1(3) states that the issue of fitness to proceed must be raised either in writing by a party to the proceedings or upon the court's own motion.

Finally, section 1 imports language from the adult criminal code[3], which states that the fact that the youth is unfit to proceed does not preclude the youth's attorney from raising additional defenses that do not require the participation of the youth. These include challenging the sufficiency of the petition, alleging that the statute of limitations has run, and other similar defenses.

[3] See ORS 161.370(12)

Section 2

Section 2 provides that only licensed psychiatrists, psychologists, or clinical social workers may conduct evaluations to determine a youth's fitness to proceed. In addition, this subsection requires the party who requested the evaluation to provide information regarding the evaluation to the other parties and the court. It authorizes any party to submit written information to the evaluator.

Section 2 also lays out who must pay for an evaluation. If the youth does not meet eligibility guidelines of the Public Defense Services Commission (i.e. they do not qualify for public defense services) the youth must pay for his or her own evaluation. If eligible, the county must pay for the evaluation, costs, and a reasonable fee to the person conducting the evaluation. If the evaluation is requested by either the district attorney or juvenile department, the county must pay for the expense of the evaluation. Furthermore, if the court or youth requests an evaluation and the state (district attorney) would like an independent evaluation, it may obtain one at its own expense. District attorney representatives reported that this was an important provision to include.

Section 3

This section directs OHA to develop training standards for persons providing evaluation services, develop guidelines for conducting evaluations, and provide the court with a list of evaluators. Although the court and parties may use that list to find qualified evaluators, they are not required to do so and may use other evaluators as long as the evaluators meet the training standards. Finally, this section provides OHA with rulemaking authority.

Section 4

This section sets out when a court may remove a youth from his or her current placement for an evaluation. Removal for evaluations should be rare and happen only in extreme circumstances. For the stability and well-being of the youth, it is important not to disrupt or change the youth's environment. In order for a youth to be removed from his or her placement, the court must find that removal is necessary for the evaluation; removal is in best interest of the youth; and, if DHS has custody of the youth, that DHS made reasonable efforts to conduct the evaluation at the youth's current placement. Usually, the youth will raise the issue of fitness and willingly participate in an evaluation. However, for example, removal may happen if the district attorney or the court raises the issue of fitness – something that is very uncommon – and the youth will not participate in the evaluation. In any case, removal must not exceed 10 days. This section also makes it clear that these statutes are not to be manipulated to move youth to hospitals or residential facilities; the purpose of these statutes is to provide an aid and assist defense, not placement.

Section 5

Section 5 sets out the requirements for filing reports and what must be contained in the evaluator's report. The report must include the information the evaluator reviewed, the evaluator's opinion regarding the fitness of the child, and whether the child would benefit from restorative services. The section provides that statements made by the youth about facts alleged in the petition may not be used against the youth in proceedings related to the petition. Additionally, this subsection provides that the OHA may obtain copies of the evaluation report and petition.

Section 6

Section 6 sets out procedures the court must follow after receiving the evaluator's report. This subsection was drafted with the purpose of ensuring efficient and timely proceedings without compromising a party's right to object to and obtain their own evaluation. Accordingly, a party may object to a report within 14 days of receipt of the report. The objecting party may obtain its own report and the court is required to hold a hearing within 21 days of the objection. If there are no written objections and the court does not adopt the findings and recommendations of the evaluator, the court must hold a hearing within 21 days after the report is filed. The court determines whether a youth is fit to proceed based on a preponderance of the competent evidence and the order issued by the court must set forth its findings.

Section 7

Section 7 is another provision relating to procedures the court must follow after receiving a report. This section states that when a written objection is not filed and the court *does* adopt the findings and determinations contained within the evaluator's report, the court must issue a written order within 24 days after the report is filed. The court must file a written order within 10 days after the hearing is held if a written objection is filed under section 6. In either case the order must set forth the findings on the youth's fitness to proceed.

Section 8

This section sets out how a court must proceed after it makes a finding as to whether the youth is fit to proceed. If the court finds that the youth is unfit to proceed and there is not a substantial probability that the youth will gain or regain fitness to proceed, the court must either immediately dismiss the petition or, within five days, arrange for an alternative proceeding (e.g. dependency proceedings) and then dismiss the petition without prejudice. If the court finds the youth fit to proceed, the court is required to vacate the stay and continue the proceedings. If the court finds the youth unfit to proceed but is likely to gain or regain fitness if provided restorative services, the court shall continue the order staying the proceedings and forward the order for restorative services to OHA.

Section 9

This section requires OHA to administer a program to provide restorative services and develop qualification standards for persons who provide restorative services. This section was included based on the concerns of some sub work group members that a court may not have authority to

order a non-party (OHA) to provide restorative services. The sub work group agreed that a specific provision providing statutory requirements of OHA would address those concerns.

Section 10

Section 10 requires OHA to implement restorative services within 30 days of receipt of the court's order. No later than 90 days after receipt of the court's order, OHA must send a report to the court describing the nature and duration of services provided and recommend whether services should be continued. After the court receives the report from OHA, the court is required to make a fitness finding and either vacate the stay, dismiss the petition, or order further restorative services. If services are continued, OHA is required to issue another report no later than 90 days after the receipt of the order from the court. This section provides for a review hearing and also limits the length of time for which restorative services may be ordered to the lesser of three years or the maximum commitment time had the youth been adjudicated.

Section 11

If the youth is cooperative and when possible, restorative services will take place at the youth's current placement. When necessary, however, the court may remove a youth in order for OHA to administer restorative services. Section 11 states that a youth may not be removed from the youth's current placement solely for the purpose of receiving restorative services unless removal is in the youth's best interest and necessary for the provision of services. The section also provides that if a youth is removed from their placement, the youth is to be returned immediately upon conclusion of the restorative services.

Section 12

This section amends existing ORS 419C.150 and allows pre-adjudication detention of the youth for an additional 28 days under certain limited circumstances when a motion regarding fitness to proceed is pending. The amendment allows for an extension for more than an additional 28 days if expressly agreed to by the youth and the court determines that detention before adjudication on the merits should continue.

Sections 13 and 14

These sections provide that sections 3 and 9 of this bill become operative immediately, while the others will not become operative until January 1, 2014. This allows OHA some time to establish standards for both conducting evaluations and providing restorative services before the other elements of this bill become operative.

# FREQUENTLY ASKED QUESTIONS (FAQs)

1. **Why is this bill, which creates statutes that establish standards and procedures to determine whether a juvenile is fit to proceed, necessary?**

   There is not a procedure in the juvenile code for juveniles to raise the issue of fitness to proceed (competency) in Oregon, even though they have a constitutional right to raise the issue. The Supreme Court held in *Dusky v. U.S.*[1] that a person has a due process right not to go through a trial unless competent. This requires that a person must have the ability to consult with a lawyer with a reasonable degree of rational understanding and also have a rational as well as factual understanding of the proceedings before them. This principle has been recognized as essential to our justice system in this country for over 100 years. In addition, the U.S. Supreme Court specifically held in *In re Gault*[2] that these due process protections apply in juvenile delinquency proceedings and include the right to fair treatment as wells as the right to counsel. In short, Oregon needs to have a statutory procedure to ensure juveniles have a process to raise the issue of inability to aid and assist and meet constitutional requirements.

2. **Why not use Oregon's adult fitness to proceed procedures for juveniles?**

   The statutes providing procedures for adult defendants to raise the issue of fitness to proceed is inadequate for juveniles because it is not tailored to juvenile court procedures and it has the potential for long delays. The adult procedures (ORS 161.360-161.370) contain relatively few deadlines for the filing of reports and evaluations, and no time frame in which to start restorative services. The bill's proposed juvenile procedures provide strict deadlines for the initial filing of reports and evaluations as well as time limits on objections. The proposed juvenile statutes also require a court order to remove the juvenile from his or her placement for an evaluation, as opposed to the adult statute which allows removal for up to 30 days. Lack of time lines can lead to placement at more expensive facilities and failure to meet state requirements of timely adjudications of juveniles. In short, the bill's proposed procedures are tailored to better serve the needs of juveniles.

3. **Currently, what options are available to juveniles seeking to raise the issue of fitness to proceed in Oregon's juvenile courts?**

   Without a statutory procedure, each county generally addresses the issue on a case by case basis, in effect creating its own practice. In counties that recognize a due process right to be competent before being adjudicated, adult procedures are often adapted and used in juvenile delinquency proceedings since nothing else is available. Some counties, like Linn County for example, require an evaluation and provide the juvenile with restorative services despite explicit authority or funding to do so. Other counties, including Clackamas County, routinely dismiss the delinquency case because of the juvenile's inability to aid and assist and therefore release the

[1] *Dusky v. U.S.*, 362 U.S. 402, 402, 80 S. Ct. 788, 789, 4 L.Ed. 2d 8241 (1960).
[2] *In re Gault*, 387 U.S. 1, 30-31, 87 S. Ct. 1428, 1445, 18 L.Ed. 2d 527 (1967).

juvenile back into the community. Another procedure used is to request that the court convert a delinquency petition to a dependency petition. Finally, we have heard that some counties prosecute delinquency cases despite aid and assist issues being raised, reasoning that there is no process. In short, it is necessary to create a statewide procedure to create consistency among counties and ensure protection of juveniles' constitutional rights.

4. **How will an aid and assist procedure help ensure timely mental health treatment?**

Without an aid and assist procedure, it is unlikely that juveniles are receiving appropriate restorative treatment, including needed mental health treatment when they are charged with committing a delinquent act. Currently, each county decides whether to provide such services or dismiss the delinquency case. Since the state is not required to provide restorative services, it is often up to the juvenile to voluntarily undergo mental health treatment at their own expense. Under the bill's procedures, treatment plans and attendance at treatment can be mandated and effectively delivered. The proposed procedures provide a statewide mechanism whereby restorative services must begin within 30 days of a court order finding the youth unfit to proceed on a delinquency petition. In addition, the Oregon Health Authority is required to provide such services. Adopting a procedure for allowing juveniles to raise the issue of fitness to proceed will help provide timely mental health treatment and permit rehabilitation of delinquent youth.

5. **How will adopting the aid and assist procedure benefit public safety?**

The current practice in Oregon is for each county to craft its own procedures for dealing with fitness to proceed issues. In some counties, the procedure is to release the juvenile when unable to aid and assist. When this happens, a youth accused of an action that would be a crime if committed by an adult goes back out into the community. The youth is untreated, unpunished, and not rehabilitated. The youth is free to make the same choices that led to the youth's arrest in the first place. If there was a statewide procedure permitting a youth to exercise his or her constitutional right to be competent to stand trial, that youth would receive restorative treatment after a finding that the youth is unfit to proceed. During the restoration, the youth would be supervised. If the youth is later determined to be fit to proceed, the delinquency proceeding can move forward and the youth can be adjudicated. The bill's procedures stop the problem of using the Juvenile Department as a revolving door that puts youth back into the community without accountability.

6. **Why is adopting the aid and assist procedure worth the expense?**

Without statewide procedures, a youth who is unable to aid and assist must often litigate the issue in order to be able to raise the issue. Oregon is seeing a number of cases litigating this issue at the juvenile court and on appeal or on mandamus. Providing a procedure would save the money spent on each youth forced to litigate this issue individually, as demonstrated in the attached mandamus case. In addition, if juveniles are able to get the treatment they need in a timely manner, there will be savings in future mental health costs as problems can be caught at an early stage. Treating juveniles rather than releasing them back into the community will

provide a savings in the reduction of recidivism as well. This will save money for both the juvenile delinquency and adult criminal justice systems in that there will be lesser costs for prosecution, incarceration, and supervision later. In addition, the bill's procedure ensures both placement at appropriate facilities, which generally translates to placement at less costly facilities, and strict timelines that provide fiscal efficiency. For example, converting a delinquency case to a dependency case may be done to ensure treatment, but it also can translate to exorbitant costs at the Children's Farm Home. Most importantly, there are unquantifiable savings for the juvenile who receives treatment at a young age and is able to go on to live a productive life. Adopting a statewide procedure to raise the issue of inability to aid and assist will provide savings and benefits that will greatly outweigh its cost.

7. **How are other states handing this issue?**

Oregon is out of step with other states and is susceptible to further litigation if the current procedures do not change. Oregon is the only western state without procedures allowing a juvenile to challenge fitness to proceed. California, Idaho, and Utah have statutory procedures providing juveniles with a mechanism to exercise their constitutional right to be competent to stand trial. California enacted its statute in 2010, Idaho in 2011, and Utah in 2012. Washington, Montana, and Nevada have court cases providing juveniles the right to raise competency issues. These cases rely on both the U.S. Constitution and state law. In short, Oregon has a gap in the law that needs to be addressed.

**Constitutional Rights -- of juveniles must be protected**

Juveniles have a constitutional right to be competent to stand trial. That is, they should not be adjudicated until they are mentally fit to proceed. The United States Supreme Court issued two opinions in the 1960s which established that juveniles have a due process right to assist in their own defense. In *Dusky v. United States,*[1] the Supreme Court held that a defendant cannot be made to stand trial unless competent, which requires an ability to have a reasonable understanding of the proceedings and an ability to reasonably consult with an attorney. The opinion affirmed a defendant's right to have a competency evaluation before standing trial (Dusky was suffering from schizophrenia when he was tried for statutory rape and kidnapping.). The Supreme Court later held in *In re Gault,*[2] that juveniles also have a due process right to fair treatment in juvenile delinquency proceedings.

In Oregon, a Linn County circuit court judge wrote an opinion that addressed this issue in 2010. See attached. After reviewing and explaining several U.S. Supreme Court and Oregon cases, the opinion came to the conclusion that before an Oregon youth can be compelled to go through an adjudicative proceeding in a delinquency case, the youth must be able to consult with his or her attorney with a reasonable degree of understanding as well as have a rational and factual understanding of the proceedings. Without any juvenile procedures available in the Oregon juvenile code (ORS 419A, 419B, and 491C) the Court decided to apply the adult ORS provisions regarding competency. The opinion explains that while any party can raise the issue of competency, defense counsel has the responsibility to obtain an independent judgment prior to bringing the issue to the court. Very recently, in *In the Matter of M.R.*, the Oregon Supreme Court also recognized the right to raise the issue of fitness to proceed, reversing a juvenile court in Washington County.

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[1] *Dusky v. U.S.*, 362 U.S. 402, 402, 80 S. Ct. 788, 789, 4 L.Ed. 2d 8241 (1960).
[2] *In re Gault*, 387 U.S. 1, 30-31, 87 S. Ct. 1428, 1445, 18 L.Ed. 2d 527 (1967).

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RE: Aid and Assist

Dear Parties:

Through their attorneys, several youths have filed motions relating to their ability to "aid and assist" counsel in the preparation and conduct of their defense. Those individual cases will be addressed, as necessary, in a separate letter specific to that youth, but this letter opinion addresses the generic issue of whether such a defense exists at all in a juvenile delinquency proceeding. Brandan Kane of the Linn County District Attorney's Office argued the matter on behalf of the state, and Jody Meeker and Mark Taleff argued the matter on behalf of the youths.

The parties agreed that the concept of "aid and assist" is not addressed anywhere in the juvenile code, even though it is addressed in the adult criminal code at ORS 161.360.[1] It has been a part of the adult criminal code since at least 1971. A major revision of the criminal code was done in 1973. Nearly 40 years have passed since that time and the legislature has not placed a provision similar to ORS 161.360 within the juvenile code in spite of revising it multiple times in that intervening time, including some major revisions. With that history, one can only conclude that the legislature's failure to include a similar provision in the juvenile code is not an oversight but a deliberate choice. If such a concept exists in Oregon's juvenile law, it would appear it must be found in constitutional law.

No party has indentified any relevant Oregon constitutional provision. The only potential provision advanced as relevant to this court is the Due Process Clause of the 14th Amendment to the U.S. Constitution.

In *Dusky v United States*, 362 US 402, 80 S Ct 788, 4 LEd2d 8241 (1960), the U.S. Supreme Court held a criminal defendant cannot be compelled to stand trial unless he is competent. The Court determined the test for competency was that the defendant must have:

> 1) A sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and
> 2) A rational as well as factual understanding of the proceedings against him.

Clearly, the test requires an ability of the party to have some reasonable understanding of the proceedings themselves and an ability to reasonably consult with their attorney. The *Dusky* ruling was expressed again by the Court in 1966 in *Pate v Robinson*, 383 US 375, 378, 86 S Ct 836, 838, 15 LEd2d 815 (1966), and reaffirmed again in 1975 in *Drope v Missouri*, 420 US 162, 171, 95 S Ct 896, 903, 43 LEd2d 103 (1975), when it said:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, **to consult with counsel, and to assist in preparing his defense** may not be subjected to trial. Thus, Blackstone wrote that one who became 'mad' after the

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[1] ORS 161.360 **Mental disease or defect excluding fitness to proceed**

(1) If, before or during the trial in any criminal case, the court has reason to doubt the defendant's fitness to proceed by reason of incapacity, the court may order an examination in the manner provided in ORS 161.365.

(2) A defendant may be found incapacitated if, as a result of mental disease or defect, the defendant is unable:

a. To understand the nature of the proceedings against the defendant; or

b. *To assist and cooperate with the counsel of the defendant*; or

c. To participate in the defense of the defendant.

(Italic emphasis added by current court.)

> commission of an offense should not be arraigned for it 'because he is not able to plead to it with that advice and caution that he ought.' Similarly, if he became 'mad' after pleading, he should not be tried,' for how can he make his defense?' 4 W Blackstone Commentaries, 24. *See Youtsey v United States*, 97 F 937, 940-946 (CA 6 1899). Some have viewed the common-law prohibition 'as a by-product of the law against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.' Foote, *A Comment on Pre-Trial Commitment of Criminal Defendant*, 108 U. Pa. L. Rev. 832, 834 (1960). *See Thomas v Cunningham*, 313 F2d 934, 938 (Ca 4 1963). **For our purposes it suffices to note that the prohibition is fundamental to an adversary system of justice.**
> (Bold emphasis added.)

In *Godingey v Moran*, 509 US 389, 402, 113 S Ct 2680, 125 LEd2d 321 (1993), the Court said:

> Requiring that a criminal defendant be competent has a modest aim: **It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel.** While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and while states are free to adapt competency standards that are more elaborate than the *Dusky* formation, the Due Process Clause does not impose these additional requirements.
> (Bold emphasis added.)

About three months after the *Drope* decision, the Court rendered its decision in *Breed v Jones*, 421 US 519, 529, 95 S.Ct. 1779, 44 LEd2d 346 (1975), where it held the double jeopardy prohibition is relevant to juvenile court proceedings and further affirmed its earlier statements that the distinction of juvenile proceedings being "civil" as opposed to "criminal" is to be disregarded as it relates to constitutional rights. As the Court said[2]:

> Although the juvenile-court system had its genesis in the desire to provide a distinctive procedure and setting to deal with the problems of youth, including those manifested by antisocial conduct, our decisions in recent years have recognized that there is a gap between the originally benign conception of the system and its realities. With the exception of *McKeiver v. Pennsylvania*, 403 US 528, 91 SCt 1976, 29 L.Ed.2d 647 (1971), the Court's response to that perception has been to make applicable in juvenile proceedings constitutional guarantees associated with traditional criminal prosecutions. *In re Gault*, 387 US 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *In re Winship*, 397 US 358. 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

In the process of finding a juvenile is entitled to the privilege against self-incrimination (5th Amendment, U.S. Constitution), the Court held in *Gault* that the Due Process Clause of the 14th Amendment to the U.S. Constitution was applicable to juvenile delinquency proceedings, and that " . . . the hearing must measure up to the essentials of due process and fair treatment."[3] It also required advance and adequate notice to the parents and the child of the pending issues[4] and

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[2] *Breed v. Jones*, p 528.
[3] *Gault*, page 30.
[4] *Gault*, pages 33-34.

the right to counsel, including court appointed counsel if the family qualified.[5] In holding the privilege of self-incrimination was applicable to a juvenile[6] it stated, "It would indeed be surprising if the privilege against self-incrimination was available to hardened criminals but not children.[7]"

In making its ruling, the court simply dismissed the concept that a juvenile court proceeding was classified as a "civil" proceeding as opposed to a "criminal" proceeding because such a classification simply overlooked the fact that the juvenile proceedings could result in deprivation of the juvenile's liberty (regardless of whether the juvenile was committed to an adult penal institution or a separate institution for juveniles).[8]

In *McKeiver v Pennsylvania*, 403 US 578, 91 S Ct 1976, 29 LEd2nd 647 (1971), the Court held juveniles had no federal constitutional right to a jury trial. In making its decision, the Court did not give a great deal of weight to consideration of whether juvenile court delinquency proceedings were either "criminal" or "civil" in nature. Rather, it expressed that, under the Due Process Clause, the issue was one of "fundamental fairness." It found a jury trial in juvenile court was not an essential ingredient to "fundamental fairness" and noted:

> . . . one cannot say that in our legal system the jury is a necessary component of accurate fact finding. There is much to be said for it, to be sure, but we have been content to pursue other ways for determining facts. Juries are not required, and have not been, for example, in equity cases, in workmen's compensation, in probate, or in deportation cases. Neither have they been generally used in military trials. *McKeiver*, page 543.

The Court also indicated[9] simply equating the adjudicative process of the juvenile proceeding with a criminal trial ignores aspects of fairness, concern, sympathy, and paternal attention inherent in the juvenile court system.

The Oregon Supreme Court in *State v Turner*, 253 Or 235, 453 P2d 910 (1969), also found no federal right to a jury trial in juvenile court nor a right to a jury trial under Oregon's constitution, *State v Reynolds*, 317 Or 560 (1993). Those decisions were reached even though the right to a jury trial in a criminal proceeding is clearly written into both the federal and state constitutions. In *State v McMaster*, 259 Or 291, 298, 486 P2d 567 (1970), the Oregon Supreme Court, in making reference to the U.S. Supreme Court, said the latter court ". . . has not held that all the substantive due process requirements of the criminal law were applicable to juvenile proceeding . . ."

From the foregoing, it is clear the Due Process Clause of the 14th Amendment to the U.S. Constitution is applicable to juvenile court and its procedures. There must be fundamental fairness. It is also abundantly clear that by the time of Blackstone it was well established in common law that a person whose mental condition was such that the person ". . . lacked capacity to understand the nature and object of the proceedings against him, to consult with counsel, and

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[5] *Gault*, page 41.
[6] *Gault*, page 55.
[7] *Gault*, page 47.
[8] *Gault*, page 49.
[9] *McKiever*, pgs. 529, 550.

to assist in preparing his defense may not be subjected to trial." (*See Drope* quoted earlier on page 2 of this document). That concept evolved as being basic to a person accused of a criminal act also being treated with basic fairness. That is the concept embodied in due process and expressed by the U.S. Supreme Court in *Dusky*. It is applicable in juvenile court proceedings. The Court concluded that Federal Constitutional law, by means of the 14th Amendment's Due Process Clause, requires a youth to meet the *Dusky* standards of competency (including the ability to aid and assist their attorney in their defense) before the youth can be compelled to go through an adjudication concerning conduct which, if the youth were an adult, would constitute a crime. If a youth is charged with a violation rather than conduct which, if the youth were an adult would constitute a crime, due process considerations would not necessarily mandate the same result. That is not the issue before this court now.

In the case of *State v L J*, 26 Or App 461, 522 P2d 1322 (1976), the Oregon Court of Appeals was presented with the issue of whether the defense of mental disease or defect[10], as then found in the criminal code at then ORS 161.295, could be raised as a defense in juvenile court in a delinquency proceeding.

At that time, ORS 161.295 (1) provided:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

The court in *L J* noted that persons similarly situated except for a slight difference in their respective ages (for example: one being one day under 17 years of age and the other being 18 years old) could very well encounter dramatically different outcomes in their cases. The adult could potentially avail himself of an insanity defense, while the juvenile, if limited to the strict wording of the juvenile code, had no such recourse and therefore would be faced with commitment to a youth correctional facility. The court said:

> We cannot believe the legislature intended that one individual could go free while another in an identical situation could be sent to MacLaren School based on the fortuity that the former was over 18 while the latter was under 18. We hold the reference in ORS 419.476 (1)(a)[11] to matters that would be violations if

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[10] In footnote 2, the court said,: The defense in question, previously called 'insanity,' is now labeled 'mental disease or defect.' For brevity, we nevertheless continue to refer to the defense as 'insanity.'"

[11] The then current provision, in relevant part, of ORS 419.476 is as follows:

**419.476 Children within jurisdiction of juvenile court.**

(1) The Juvenile Court has exclusive jurisdiction in any case involving a person who is under 18 years of age and:

(a) Who has committed an act which is a violation, or which if done by an adult would constitute a violation, of law or ordinance of the United States or a state, county or city; or

(b) Who is beyond the control of his parents, guardian or other person having his custody; or

(c) Whose behavior, or condition or circumstances are such as to endanger his own welfare or the welfare of others; or

committed by adults includes a cross-reference to all of the affirmative defenses that would be available to adults.

Therefore, the defense was then made available to the juvenile as well as an adult.

The court did not otherwise identify any other legal authority for its decision. No participant has pointed out any case which overrules *L J*, and this court suggests it is rooted in the principal of "fundamental fairness" which is central to the federal due process clause. At the time of that decision, the statutory scheme for evaluation set out in ORS 161.360-161.370 was already a part of the statutory scheme. This court, therefore, interprets the ruling in *L J* to also include the references to those statutes as well. Case law, as well as ORS 161.360 and 161.365(1), make it a responsibility of the court to ascertain the capacity of the defendant (or youth, if in juvenile court) to aid and assist once that capacity is placed in doubt and to schedule a hearing to allow parties to present evidence on that issue. Any information on that topic would be relevant evidence which the court would anticipate would be placed into evidence. This court anticipates the Juvenile Department, as well as a youth's attorney, would likely be the first to learn of a potential issue of "aid and assist" and, therefore, bring the matter to the court's attention. In essence, that is what is occurring at the present time. The state, however, will have the benefit of the statutory procedure to follow, if it determines to do so.

In summary, this court concludes:

1. The due process clause of the 14th Amendment requires that the test enunciated in *Dusky* is applicable to delinquency proceedings. For a youth to be compelled to go through an adjudicative hearing to establish jurisdiction over that youth, the youth must have all of the following:
   a. A sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding; and
   b. Have a rational as well as a factual understanding of the proceedings against him or her.

   This is stated in slightly different terms in *Drope v Missouri*, *supra*, page 171, when the Court stated "[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel,

---

(d) Who is dependent for care and support on a public or private child-caring agency that needs the services of the court in planning for his best interests; or
(e) Either his parents or any other person having his custody have abandoned him, failed to provide him with the support or education required by law, subjected him to cruelty or depravity or to unexplained physical injury or failed to provide him with the care, guidance and protection necessary for his physical, mental or emotional well-being; or
(f) Who has run away from home
..."

The last modifications made to this statute prior to the court's opinion in *State v L J*, 26 Or App 461, 522 P2d 1322 (1976) were made in 1971, See relevant Session Laws c 451, s 17.

Section 1(a) of that former statute is nearly identical to current ORS 419C.005 (1) which provides: "Except as otherwise provided in ORS 137.707, the juvenile court has exclusive original jurisdiction in any case involving a person who is under 18 years of age and who has committed an act that is a violation, or that if done by an adult would constitute a violation, of a law or ordinance of the United States or a State, county or city."

and to assist in preparing his defense may not be subjected to trial."

2. The provisions of ORS 161.360-161.370 are applicable to juvenile proceedings.
3. Any party who doubts a youth's competency to proceed must notify the court and provide the court with any documentation of that concern. That information is subject to disclosure to the other party. The appropriate procedure would be for defense counsel to obtain an independent opinion before bringing the matter to the court and the attention of the state and juvenile department.
4. If the matter is not resolved, the court will set an evidentiary hearing on the issue.

Sincerely,

Carl H. Brumund
Judge Pro Tem

CHB:gh

## Adult Practice and Procedure--is not Appropriate for Juvenile Court

While juveniles have the same constitutional right as adults to be competent to stand trial, the differences between trying and treating juveniles and adults require the use of separate procedures to challenge fitness to proceed. This has long been recognized, most notably by the creation of a separate justice system for juveniles. The adult competency procedures (found at ORS 161.360 to 161.370) are inadequate for juveniles because the time lines are too long, the evaluation and treatment facility needs are different, the competency standards are different and the juvenile court process and entities involved are different. The adult procedures create the potential for long delays that are unacceptable to the needs of juveniles. The attached chart contains a timeline outlining the differences between the existing adult procedures and proposed juvenile procedures. In short, the Oregon juvenile code needs competency standards and procedures that are tailored to the needs of juveniles and juvenile court.

**Adult Aid and Assist Timeline (ORS 161.360 to 161.370) Compared with Proposed Juvenile Aid and Assist Codification Time Line (HB 2836)**

| | Adult Timeline ↓ | Proposed Juvenile Timeline ↓ |
|---|---|---|
| **Removal from placement for evaluation to determine if fit to proceed** | Court may order removal for up to 30 days. ORS 161.365(1)(b). | No removal solely for evaluation; need court order for removal.<br><br>If court approves removal, up to 10 days to conduct evaluation. (Section 4) |
| **Evaluation report due to court** | No deadline. | Report must be filed within 30 days after order for evaluation unless extension for good cause. Maximum extension of 30 days. (Section 5.) |
| **Objection to evaluation report by parties due** | No deadline. | Within 14 days after report is received by the party. (Section 6.) |
| **Court hearing when there is an objection to the evaluation report** | No deadline. | Within 21 days after the objection is filed with the court. (Section 6.) |
| **Court order setting forth the findings on the fitness to proceed (when there has been a hearing)** | No deadline. | Within 10 days after the hearing. (Section 7.) |
| **State to start providing restorative services** | No deadline. | Within 30 days after receiving a court order finding that youth is unfit to proceed and there is a substantial probability that the youth will gain or regain fitness to proceed in the foreseeable future. (Section 10.) |
| **Initial report to court after restorative services ordered** | 60 days to conduct the evaluation, 90 days to notify the court after delivery of defendant to custody of superintendent of state hospital or director of a facility. ORS 161.370(5). | 90 days after receipt of order to provide services (Section 10.) |
| **Court to review report and make determination re fitness to proceed** | No deadline. | 14 days after receiving report. (Section 10.) |
| **Review hearing** | No deadline. | Upon recommendation of OHA, request of party, or court's own motion, court may hold a review hearing at any time. (Section 10.) |
| **If remain unfit to proceed, regular reports to court** | Every 180 days. ORS 161.370 (6)(a). | Every 90 days. Section 10.) |

**The following are the adult fitness to proceed statutes:**

**161.360 Mental disease or defect excluding fitness to proceed.** (1) If, before or during the trial in any criminal case, the court has reason to doubt the defendant's fitness to proceed by reason of incapacity, the court may order an examination in the manner provided in ORS 161.365.

(2) A defendant may be found incapacitated if, as a result of mental disease or defect, the defendant is unable:

(a) To understand the nature of the proceedings against the defendant; or

(b) To assist and cooperate with the counsel of the defendant; or

(c) To participate in the defense of the defendant. [1971 c.743 §50; 1993 c.238 §1]

**161.365 Procedure for determining issue of fitness to proceed.** (1) When the court has reason to doubt the defendant's fitness to proceed by reason of incapacity as described in ORS 161.360, the court may call any witness to its assistance in reaching its decision. If the court determines the assistance of a psychiatrist or psychologist would be helpful, the court may:

(a) Order that a psychiatric or psychological examination of the defendant be conducted by a certified evaluator as defined in ORS 161.309 and a report of the examination be prepared; or

(b) Order the defendant to be committed for the purpose of an examination for a period not exceeding 30 days to a state mental hospital or other facility designated by the

Oregon Health Authority if the defendant is at least 18 years of age, or to a secure intensive community inpatient facility designated by the authority if the defendant is under 18 years of age.

(2) The report of an examination described in this section must include, but is not necessarily limited to, the following:

(a) A description of the nature of the examination;

(b) A statement of the mental condition of the defendant;

(c) If the defendant suffers from a mental disease or defect, an opinion as to whether the defendant is incapacitated within the description set out in ORS 161.360; and

(d) If the defendant is incapacitated within the description set out in ORS 161.360, a recommendation of treatment and services necessary to restore capacity.

(3) Except when the defendant and the court both request to the contrary, the report may not contain any findings or conclusions as to whether the defendant as a result of mental disease or defect was subject to the provisions of ORS 161.295 or 161.300 at the time of the criminal act charged.

(4) If the examination by the psychiatrist or psychologist cannot be conducted by reason of the unwillingness of the defendant to participate in the examination, the report shall so state and shall include, if possible, an opinion as to whether the unwillingness of the defendant was the result of mental disease or defect affecting capacity to proceed.

(5) The report shall be filed in triplicate with the clerk of the court, who shall cause copies to be delivered to the district attorney and to counsel for defendant.

(6)(a) When upon motion of the court or a financially eligible defendant, the court has ordered a psychiatric or psychological examination of the defendant, a county or justice court shall order the county to pay, and a circuit court shall order the public defense services executive director to pay from funds available for the purpose:

(A) A reasonable fee if the examination of the defendant is conducted by a psychiatrist or psychologist in private practice; and

(B) All costs including transportation of the defendant if the examination is conducted by a psychiatrist or psychologist in the employ of the Oregon Health Authority or a community mental health program established under ORS 430.610 to 430.670.

(b) When an examination is ordered at the request or with the acquiescence of a defendant who is determined not to be financially eligible, the examination shall be performed at the defendant's expense. When an examination is ordered at the request of the prosecution, the county shall pay for the expense of the examination. [1971 c.743 §51; 1975 c.380 §4; 1981 s.s. c.3 §131; 1983 c.800 §11; 1987 c.803 §18; 1993 c.238 §2; 2001 c.962 §90; 2005 c.685 §5; 2009 c.595 §106; 2011 c.724 §7]

**161.370 Determination of fitness; effect of finding of unfitness; proceedings if fitness regained; pretrial objections by defense counsel.** (1) When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the finding of the report filed under ORS 161.365, the court may make the determination on the basis of the report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence in the hearing, the party who contests the finding has the right to summon and to cross-examine any psychiatrist or psychologist who submitted the report and to offer evidence upon the issue. Other evidence regarding the defendant's fitness to proceed may be introduced by either party.

(2) If the court determines that the defendant lacks fitness to proceed, the criminal proceeding against the defendant shall be suspended and:

(a) If the court finds that the defendant is dangerous to self or others as a result of mental disease or defect, or that the services and supervision necessary to restore the defendant's fitness to proceed are not available in the community, the court shall commit the defendant to the custody of the superintendent of a state mental hospital or director of a facility, designated by the Oregon Health Authority, if the defendant is at least 18 years of age, or to the custody of the director of a secure intensive community inpatient facility designated by the authority if the defendant is under 18 years of age; or

(b) If the court does not make a finding described in paragraph (a) of this subsection, or if the court determines that care other than commitment for incapacity to stand trial would better serve the defendant and the community, the court shall release the defendant on supervision for as long as the unfitness endures.

(3) When a defendant is released on supervision under this section, the court may place conditions that the court deems appropriate on the release, including the requirement that the defendant regularly report to the authority or a community mental health program for examination to determine if the defendant has regained capacity to stand trial.

(4) When the court, on its own motion or upon the application of the superintendent of the hospital or director of the facility in which the defendant is committed, a person examining the defendant as a condition of release on supervision, or either party, determines, after a hearing, if a hearing is requested, that the defendant has regained fitness to proceed, the criminal proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed since the commitment or release of the defendant on supervision that it would be unjust to resume the criminal proceeding, the court on motion of either party may dismiss the charge and may order the defendant to be discharged or cause a proceeding to be commenced forthwith under ORS 426.070 to 426.170 or 427.235 to 427.290.

(5) The superintendent of a state hospital or director of a facility to which the defendant is committed shall cause the defendant to be evaluated within 60 days from the defendant's delivery into the superintendent's or director's custody, for the purpose of determining whether there is a substantial probability that, in the foreseeable future, the defendant will have the capacity to stand trial. In addition, the superintendent or director shall:

(a) Immediately notify the committing court if the defendant, at any time, gains or regains the capacity to stand trial or will never have the capacity to stand trial.

(b) Within 90 days of the defendant's delivery into the superintendent's or director's custody, notify the committing court that:

(A) The defendant has the present capacity to stand trial;

(B) There is no substantial probability that, in the foreseeable future, the defendant will gain or regain the capacity to stand trial; or

(C) There is a substantial probability that, in the foreseeable future, the defendant will gain or regain the capacity to stand trial. If the probability exists, the superintendent or director shall give the court an estimate of the time in which the defendant, with appropriate treatment, is expected to gain or regain capacity.

(6)(a) If the superintendent or director determines that there is a substantial probability that, in the foreseeable future, the defendant will gain or regain the capacity to stand trial, unless the court otherwise orders, the defendant shall remain in the superintendent's or director's custody where the defendant shall receive treatment designed for the purpose of enabling the defendant to gain or regain capacity. In keeping with the notice requirement under subsection (5)(b) of this section, the superintendent or director shall, for the duration of the defendant's period of commitment, submit a progress report to the committing court, concerning the defendant's capacity or incapacity, at least once every 180 days as measured from the date of the defendant's delivery into the superintendent's or director's custody.

(b) Notwithstanding paragraph (a) of this subsection, if the superintendent or director determines that a defendant committed under this section is no longer dangerous to self or others as a result of mental disease or defect, or that the services and supervision necessary to restore the defendant's fitness to proceed are available in the community, the superintendent or director shall file notice of that determination with the court. Upon receipt of the notice, the court shall order the person released on supervision as described in subsection (3) of this section.

(7)(a) A defendant who remains committed under subsection (6) of this section shall be discharged within a period of time that is reasonable for making a determination concerning whether or not, and when, the defendant may gain or regain capacity. However, regardless of the number of charges with which the defendant is accused, in no event shall the defendant be committed for longer than whichever of the following, measured from the defendant's initial custody date, is shorter:

(A) Three years; or

(B) A period of time equal to the maximum sentence the court could have imposed if the defendant had been convicted.

(b) For purposes of calculating the maximum period of commitment described in paragraph (a) of this subsection:

(A) The initial custody date is the date on which the defendant is first committed under this section on any charge alleged in the accusatory instrument; and

(B) The defendant shall be given credit against each charge alleged in the accusatory instrument for each day the defendant is committed under this section, whether the days are consecutive or are interrupted by a period of time during which the defendant has regained fitness to proceed.

(8) The superintendent or director shall notify the committing court of the defendant's impending discharge 30 days before the date on which the superintendent or director is required to discharge the defendant under subsection (7) of this section.

(9) When the committing court receives a notice from the superintendent or director under subsection (5) or (8) of this section concerning the defendant's progress or lack

thereof, the committing court shall determine, after a hearing, if a hearing is requested, whether the defendant presently has the capacity to stand trial.

(10) If at any time the court determines that the defendant lacks the capacity to stand trial, the court shall further determine whether there is a substantial probability that the defendant, in the foreseeable future, will gain or regain the capacity to stand trial and whether the defendant is entitled to discharge under subsection (7) of this section. If the court determines that there is no substantial probability that the defendant, in the foreseeable future, will gain or regain the capacity to stand trial or that the defendant is entitled to discharge under subsection (7) of this section, the court shall dismiss, without prejudice, all charges against the defendant and:

(a) Order that the defendant be discharged; or

(b) Initiate commitment proceedings under ORS 426.070 or 427.235 to 427.290.

(11) All notices required under this section shall be filed with the clerk of the court and delivered to both the district attorney and the counsel for the defendant.

(12) If the defendant regains fitness to proceed, the term of any sentence received by the defendant for conviction of the crime charged shall be reduced by the amount of time the defendant was committed under this section to the custody of a state mental hospital, or to the custody of a secure intensive community inpatient facility, designated by the Oregon Health Authority.

(13) Notwithstanding the suspension of the criminal proceeding under subsection (2) of this section, the fact that the defendant is unfit to proceed does not preclude any objection through counsel and without the personal participation of the defendant on the grounds that the indictment is insufficient, that the statute of limitations has run, that double jeopardy principles apply or upon any other ground at the discretion of the court which the court deems susceptible of fair determination prior to trial. [1971 c.743 §52; 1975 c.380 §5; 1993 c.238 §3; 1999 c.931 §§1,2; 2005 c.685 §6; 2009 c.595 §107; 2011 c.508 §1; 2011 c.724 §8]

**161.375 Escape of person placed at hospital or facility; authority to order arrest.** (1) When a patient, who has been placed at a state hospital for evaluation, care, custody and treatment under ORS 161.315 to 161.351 or by court order under ORS 161.315, 161.365 or 161.370, has escaped or is absent without authorization from the hospital or from the custody of any person in whose charge the superintendent has placed the patient, the superintendent may order the arrest and detention of the patient.

(2) When a patient, who has been placed at a secure intensive community inpatient facility for evaluation, care, custody and treatment under ORS 161.315 to 161.351 or by court order under ORS 161.315, 161.365, 161.370 or 419C.527, has escaped or is absent without authorization from the facility or from the custody of any person in whose charge the director of the facility has placed the patient, the director of the facility shall notify the Director of the Oregon Health Authority. The Director of the Oregon Health Authority may order the arrest and detention of the patient.

(3) The superintendent or the Director of the Oregon Health Authority may issue an order under this section based upon a reasonable belief that grounds exist for issuing the order. When reasonable, the superintendent or the Director of the Oregon Health Authority shall investigate to ascertain whether such grounds exist.

(4) Any order issued by the superintendent or the Director of the Oregon Health Authority as authorized by this section constitutes full authority for the arrest and detention of the patient and all laws applicable to warrant or arrest apply to the order. An order issued by the superintendent or the Director of the Oregon Health Authority under this section expires 72 hours after being signed by the superintendent or the Director of the Oregon Health Authority.

(5) As used in this section, "superintendent" means the superintendent of the state hospital to which the person was committed or the superintendent's authorized representative. [1997 c.423 §1; 2005 c.685 §7; 2005 c.843 §24a; 2009 c.595 §108; 2011 c.708 §7]

**161.380** [1971 c.743 §53; renumbered 161.290]

**161.385 Psychiatric Security Review Board; composition, term, qualifications, compensation, appointment, confirmation and meetings.** (1) There is hereby created a Psychiatric Security Review Board consisting of 10 members appointed by the Governor and subject to confirmation by the Senate under section 4, Article III of the Oregon Constitution.

(2) The membership of the board may not include any district attorney, deputy district attorney or public defender. The Governor shall appoint:

(a) A psychiatrist experienced in the criminal justice system and not otherwise employed on a full-time basis by the Oregon Health Authority or a community mental health program;

**Consistency—in practice and procedure is needed throughout the State of Oregon**

The creation of a procedure allowing juveniles to raise the issue of inability to aid and assist is needed for consistency among Oregon counties. Without a statewide procedure, each county is free to decide individually how to proceed. Linn County has decided to use the adult aid and assist procedures. (See attached opinion.) In other counties, delinquency cases involving a juvenile found unable to aid and assist are routinely dismissed and juveniles are not held responsible. Some counties convert juvenile delinquency petitions to juvenile dependency petitions. Still in other Oregon counties, juveniles are adjudicated despite having competency issues—in violation of their constitutional rights.

In a juvenile court case in Washington County last fall, the attorney for the youth filed a motion requesting a hearing to determine whether the youth was fit to proceed. The attorney for the youth based her argument on a psychologist's report which found that the youth was unable to aid and assist and not likely to become able to aid and assist. In that case, the youth was in a special education class and was not able to read or retain information. The youth did not understand his Miranda rights or basic legal terminology. In addition, he was not able to recall the acts he was alleged to have committed and was not able to have a meaningful conversation with his attorney. The state did not provide any evidence to the contrary, and acknowledged that the court could apply the adult competency procedures. However, the trial court issued a conclusory ruling denying the motion. The trial court did not allow any witnesses to testify as to the youth's competency, believing it to be "irrelevant." The youth appealed and the Oregon Supreme Court granted a writ of mandamus ordering the trial court to hold a hearing to determine whether the youth was able to aid and assist.

Although the Supreme Court did not issue a written opinion but a simple order issuing the writ, the briefs on behalf of the youth and the state shed light on the decision. The youth argued that an adult defendant has a due process right to consult with his or her lawyer and have a rational and factual understanding of the proceeding, which includes more than just passive observance. The youth argued that this right should be extended to juveniles given the due process rights given to juveniles in other situations. The state did not contest that competency is a relevant issue in a juvenile delinquency proceeding. Instead of arguing against a hearing to determine competency, the state argued that mandamus was not proper in this case. The Supreme Court granted the writ,

In short, providing a statewide procedure for juveniles to exercise their right to be competent to stand trial would alleviate the need to litigate this issue on a case by case basis and provide consistency among counties. Judges, district attorneys, and defense attorneys need consistent standards and procedures to apply in juvenile court.

# SUPREME COURT

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Contact:
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Staff Attorney
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On November 27, 2012, the Supreme Court:

1. Directed the issuance of a peremptory writ of mandamus commanding the Washington County Circuit Court to vacate the September 5, 2012, order denying the motion for determination of youth's fitness to proceed, and to hold a hearing to determine youth's fitness to proceed, in *State of Oregon v. M. R.* (S060771).

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of M. R., a Youth,

STATE OF OREGON,
Adverse Party,

v.

M. R.,
Relator.

Washington County Circuit Court
J120235

S060771

**ORDER ALLOWING PETITION FOR PEREMPTORY WRIT OF MANDAMUS AND GRANTING MOTION TO WAIVE FILING FEE**

Upon consideration by the court.

The petition for peremptory writ of mandamus is allowed. The motion to waive the filing fee is granted.

11/27/2012
2:36:54 PM
MARTHA L. WALTERS
PRESIDING JUSTICE, SUPREME COURT

c: Anna Marie Joyce
Jeremy Rice
Laura Graser
Roger R. Wong
Hon. Eric E Butterfield

kag

IN THE SUPREME COURT OF THE STATE OF OREGON

| | |
|---|---|
| Relating to: In the Circuit of the State of Oregon for the County of Washington, Juvenile Department.<br><br>In the Matter of M.R., a Youth. | |
| THE STATE OF OREGON,<br><br>Adverse Party,<br><br>vs.<br><br>M.R., a Youth,<br><br>Relator. | SC NO. _____<br><br>Relating to Case No. 01-J12-0235 (Washington County)<br><br>INITIATING DOCUMENT – PETITION FOR WRIT – PETITION FOR AN ALTERNATIVE WRIT OF MANDAMUS |

**MANDAMUS PROCEEDING**

A trial is currently set for November 8, 2012. While no stay is currently in place, relator will seek one in the trial court on November 1, if this court has not yet ruled. The petition was filed in juvenile court on March 2, 2012.

Attorney for the Relator:

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The trial judge:

Hon Eric E Butterfield, 925170
Washington Co Circuit Court
150 N 1st Ave
Hillsboro OR 97124
503 846-6344
[no email listed in OSB directory]

Relator alleges:

1.

Relator M.R. is a youth, age 13 (DOB 1998).

On March 2, 2012, the juvenile department of Washington County filed a petition alleging that the youth is within the jurisdiction of the court because the youth has committed acts which if done by an adult would constitute Sodomy in the First Degree and Sexual Abuse in the First Degree, involving the same victim, between May 2010 and August 2011. ER-1 [redacted petition].

2.

The trial judge below whose ruling is at issue is the Honorable Eric E. Butterfield, Judge of the Circuit Court of Washington County.

The state below supported of Judge Butterfield's ruling and thus is an adverse party.

3.

The delinquency adjudication is currently set for November 8, 2012.

If this matter is still pending before this court on November 1, 2012, the youth will seek a stay in the trial court. As the trial court itself noted that the youth could "appeal" its ruling (Tr 14), the youth/relator anticipates that the trial court would issue a stay if this matter were pending before this court at that time. However, in the event that the trial court does not issue a stay, the youth will seek a stay of the adjudication before this court.

4.

On August 8, 2012, the youth's counsel filed a "motion for determination of youth's fitness to proceed under Dusky v. US, 362 US 402 (1960)." Counsel also filed an affidavit that asserted that the youth had been in a special education program, and had been receiving treatment from a social worker. The youth had been evaluated by Orin Bolstad, a psychologist, and Dr. Bolstad found that the youth was unable to aid and assist in the proceedings.

In the affidavit, counsel claimed that the youth could not be required to proceed unless he had a "sufficient present ability to consult with his attorney with a reasonable degree of rational understanding, and a rational as well as factual understanding of the proceedings against him" (quoting Dusky v. US). Counsel submitted Dr. Bolstad's report to the trial court. (The report is not before this court.) Counsel then requested "that the court determine that [the youth] is unable to proceed at this time."

5.

A hearing on that motion was held on September 4, 2012, in the juvenile court of Washington County, through the Honorable Eric E. Butterfield. A redacted copy of the transcript is in the excerpt of record.

The trial court had Dr. Bolstad's report. During the hearing, the youth's counsel observed that the youth had already received extensive services from the state, but in counsel's opinion, the youth does not understand basic legal

terminology, he cannot retain information, and he cannot remember the past. The youth cannot read, despite repeated attempts to teach him to read. Counsel stated, "I'm not able to have a meaningful discussion with my client." Tr 3-4.

6.

During the hearing, the state did not ask to offer any evidence about the youth, but asked that trial occur when it was set, in two days.

7.

During the September 4, 2012, hearing, the court ruled,

> So the Court is denying the youth's motion for determination on the issue of whether or not he's able to proceed -- fitness to proceed. And we'll just start up with our trial Thursday morning [in two days].

The youth's counsel asked for clarification, asking, "So the Court's not allowing me to call witnesses?" and the court ruled:

> No. I think it's -- I think it's irrelevant.

The record does not reflect whether or not the trial court had read Dr. Bolstad's report. The court made no findings of fact.

8.

The court's ruling was memorialized in an order, "Youth's motion for determination of fitness to proceed denied." The order was signed on September 4, 2012, and entered on September 5, 2012. ER-23 (and attached to the petition).

9.

The trial court's ruling consisted only of its conclusion that the youth was not entitled to a hearing, as a matter of law. The trial court made no comment, nor expressed any opinion, either about Dr. Bolstad's report, or about the youth's attorney's comments about the youth's condition.

10.

The youth/relator will be irremediably damaged, both in the present and in the future, if he is adjudicated while incompetent.

First, the youth/relator's trial counsel stated her opinion that, given youth's mental condition, it would be "cruel" to subject him to an adjudication now. Tr 14.

Second, if the youth/relator is found to have done the acts charged in the petition, he will face dire consequences, which will affect the rest of his life. These consequences will include lifetime registration as a sexual offender. ORS 181.592 - .594. He could later ask for relief from registration, but given his deficits, he probably would not qualify. Once he has registered as a sexual offender, his ability to receive treatment will be greatly limited. If he is not able to receive extensive treatment, no one will be able to say that he "rehabilitated" himself. ORS 181.823. Therefore, the juvenile adjudication, leading to sexual offender registration, will make it difficult for him to access services as he gets older.

11.

The youth/relator has no plain, speedy, or adequate remedy in the ordinary course of law, because there is no appellate remedy that can undo the damage to him, both now and for the rest of his life, if he is adjudicated while incompetent. A writ of mandamus is his only remedy.

12.

Given the grave nature of the trial court's error, and the potential damage to the youth/relator, both immediately and in the future, this court should issue a writ of mandamus.

13.

This petition is timely as the motion to modify probation was denied by Judge Butterfield in a written order entered September 5, 2012. This petition is being filed October 4, 2012.

The written order is attached to this petition, and is in the excerpt of record.

14.

This petition is made to this court rather than to the Circuit Court because the Honorable Eric E. Butterfield is a judge of the Circuit Court of the State of Oregon.

THEREFORE, Relator prays:

1. That this court exercise its original jurisdiction in this matter.

2. That this court issue an alternative writ of mandamus, commanding

Judge Butterfield, then and there to return the writ, with his certificate annexed, of having done as he was commanded, or the cause of omission thereof.

3. That this court award relator such other and further relief as the court deems just.

October 4, 2012.

Respectfully submitted,

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Attachments: Order

IN THE SUPREME COURT OF THE STATE OF OREGON

| | | |
|---|---|---|
| Relating to: In the Circuit of the State of Oregon for the County of Washington, Juvenile Department.<br><br>In the Matter of M.R., a Youth. | ) | |
| THE STATE OF OREGON,<br>Adverse Party,<br><br>vs.<br><br>M.R., a Youth,<br>Relator. | ) | SC NO. _____<br><br>Relating to Case No. 01-J12-0235<br>(Washington County)<br><br>MEMORANDUM IN SUPPORT OF PETITION FOR AN ALTERNATIVE WRIT OF MANDAMUS |

**MANDAMUS PROCEEDING**

A trial is currently set for November 8, 2012. While no stay is currently in place, relator will seek one in the trial court on November 1, if this court has not yet ruled. The petition was filed in juvenile court on March 2, 2012.

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## Question Presented

When the youth's counsel told the court that counsel had reason to doubt the youth's fitness to proceed by reason of incapacity, and counsel asked for a hearing to determine whether the youth had the capacity to proceed, may the court deny the youth a hearing to determine the youth's capacity?

To put the question in another way, may a youth be subject to the adjudicative stage of a juvenile delinquency proceedings during a time when the youth is incapacitated, that is, while he does not have a sufficient present ability to consult with his attorney with a reasonable degree of rational understanding, and a rational as well as factual understanding of the proceedings against him?

## Proposed Rule of Law

No youth can be adjudicated for acts which would be a crime if done by an adult, during a period when the youth lacks the fitness to proceed by reason of incapacity. This is true notwithstanding that Oregon does not have a statute that specifically applies to a youth's capacity. Federal Due Process, and the federal and Oregon right to counsel, require that a youth be competent to proceed during the adjudicative stage of a juvenile proceedings. The Dusky standard requires that when he is adjudicated, the youth must have a "sufficient present ability to consult with his attorney with a reasonable degree of rational understanding, and a rational as well as factual understanding of the proceedings against him."

When a youth's capacity is in question during a delinquency proceeding, the trial court must hold a hearing to determine if the youth is fit to proceed.

Statement of facts, including the procedural posture in the juvenile court of Washington County.

On March 2, 2012, the juvenile department of Washington County filed a petition, alleging that the youth, who is 13, had committed acts which are violations of the law, or which, if done by an adult, would constitute Sodomy in the First Degree and Sexual Abuse in the First Degree. ER-1.

There was a hearing on June 4, 2012, where the youth's counsel mentioned the youth's inability to aid and assist, but there was no resolution of the matter then. 9/4/12 Tr 10.

On August 8, 2012, the youth's counsel filed a "motion for determination of youth's fitness to proceed under Dusky v. US, 362 US 402 (1960)." Counsel also filed an affidavit that asserted that the youth had been in a special education program, and had been receiving treatment from a social worker. The youth had been evaluated by Orin Bolstad, a psychologist, and Dr. Bolstad found that the youth was unable to aid and assist in the proceedings.

In the affidavit, counsel claimed that the youth could not be required to proceed unless he had a "sufficient present ability to consult with his attorney with a reasonable degree of rational understanding, and a rational as well as factual understanding of the proceedings against him" (quoting Dusky v. US). Counsel requested "that the court determine that [the youth] is unable to proceed at this time." Counsel submitted Dr. Bolstad's report to the trial court. (The report is not before this court.)

A hearing for a ruling on the motion to determine competency occurred on September 4, 2012, in the juvenile court of Washington County, through the

Honorable Eric E. Butterfield. The transcript is in the excerpt of record.

The trial court had Dr. Bolstad's report, but the record does not reflect whether or not the trial court had read it. The court made no findings of fact.

The parties discussed the nature of the evidence that would be presented two days later, at the time of trial.

The state did not seek to offer any evidence regarding the youth's competency.

The youth's counsel urged the court to find that the youth was unable to proceed, based on Dr. Bolstad's report alone. Counsel added her impressions of the youth, including that he does not understand basic legal terminology, he cannot retain information, and he cannot remember the past. The youth cannot read, despite repeated attempts to teach him to read. Counsel stated, "I'm not able to have a meaningful discussion with my client." Tr 3-4.

The state noted, and the youth did not dispute, that Oregon's juvenile code contains nothing that addresses youths who cannot aid and assist. The state asked that if the court were to apply the criminal code competency provisions (ORS 161.360 - .370) to the youth's case, the state would request an opportunity to have its expert evaluate the youth. Tr 6. The state made an argument on the facts from Dr. Bolstad's report, but made no further legal argument. Tr 7-9. It requested that the trial, set in two days, occur then. Tr 10.

The court ruled,

> So the Court is denying the youth's motion for determination on the issue of whether or not he's able to proceed -- fitness to proceed. And we'll just start up with our trial Thursday morning [in two days].

The youth's counsel asked for clarification, asking, "So the Court's not

allowing me to call witnesses?" and the court ruled:

"No. I think it's -- I think it's irrelevant."

The youth's counsel asked to make a record about the youth's inability to aid and assist, because the "youth is not able to communicate with me in any way, shape or form about what happened. And it is cruel to put him through a trial under those circumstances."

The court replied, "I understand your position, [youth's counsel], * * * can't you appeal my decision today?"

The youth's counsel said, "I suppose I can."

The court said, "I think that's maybe what you'd want to think about doing." With that comment, the hearing ended. Tr 14.

The court's ruling was memorialized in an order, "Youth's motion for determination of fitness to proceed denied." ER-23.

After this hearing, the September 6 trial was postponed until November 8, 2012.

## Argument

**1. Due Process requires that all accused, including youths in the juvenile justice system, be competent to proceed.**

The law is clear that adult criminal defendants have a substantive Due Process right not to be tried while incompetent, under the Fourteenth Amendment to the United States Constitution.[1] *See* Pate v. Robinson, 383 US 375, 378 (1966).

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1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *.

The U.S. Supreme Court has declared that, "a person whose mental condition is such that he lacks the capacity to understand the nature and the object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial." Drope v. Missouri, 420 US 162, 171 (1975). "The [Due Process] test [for competency] must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as a factual understanding of the proceedings against him." Dusky v. United States, 362 US 402 (1960)(per curium)(internal citations omitted); *see also* Odle v. Woodford, 238 F3d 1084, 1089 (9th Cir), *cert denied,* 534 US 888 (2001) ("[C]ompetence to stand trial does not consist merely of passively observing the proceedings. Rather, it requires the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense.")

The "rule that a criminal defendant who is incompetent should not be required to stand trial has deep roots in our common-law heritage." Medina v. California, 505 US 437, 446 (1992).

Competency disputes give rise to two types of Due Process claims -- substantive and procedural. *See, e.g.,* Lounsbury v. Thompson, 374 F3d 785, 788 (9th Cir 2004). It order to assure the substantive Due Process right to be tried only if competent, a party has a procedural Due Process right to a fair evidentiary hearing.

In this case, the question before this court is whether this Due Process right applies to youths in the juvenile justice system.

**2. Federal law strongly implies that youths have a Due Process, and a Sixth Amendment, right to be competent when adjudicated.**

The leading federal cases about an adult's Due Process right to proceed only when competent were described above.

The United States Supreme Court has long recognized that, although juvenile delinquency proceedings must not conform to all of the requirements of a criminal trial, delinquency proceedings, "must measure up to the essentials of due process and fair treatment." Kent v. United States, 383 US 541, 562 (1966).

The youth is both young and mentally retarded or disabled. In recent years, the United States Supreme Court has increased the protection for juveniles, and for the mentally limited. The following examples are to illustrate that trend.

In 1988, the Court held that a juvenile who murders when under the age of 16 may not be sentenced to death. Thompson v. Oklahoma, 487 US 815 (1988) (plurality opinion). In 2005, the Court applied the same rule to juveniles who are under 18. Roper v. Simmons, 543 US 551 (2005) (under the Eighth Amendment).

The Court ruled that a juvenile may not be subjected to a mandatory life sentence, with no chance of parole, for a non-homicide case, Graham v. Florida, 130 S Ct 1211 (2010), and then extended that prohibition to include murder cases. Miller v. Alabama, 132 S Ct 2455 (2012) (Eighth Amendment).

Further, the United States Supreme Court has become increasingly protective of the mentally disabled. In 1986, the court held that mentally incompetent people cannot be executed. Ford v. Wainwright, 477 US 399 (1986). In 2002, it held that the mentally retarded cannot be executed. Atkins v. Virginia, 536 U S 304 (2002). This term the Court, in two cases, will examine whether an

inmate must be competent while his federal habeas corpus case is pending. The first case is Tibbals v. Carter, 11-218 (OT 2012). The case below was Carter v. Bradshaw, 644 F3d 329 (6th Cir 2010), which held that if a petitioner in a habeas case is incompetent, it is appropriate to stay the petition until the petitioner is competent. The Sixth Circuit found this right was derived from a federal statute, not the constitution. The second case is Ryan v. Gonzales, 10-930 (OT 2012). The case below held that a habeas petitioner is entitled to a stay until he is competent. 623 F3d 1242 (9th Cir 2010).

It is noteworthy that in 1966, the U.S. Supreme Court granted a stay to a petitioner, sentenced to death, who moved to dismiss his petition for certiorari. The Court directed the district court to evaluate the petitioner's competence to dismiss his petition. The Court never ruled thereafter. The petitioner died in prison, and his case was dismissed in 1995. Rees v. Peyton, 384 US 312 (1966); Rohan ex rel. Gates v. Woodford, 334 F3d 803, 815 (9th Cir), *cert denied*, 540 US 1069 (2003) (describing Rees's death).

The Sixth Amendment right to counsel[2] is directly affected when a person facing adjudication does not have the capacity to communicate with his lawyer. "Competence was more than just the ability to understand what was going on - it was the capacity to communicate exonerating information to others." Rohan, *supra,* 334 F3d 808 (citing the right to be competent in 17th and 18th Century common law). To further quote Judge Kozinski, an incompetent person's counsel cannot be required to identify "precisely what the [person] would tell him were he

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2. In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense.

able, [because that] seems more likely to elicit the response, 'Well, if I knew that, I wouldn't have to ask!'" 334 F3d 818.

**3. Oregon Law.**

Youth acknowledges that the juvenile code contains no statute addressing a youth's ability to aid and assist, nor is there any controlling case law. There is one case from the Court of Appeals that reversed an adjudication because the adjudication was held immediately after the youth's counsel had met the youth. The court reasoned that counsel had not been able to investigate, for example, the youth's mental status or the youth's ability to aid and assist counsel. State ex rel Juvenile Dept. of Malheur County v. Garcia, 180 Or App 279, 287-88, 44 P3d 591, 595-96 (2002).

The Oregon State Bar's handbook, while stating strongly that the right to be competent exists under Due Process, cites no direct Oregon authority. Juvenile Law (Oregon CLE 2007) (Chapter 26, Michael J. Clancy). An author's comment observes:

> The unfortunate reality is that incompetent youths are adjudicated in Oregon courts every day. This practice arises both because of the inadequate level of motion practice in many Oregon delinquency courts and because of the resistance of many in the system who cling to an outdated notion of a paternalistic juvenile court in which the best interests of the youth are of paramount concern and adversarial processes are discouraged.
>
> The increasing stakes in delinquency cases, however, demand that youths must be competent to stand trial before they are subjected to adjudication. Although this is true for all youths, the argument for those 15 and under is even more compelling in light of current understanding of their developmental capacities.

*Id.* at §26.12.

Although the Oregon Constitution contains no Due Process clause, our Constitution guarantees the right to counsel. Article I, section 11.[3] The Oregon right to counsel includes the right to communicate to counsel, just as the Sixth Amendment does. Yet, in our case, the trial court declined to determine whether the youth's counsel's statement, that "youth is not able to communicate with me in any way, shape or form about what happened," was accurate. This determination violated the youth's Oregon right to counsel.

**4. Cases from other states.**

Every out-of-state case that youth found squarely holds that youths have a right to be tried only when competent.

In re Carey, 241 Mich App 222, 228-31, 615 NW2d 742 (2000) involved a state, like Oregon, that had neither a statute nor state case law guidance. The court relied directly on Dusky and the federal Due Process clause, holding: "We conclude, as have many other jurisdictions, that the right not to be tried while incompetent is as fundamental in juvenile proceedings as it is in the criminal context. 241 Mich App 231. The court directed the trial court to apply the existing adult statute to the juvenile, "to the extent possible, recognizing that its provisions may sometimes need to be liberally construed or modified for application in this context." 241 Mich App 233 n3.

The Michigan court cited cases in California (1978), Louisiana (1978), Nevada (1979), Minnesota (1979), Arizona (1980), the District of Columbia (1990), Georgia (1996), Washington (1996), and Ohio (1997) as having come to

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3. In all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel; * * *

the same conclusion. It observed, "It appears that all courts that have spoken on this issue have recognized the right of juveniles to a competency determination." 241 Mich App 229-30. None of the cases the Carey court cited have been overruled, as of September 2012.

Since Carey was decided in 2000, a number of other states have also held that a juvenile is entitled to a competency hearing before being adjudicated delinquent: Arkansas (Golden v. State, 341 Ark 656, 21 SW3d 801, *cert denied,* 531 US 1022 (2000)); Vermont (In re J.M., 172 Vt 61, 769 A2d 656 (2001) (applying a court rule); Indiana (In re R.L.H., 831 NE2d 250 (Ind Ct App 2005) (relying on a statute); Maryland (In re Lakeshia M., 398 Md 551, 921 A2d 258 (2007) (relying on a new statute); Connecticut (State v. Juan L., 291 Conn 556, 969 A2d 698 (2009) (interpreting adult statute to apply to juveniles); New Hampshire (In re Kotey M.,158 NH 358, 965 A2d 1146 (2009) (a child is not entitled to be competent to be adjudged a "child in need of services" -- his mental state may be why the child needs services, but a child is entitled to be competent during a delinquency proceeding); North Dakota (In re T.S., 2011 ND 118, 798 NW2d 649 (2011)).

Of the 17 cases that the youth has found on the subject of a juvenile's right to be adjudicated only when competent, all cases find such a right. The youth found no case to the contrary.

**5. A writ of mandamus is the only remedy that will afford relief.**

A writ of mandamus is the youth's only adequate remedy. ORS 34.110 - .120. There is no remedy on appeal. A appellate court cannot review for harmless error by speculating what the defendant might have said to his lawyer had he been able to communicate. The error contaminates the entire proceeding. *See* Rohan ex rel. Gates v. Woodford, *supra,* 334 F3d 818.

The situation is analogous to the Double Jeopardy/Former Jeopardy right.[4] After an acquittal, those rights protect an accused not just from a conviction, but from having to endure a second trial. An appeal would be too late to vindicate that right. State ex rel Turner v. Frankel, 322 Or 363, 376, 908 P2d 293 (1995). *See also,* State v. Sawatzky, 339 Or 689, 693 n.4, 125 P3d 722 (2005) ("significant former and double jeopardy issue presented," so writ issued).

Here, relator, a youth, has the right not to endure a trial while incompetent. As his trial counsel put it, when she described youth's inability to communicate with her, "it is cruel to put him through a trial under those circumstances."

Further, the consequences of being adjudicated of the alleged sexual offenses are dire. He would be required to register as a sexual offender, for his lifetime. ORS 181.592 - .594. While, in time, he could seek relief from registration, given his deficits, he probably could not qualify. Once he has registered as a sexual offender, his ability to receive treatment will be greatly

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4. The Oregon Constitution provides, "No person shall be put in jeopardy twice for the same offence (sic) * * *." Article I, section 12. The United States Constitution, Amendment V (incorporated by Amendment XIV) provides, "No person * * * shall * * * be subject for the same offence to be twice put in jeopardy of life or limb; * * *.

limited, and if he is not able to receive extensive treatment, no one will be able to say that he "rehabilitated" himself to qualify for relief. ORS 181.823. As a registered sexual offender it will be difficult for him to access services as he gets older.

A writ of mandamus is his only remedy.

**6. The writ requested from this court.**

The youth, relator, asks this court to issue an alternative writ of mandamus, directing the circuit court to hold a hearing to determine the youth's competency to proceed. If the youth is competent, the adjudication can proceed. If he is not, the circuit court should take appropriate action, which may include dismissing the case, and converting the matter to a dependency case. ORS 419C.261. The exact form of the competency hearing is not before this court. The youth is only asking this court to order that there be a competency hearing.

**Conclusion**

This court should direct the Circuit Court of Washington County, through the Honorable Eric E Butterfield, to hold a hearing to determine the youth's ability to aid and assist in the proceeding, or to show cause why it should not do so, making a showing before this court.

Respectfully submitted,

/s/Laura Graser, OSB 792463
Attorney for Relator, M.R., a youth

October 4, 2012

FILED November 1, 2012 10:30 AM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

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|---|---|
| In the Matter of M.R., a Youth,<br>STATE OF OREGON,<br>Adverse Party,<br>v.<br>M.R.,<br>Relator. | Washington County Circuit Court No. J120235<br>Supreme Court No. S060771<br>ADVERSE PARTY'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS<br>**MANDAMUS PROCEEDING** |

This court requested that the state, as adverse party, respond to relator's petition for alternative writ of mandamus. In that petition, relator asks this court to compel the juvenile court to hold a hearing to determine his competency to stand trial, arguing that he is entitled to the hearing as a matter of due process and to effectuate his right to counsel.

The juvenile court failed to consider whether to hold a hearing to determine relator's competence, explaining only that it was "irrelevant." The state acknowledges that competency is relevant in a juvenile delinquency proceeding under Supreme Court case law, which suggests that a trial court must exercise its discretion to determine whether there is cause to doubt a juvenile's competency so as to require a hearing. *See In re Gault*, 387 US 1, 36, 87 S Ct 1428, 18 L Ed 2d 527 (1967) (due process applies in juvenile delinquency proceeding, which is "comparable in seriousness to a felony



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prosecution"); *Pate v. Robinson*, 383 US 375, 385, 86 S Ct 836, 15 L Ed 2d 836 (1966) (in criminal proceeding, trial court's failure to inquire into the defendant's competence "deprived [the defendant] of his constitutional right to a fair trial"). The state does not necessarily concede, however, that the trial court in this case erred in failing to order an examination or conduct a hearing. *Cf.* ORS 161.360 (in adult criminal context, when "the court has reason to doubt" a defendant's fitness to proceed, it "may order an examination"); *State v. Taylor*, 224 Or 106, 335 P2d 603 (1960) (reviewing denial of aid-and-assist hearing in adult criminal context for abuse of discretion).

In any event, this court need not consider any of those issues because mandamus is not the proper vehicle for relator's claims. As explained below, this court should decline to issue a writ because relator has a "plain, speedy and adequate" remedy by way of a direct appeal if he is adjudicated delinquent.

**A. Mandamus is available only when a relator has no "plain, speedy and adequate remedy in the ordinary course of law."**

Mandamus is an extraordinary remedy, available when a relator has no "plain, speedy and adequate remedy in the ordinary course of law." ORS 34.110. To be "adequate," a "law remedy must afford all relief to which the relator is entitled." *State ex rel. Bathke v. Bain*, 193 Or 688, 705, 240 P2d 958).



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Generally, the right of direct appeal in a criminal case is a speedy and adequate remedy, even when a person claims that his constitutional rights have been violated. *State ex rel. LeVasseur v. Merten*, 297 Or 577, 580, 686 P2d 366 (1984); *see also State ex rel. Maizels v. Juba*, 254 Or 323, 332-33, 460 P2d 850 (1969) (direct appeal sufficient remedy to review claimed First Amendment violation). The time required for an appeal "is not a factor" in evaluating "speediness" – instead, the relevant inquiry is whether the ordinary remedy "can be expedited as readily as can the proceeding in mandamus." *State ex rel. Sajo v. Paulus*, 297 Or 246, 649, 688 P2d 367 (1984).

Direct appeal is not an adequate remedy, however, when the standard procedures of trial and appeal would cause "the relator [to] suffer a special loss beyond the burden of litigation." *LeVasseur*, 397 Or at 580 (concluding that no "special loss" would result for relator seeking paternity determination in filiation action).

**B. Relator has a "plain, speedy and adequate" remedy in the form of a direct appeal if he is adjudicated delinquent.**

Applying those principles here, this court should decline to issue a writ because relator has a plain, speedy and adequate remedy in the ordinary course of law in the form of a direct appeal from the juvenile court's order, should the



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juvenile court adjudicate him delinquent. That order is appealable under ORS 419A.200, which provides for appellate review of "any interlocutory order that "necessarily affects the judgment or final order appealed from[.]" ORS 419A.200(8)(a). The juvenile court's refusal to consider relator's competency to stand trial would "necessarily affect" a judgment of jurisdiction.[1]

If relator is found within the court's delinquency jurisdiction, a direct appeal would fully vindicate his right not to be adjudicated while incompetent. He would suffer no irreparable harm to his rights by having to endure the adjudication and appeal process; despite his insistence to the contrary, the Supreme Court has never held that a person's right to due process is violated by causing him to "endure" trial while incompetent. Rather, due process is violated when an incompetent person is *convicted*.[2] *See Pate v. Robinson*, 383

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[1] The Court of Appeals has addressed claims of trial court error in failing to hold competency hearings in the criminal-law context. *See State v. Cunningham*, 164 Or App 680, 682, 995 P2d 561 (2000) (trial court erred by failing to order mental status examination to determine the defendant's fitness to stand trial, but error harmless given defendant's trial testimony); *see also State v. Gilmore*, 102 Or App 102, 792 P2d 1242 (1990) (trial court failed to "discharge its duty to assess defendant's fitness to proceed").

[2] Relator argues that "[t]he Sixth Amendment right to counsel is directly affected when a person facing adjudication does not have the capacity to communicate with his lawyer." (Memo in Support 18). However, the state is aware of no cases addressing whether a person's Sixth Amendment right to counsel is violated when he is tried while incompetent. The case that relator cites, *Rohan ex rel. Gates v. Woodford*, does not address that question. 334 F3d



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US 375, 378, 86 S Ct 836, 15 L Ed 2d 815 (1966) (noting state's concession "that the *conviction* of a person while he is legally incompetent violates due process" (emphasis added)). *See also Riggins v. Nevada*, 504 US 127, 139, 112 S Ct 1810, 118 L Ed 2d 479 (1992) (Kennedy, J., concurring in judgment) (agreeing with majority that "*conviction* of an incompetent defendant violates due process," citing *Pate* (emphasis added)). *But see Drope v. Missouri*, 420 US 162, 171, 95 S Ct 896, 43 L Ed 2d 103 (1975) (incompetent person "may not be subjected to a trial") and *Dusky v. United States*, 362 US 402, 403, 80 S Ct 788, 4 L Ed 2d 824 (1960) (remanded for determination of "present competency to stand trial").

That difference—having to "endure" a trial proceeding, versus being convicted after such a proceeding, with all of the consequences of that conviction—reveals the flaw in relator's attempt to analogize his situation to a double-jeopardy violation. (Memo in Support of Pet 12). Double jeopardy prevents a person being put "*in jeopardy* twice for the same offence." *See* Or Const Art I, § 12 (emphasis added); *see also State ex rel. Turner v. Frankel*, 322

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803 (9th Cir 2003). There, the Ninth Circuit held that a habeas petitioner "has a *statutory* right to competence in his federal habeas proceedings[.]" *Id.* at 817(emphasis added). In reaching that conclusion, the court acknowledged that "the constitutional right to counsel [at trial] * * * do[es] not apply to habeas." *Id.*



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Or 363, 376, 908 P2d 293 (1995). Thus, merely having to endure a second trial violates a person's double-jeopardy right, and an appeal after a second trial is inadequate to vindicate that right. Here, petitioner will suffer no irreparable harm by virtue of having to sit through his adjudication hearing. *See generally State ex rel. OHSU v. Haas*, 325 Or 492, 497, 942 P2d 261 (1997) (appeal not adequate remedy to challenge trial court order to disclose privileged communication because "[o]nce a privileged communication has been disclosed, the harm cannot be undone").

Nor will relator suffer a "special loss" by having to endure the adjudication process. A "special loss" is a loss suffered "*beyond* the burden of litigation." *LeVasseur*, 397 Or at 580 (emphasis added). Relator's sole claim of harm is having to endure the litigation process itself – a type of harm that does not render a direct-appeal remedy "inadequate."

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To summarize, relator has a plain, speedy, and adequate remedy in the form of a direct appeal in the event that the juvenile court finds him within its delinquency jurisdiction. Mandamus is therefore not an available remedy, and this court should decline to issue a writ.

Respectfully submitted,

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**Mental Health of Youth– needs to be truly addressed**

It is necessary to adopt a procedure for juveniles to raise the issue of competency to stand trial in order to evaluate juveniles and provide appropriate and timely mental health treatment. Juveniles can be found incompetent to assist in their defense for a variety of reasons – they may not understand the court system, they may be under the influence of a drug, or more commonly – they have a mental disease or defect that requires treatment. Treating and restoring juveniles with mental health issues benefits both the juvenile and society as a whole. Timely treatment is a much better solution than doing nothing and letting a problem become worse. It is also necessary to prevent juveniles from cycling in and out of the juvenile justice system and reoffending.

The first of the attached articles tells the story of Jordan and other youth who "cycle in and out" of detention for several years to the point where detention centers become a place a "dumping ground" for juveniles with mental health issues to "catch up on lost sleep." Improving mental health treatment has also been in the news lately with the recent mass shootings; the need for improvement has been recognized both in Oregon and nationally. Many commentators emphasize the need to provide treatment to young people as early as possible. Senate President Peter Courtney has also called for a "game-changing investment" in mental health care. In addition, Oregon's own case involving Kip Kinkel continues to highlight the mental health gap in Oregon law. Kip Kinkel's lawyers are still arguing that Kinkel should have been given a mental health evaluation before he was sentenced. In short, codifying juvenile competency standards and procedures will help ensure timely evaluations, improve mental health care, and provide earlier treatment.

# Northwest Mentally Ill Juveniles Cycle In And Out Of Detention

Northwest News Network | Nov. 20, 2011 11:44 p.m. | Updated: July 17, 2012 1:03 a.m.

SEATTLE – Every year in the Northwest, thousands of mentally ill teenagers get caught up in the juvenile justice system. In fact, some counties estimate more than half of the kids they place behind bars have a diagnosable mental health condition like schizophrenia, bi-polar or personality disorder. Yet many of these teens do not get the treatment they need. Instead, they cycle in and out of detention.

This week we're reporting on failures in how the Northwest treats youth with serious mental health issues.

The first thing you notice about 16-year-old Jordan — we're just using his first name — are his ears. Actually his earlobes. They've got big holes in them — tribal style. He's stretching them to fit large decorative rings.

"I'm going to an inch," Jordan says.

It looks painful. And I ask him why he's doing this.

"It's the thing about being different," he responds. "I like being different."

When he was younger, Jordan says being different meant he got picked on and bullied at school. One day he'd had enough.

"So I brought a knife to school and I pulled a knife on two different kids."

He was charged with assault and put on probation. But the trouble didn't stop there. Jordan says back then he was full of rage.

"You know I grew up and I got bigger, so I became the bully," he says.

He committed another assault and another. He also drank and took drugs. Jordan cycled in and out of juvenile detention. A place called Martin Hall near Spokane.

He says it was a "cake walk."

"Martin Hall is nothing to me. It's just somewhere to catch up on some lost sleep," Jordan says. "And they just kept sending me there. It was like they didn't even care."

Now there's something you need to know about Jordan. At an early age, he was diagnosed with clinical depression. Later, he experienced drug induced psychosis. This doesn't excuse his criminal behavior. But here's the thing, at Martin Hall he says he didn't get any treatment for his mental health issues.

"Not really. You know they gave you your meds in the morning that you were taking on the outside," he explains.

I ask, "Did you have mental health counseling sessions, did you have group therapy? Anything like that?"

"Not that I can remember."

Officials at Martin Hall confirm they do not have a mental health professional on staff. Most county juvenile lock ups don't.

"This is not a place for kids who have serious mental illnesses," says Mark Tips who runs the juvenile detention center in Thurston County — in the shadow of Washington's state capitol. As he gives me a tour, he's blunt.

"There are not treatment options here. It's a jail, it was built as a jail and not as a treatment facility," he says.

And yet, says Tips, county lock ups like his have become "dumping grounds" for mentally ill youth. Sometimes, he says, juveniles show up here who just the week before were declared not competent to stand trial.

"Kids with substantial problems who we can maintain here safely, maintain securely, but who cannot and will not get better from anything that will happen here."

Tips says the problem is simple: mental health services in the community are inadequate.

Mark Freedman wouldn't disagree. He runs Thurston County's mental health program for the poor.

"Without a doubt if we had more funding and more clinicians and lower caseloads we could improve on the system," he says.

But Freedman says there are other barriers to getting a kid help before he ends up cycling through juvenile detention. For one, usually only Medicaid eligible youth qualify for services. And then it's purely voluntary.

"Even if they are referred, if the child and the family does not want to participate in treatment, we can't make them," Freedman explains.

Freedman says ideally you start treatment when the kid is in jail because you're more likely to get buy in.

But there's a problem. Medicaid doesn't cover kids who are locked-up. That means sometimes these youth don't get the help they need until after they're convicted of a crime and either sent up to a state juvenile facility or put on probation.

Probation officer Jen Herbert supervises about 40 youth offenders in Thurston County. Some, she says, are clear examples of the mental health system failing.

"I think that we all have cases on our caseload where clearly if the right services were made available to that youth before they started acting out that they would not be involved in the criminal justice system," Herbert says.

Herbert tells me about a teenager girl who was sent to live in a group home. There she repeatedly assaulted staff or damaged property. Each time the cops were called and the girl cycled in and out of juvenile hall.

Herbert says, "It was at least eight times."

But it wasn't until she tried to commit suicide that she finally got help.

"Unfortunately it was after many, many months of accumulating criminal history, of frustration I'm sure on her part as well as the community's part in trying to protect her, in trying to protect others," she says.

That teenager is currently getting in-patient psychiatric care. But that's a last resort and those beds are few and far between.

Eric Trupin is a child psychologist at the University of Washington. He says the system should be catching these kids before there's a crisis. He's an evangelist for evidence-based intervention programs that involve all the adults in a kid's life who then come up with an individualized care plan for the youth.

The term is wrap-around services.

"Sort of thinking about what's going on in that youth's environment that could be modified or changed to really improve the outcome," Trupin says.

Trupin runs something called Family Integrated Transitions or FIT. It's a combination of several evidence-based programs for kids like Jordan with both mental health and drug or alcohol problems. Studies show FIT and other intensive wrap-around programs for juveniles could actually save Washington from having to build a prison in the future.

But these services are not widely available. In fact, state figures show last year evidence-based programs served just one-quarter of the Washington youth who were eligible. Trupin calls it "outrageous."

He says he's watched kids who cycle in and out of detention become "hardened individuals with despair and misery and little hope that they're going to have effective lives."

The issue, of course, is funding. Traditional one-on-one counseling is cheaper than evidence-based wrap-around programs. As for Jordan, he's been in both.

Now he's in Trupin's FIT program. There are no guarantees. But for the first time since he was 11, he's stayed out of trouble long enough to get off juvenile probation.

"It's my mindset," he says. "I've changed my way of thinking. I don't have to be that, pardon my language, 'Billy Bad Ass' any more, I don't have to be that guy."

This January, Washington State Representative Marylou Dickerson, a Seattle Democrat, will introduce legislation to expand the availability of evidence-based programs in Washington. She'll make the case that it makes sense in a tight budget to invest in what's been proven to work.

THE REGISTER-GUARD

# A mental health challenge

## Courtney proposes a "game-changing" investment

**Published:** *Midnight,* Feb. 10, 2013

The national push for expanded mental health services after the massacre of schoolchildren in Newtown, Conn., has surfaced in Oregon, where Senate President Peter Courtney has called on state lawmakers to make a "game-changing" investment in mental health care.

Until now, the debate over the shooting at Sandy Hook Elementary has focused largely on gun control, with legislative proposals introduced in Congress and state legislatures across the nation. Less attention has been paid to mental health care, despite agreement by Democrats and Republicans alike about the need to address gaping holes in the nation's mental health system.

Courtney proposes raising an additional $330 million per biennium through new taxes and fees. That money would pay for an broad range of programs aimed at improving mental health care for both adults and juveniles.

For adults, the services would include crisis hot lines, assistance with rental housing and supported employment programs and jail diversion programs, along with increases in both outpatient care and acute, facility-based mental health care.

For young people, they would include early intervention: more mental health care professionals in schools; training for teachers and pediatricians to identify early signs of illness; treatment for children with psychotic disorders and less severe illnesses; and community-based facilities for mentally ill youth, including those who have committed crimes.

It's an impressively long list of services that was best summarized by Linda Hammond, interim director of the Oregon Health Authority's Addictions and Mental Health Division. She said it "would help people cope with daily life and maximize their ability" in terms of pursuing "jobs and education they couldn't otherwise achieve."

It's hard to think of a better use for state budget dollars, but those dollars don't exist yet. Raising new revenue will be a daunting challenge at a time when every aspect of state government — from schools to public safety — is squeezed for funding.

But it can be done. Courtney has produced a plan that, while substantial in size, can be accomplished with relatively small increases in taxes or fees.

While Courtney proposed no specific revenue sources, he cited a new tax on beer and wine as one possibility. That won't be an easy fight. Few industries are more politically influential in

Oregon, and beverage lobbyists probably were deploying in Salem within minutes after Courtney's announcement.

But the need for Courtney's proposal is beyond debate. As he reminded lawmakers last week, only 35 percent of youth and 45 percent of adults with mental illness are getting the treatment they need.

At a time when other states have been slashing spending for mental health care, Oregon has taken important steps in recent years to bolster its system. The state replaced the Oregon State Hospital, built in 1883 and the site for the filming of "One Flew Over the Cuckoo's Nest." In its place, legislators approved funding for a new 620-bed hospital in Salem, and plans remain in place, despite funding uncertainties, for a proposed 174-bed psychiatric hospital in Junction City. Meanwhile, Gov. John Kitzhaber's proposed budget includes $28 million for new community-based mental health and addiction services.

But the need remains great, and Courtney's proposal for a significant new investment in mental health care could truly be, as the Senate president says, a "game changer."

# Kinkel's Lawyer Says He Belongs In Mental Health Hospital

AP | Aug. 12, 2011 2:54 a.m. | Updated: July 17, 2012 1:04 a.m. | Portland, OR

AP

A lawyer for Springfield school shooter Kip Kinkel has filed a federal court challenge to Kinkel's prison sentence of more than 111 years for the 1998 shooting spree that killed his parents and two fellow Thurston High School students and wounded 25 others.

Kinkel's state court appeals are exhausted but his arguments remain much the same. His lawyer says Kinkel was mentally ill and the trial court should not have accepted his guilty plea without ordering a mental health exam. The petition also says he had inadequate legal representation.

Kinkel's lawyer Dennis Balske says his client should be in the state mental hospital rather than state prison.

Kinkel turns 29 this month. He was 15 when he killed his parents in their rural home, then opened fire in Thurston's cafeteria the next morning.

Oregon attorney general's spokesman Tony Green says his office has argued successfully so far that Kinkel is not entitled to a new trial.

**Public Safety—will be improved with this bill**

Enacting a juvenile aid and assist procedure is in the interest of public safety because it will allow youth to be adjudicated and held responsible when constitutionally possible. Sometimes this means simply delaying a trial or plea until restorative services are provided, but a procedure is necessary to make this happen. While a juvenile may be able to raise the issue of fitness to proceed in some counties, the state is still unable to provide restorative services as such services are not authorized in statutes or state budgets. A juvenile who is taken into custody for committing a crime, who is also unable to aid and assist, thus is often released back into his or her community without any treatment or supervision. Without proper accountability, the youth may engage in a pattern of reoffending – creating a drain on police resources and creating more victims. Markus Fant, a Juvenile Counselor for the Clackamas County Juvenile Department, gave an example of a juvenile who was brought into the Juvenile Department Intake and Assessment Center three times in a single day. This juvenile has been referred to the juvenile Department over two dozen times, 13 of which were for criminal allegations. Each time the juvenile was released because he could not aid and assist and thus could not be adjudiciated. The Juvenile Department's hands are tied as they can provide no restorative services under the present law; a revolving door problem exists. Instead, is it essentially left to the juvenile to voluntarily seek mental health treatment in these delinquency cases. If the state were able to provide restorative services, a juvenile would often be able to stand trial later and receive the appropriate consequences if found guilty. In addition, the youth would be supervised while restorative services are completed. In short, providing a procedure to allow a juvenile to become competent to stand trial will provide appropriate treatment and supervision, and curb revolving door occurrences in the public safety system.

CLACKAMAS COUNTY

Note: This letter was submitted as written testimony in support of SB 411 during the 2011 legislative session. HB 2836 is identical to SB 411.

**Ellen Crawford**
Director

**JUVENILE DEPARTMENT**

**Juvenile Intake and Assessment Center**
2121 Kaen Road | Oregon City, OR 97045

February 17, 2011

The Honorable Chair Floyd Prozanski and Vice-Chair Jeff Kruse
Senate Judiciary Committee
900 Court St. NE, Room 343
Salem, OR 97301

RE: SB 411

Dear Chair Prozanski, Vice-Chair Kruse, and members of the Senate Judiciary Committee:

Please consider this letter as my official testimony regarding SB 411. As Director of Clackamas County's Juvenile Department, I would like to express my support of SB 411.

"Aid and assist" language does not exist in the juvenile code of the Oregon Revised Statutes. This right is important for both youth and community protections. Without aid and assist statutes, and the complementary restorative services provisions, youth offenders are not supervised, provided treatment services, or held accountable by county juvenile departments. The juvenile justice system becomes a "revolving door," and youth are in and out of police and juvenile department attention with no ability to intervene. This creates new victims and new costs to our communities. Some of these youth receive services from Developmental Disabilities, mental health, and special education services, but all of these services are voluntary, and neither the youth nor parents have to comply. These agencies are eager to work with the juvenile department to ensure treatment compliance and provide youth services.

With an aid and assist statute in the juvenile code, these youth may receive juvenile justice intervention, the safety of the public is addressed, and other treatment services will be more effective. Thank you for the opportunity to share our support of SB 411. Please do not hesitate to contact me if you have any questions.

Sincerely,

Ellen Crawford

Ellen Crawford
Director, Clackamas County Juvenile Department

## Legal Ethical Standards—require an aid and assist procedure for juveniles

The ethical standards for lawyers representing juveniles in delinquency cases support the creation of procedures and standards expressly allowing a juvenile to raise the issue of competency. Indeed, a lawyer has an ethical duty to determine whether a client is able to aid and assist in the client's defense before proceeding, and to try to maintain a normal client-lawyer relationship.[3] A juvenile client's inability to aid and assist can be due to immaturity, mental incompetence, mental disability, etc. If a lawyer has a doubt as to the ability of the client to aid and assist, the lawyer should consult with the client and make a motion to the court for an evaluation of the client subject to the client's agreement.[4] The lawyer for the youth and the prosecutor can also stipulate that the youth is unable to aid and assist when they agree.[5] The lawyer should advocate for the youth's rights during the hearing to determine ability to aid and assist.[6] If the youth is found to be unable to aid and assist, the lawyer should make a motion to dismiss the case or to have the case converted to a dependency petition.[7] If the youth is found able to aid and assist, the lawyer should continue to raise concerns about the youth's inability to aid and assist.[8] However, it is the client who must make the ultimate decision about obtaining a mental health evaluation as it is the client who bears the consequences of the consequences of the outcome.[9] Lawyer ethics rules and guidelines have long recognized this aid and assist issue but Oregon's juvenile law is out of sync because it still does not provide lawyers with appropriate statutory tools to do their job in representing juveniles.

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[3] Or. R. Prof. Conduct 1.14.
[4] *See* Bar Guidelines 2.8(2)(a).
[5] *See* Bar Guidelines 2.8(2)(b).
[6] *See* Bar Guidelines 2.8(2)(c).
[7] *See* Bar Guidelines 2.8(2)(d), (f).
[8] *See* Bar Guidelines 2.8(2)(e).
[9] Or. R. Prof. Conduct 1.2.

**OREGON RULES OF PROFESSIONAL CONDUCT (LEGAL ETHICS RULE)**

**RULE 1.14 CLIENT WITH DIMINISHED CAPACITY**

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

*Adopted 01/01/05*

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OREGON STATE BAR

# Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

In September 1996, the Oregon State Bar Board of Governors approved Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Commitment Cases. In May 2006, the Oregon State Bar Board of Governors accepted revisions to the 1996 standards, including the following excerpts:

**STANDARD 2.3**
**Role of Counsel**

A lawyer should follow Oregon Rule of Professional Conduct 1.2 in determining the scope of the lawyer's representation and the allocation of authority between a client and a lawyer. A lawyer should not substitute the lawyer's judgment for that of the client in decisions that are the responsibility of the client. A lawyer should follow ORPC 1.14 in representing clients with diminished capacity, whether because of minority or mental impairment, or for some other reason. It is the lawyer's duty to determine whether a client is unable to aid and assist in the

client's defense because of immaturity or mental incompetence. *See* Standard 2.8. If the client is immature or mentally disabled the lawyer should, as far as reasonably possible, maintain a normal attorney-client relationship.

**Implementation**

1. A lawyer should follow Standard 1.3, Implementations 1 and 2.
2. Decisions whether to enter an admission, accept diversion or other pretrial early disposition, testify, or waive any right with respect to jurisdiction, trial, waiver, rehearing, or appeal are ultimately for the client to determine.
3. In juvenile delinquency proceedings as in adult criminal matters, a lawyer is ordinarily bound by the client's definition of his or her interests and should not substitute the lawyer's judgment for that of the client regarding the objectives of the representation. If the client is unable to aid and assist in the client's own defense, see Standard 2.8.

* * *

**STANDARD 2.8**
**Pretrial Motions and Notices; Hearings Regarding Ability to Aid and Assist and Waiver of Juvenile Court Jurisdiction**

A lawyer should research, prepare, file, and argue appropriate pretrial motions and notices whenever there is reason to believe the client is entitled to relief. A lawyer should be prepared to provide quality representation and advocacy for the client at any hearings regarding the client's ability to aid and assist and waiver of juvenile court jurisdiction.

**Implementation**

1. A lawyer should research, prepare, file, and argue pretrial motions and notices, if appropriate, to address issues such as:
    a. constitutionality of relevant statutes;
    b. defects in the charging process or instrument;
    c. severance of charges and/or co-defendants for trial;
    d. change of venue;
    e. request to recuse or affidavit of prejudice;
    f. *Brady v. Maryland* motions;
    g. motions to compel discovery;
    h. motions for sanctions because of discovery violations;

i. violations of federal and state constitutional and statutory provisions, including but not limited to:

(1) illegal searches and/or seizures;

(2) statements obtained in violation of the client's right to counsel or privilege against self-incrimination;

(3) unreliable identification evidence;

(4) speedy trial; and

(5) double jeopardy.

j. motions or requests for nonroutine expenses, such as:

(1) interpreters;

(2) mental health experts to assess the client's mental capacity and ability to form the requisite mental states, to make recommendations regarding waiver and disposition, and a plea of guilty but insane;

(3) forensic services; and

(4) investigative services.

k. matters of trial evidence that may be appropriately litigated by means of a motion in limine.

l. notices of affirmative defenses and notice of intent to present particular evidence if required;

m. motions to dismiss based on civil compromise, "best interests of the youth," "in the furtherance of justice," and "general equitable powers of the court."

2. A lawyer should take the following steps with regard to seeking a determination of the client's ability to aid and assist:

a. Whenever a lawyer has a good-faith doubt about the client's ability to aid and assist in the proceedings, the lawyer should fully advise the client concerning the consequences of a determination that the client unable to aid and assist and should move for an evaluation of the client, if the client so agrees. If the client opposes such an evaluation, the lawyer should inform the court that the lawyer has a good-faith doubt about the client's ability to aid and assist in the matter, but should not divulge the client's confidences and secrets.

b. If the client agrees, the lawyer should obtain an independent evaluation of the client or should advocate that evaluators appointed by the court are qualified by training and experience to testify concerning the client's ability to aid and assist. If the client and prosecutor concur, the lawyer may stipulate that the client is unable to aid and assist the lawyer in the proceedings.

c. At the hearing to determine whether the client is able to aid and assist, a lawyer should protect and exercise the client's constitutional and statutory rights, including cross-examining the state's witnesses, calling witnesses on behalf of the client such as independent experts, and making appropriate evidentiary objections.

d. If an adult client is found to be unable to aid and assist, a lawyer should advocate for the least restrictive level of supervision and the least intrusive treatment. If a child, adolescent, or young adult client is found to be unable to aid and assist in a juvenile court proceeding, a lawyer should seek to resolve the delinquency matter by having the petition converted to a dependency petition. An appropriate disposition should be sought as in a dependency case.

e. If the client is found able to aid and assist, a lawyer should recognize a continuing obligation during the course of the proceedings to raise good-faith concerns about the client's ability to aid and assist.

f. A lawyer for children, adolescents, and young adults should also consider a motion to dismiss or amend to a dependency petition based on the youth's lack of considered judgment that does not rise to the level of inability to aid and assist.

3. A lawyer should do the following with regard to opposing waiver of juvenile court jurisdiction in juvenile proceedings:

   a. A lawyer should investigate and become knowledgeable about the consequences of waiver of juvenile court jurisdiction in the particular client's case and should thoroughly explain the consequences to the client.

   b. If the client decides to oppose waiver of the juvenile court's jurisdiction, a lawyer should be fully prepared to present evidence and argument against the waiver

   c. At the waiver hearing, a lawyer should address all the requirements of ORS 419C.349. To make an "amenability" argument, a lawyer should:

      (1) describe the youth's background, including attachment to family and positive statements from persons who believe the youth has potential;

      (2) show that the youth was not thinking as an adult at the time of the offense;

      (3) describe the youth's moral development and remorse if possible to do so without jeopardizing the youth's right to remain silent at a trial;

      (4) document successful juvenile interventions that have been used for similar youth; and

      (5) describe how the youth's delinquent behavior could change if services met his or her needs.

   d. If juvenile court jurisdiction is waived, a lawyer should make every effort to have the client released pending trial or held in a juvenile facility. If the client is transferred to an adult facility, a lawyer should advocate for measures that will protect the client and provide age-appropriate services, including mental health and educational or special education services if the client so desires.

**Cost – a codified procedure will be cost-effective in the long term**

In 2011, the estimated financial impact of this bill was $787,582 for 2013-2015. This includes what it would cost the Oregon Health Authority to hire a policy analyst and provide restorative services for 40-45 youth. The bill would have an indeterminate or minimal financial impact on other agencies involved. Despite this cost, it is believed that adopting standards and procedures for fitness to proceed will result in unquantifiable savings now and in the future. Providing proper evaluation and treatment for youth who are unable to aid and assist will save money for the state in a reduction of youth who reoffend and it will also likely lessen future mental health costs. It also allows the possibility of enabling the youth to become a productive citizen, which provides enormous benefits for the youth and society generally. More obviously, in many counties these cases are now often changed from delinquency cases to dependency cases. In such circumstances, juveniles often are placed in more expensive facilities for longer periods of times when they are transferred to dependency jurisdiction. Placement at the children's farm home is very common. When counties must make up a solution in each case, it also takes more staffing time – with courts, defense attorneys, juvenile departments, DHS caseworkers and district attorneys – not to mention increased litigation costs. Having to retry a couple of cases due to the gap in the law or having to litigate an appeal, can quickly equate to large legal bills, not to mention the toll on families and victims. In counties that recognize aid and assist issues, the cost can be more expensive than necessary because there are not accepted time lines in place like the bill would require. In short, this new proposed law has a fiscal impact but it is shortsighted to not fund it due to the savings embedded within it for the long term.

**FISCAL IMPACT OF PROPOSED LEGISLATION** **Measure: HB 2836**

Seventy-Seventh Oregon Legislative Assembly – 2013 Regular Session
Legislative Fiscal Office

***Only Impacts on Original or Engrossed Versions are Considered Official***

Prepared by: Kim To
Reviewed by: Linda Ames, Steve Bender, Monica Brown, Linda Gilbert
Date: 4/2/2013

**Measure Description:**
Establishes standards and procedures for determining fitness of youth to proceed on delinquency petition.

**Government Unit(s) Affected:**
Oregon Health Authority (OHA), Oregon Judicial Department (OJD), Department of Justice (DOJ), Oregon Youth Authority (OYA), Public Defense Services Commission

**Local Government Mandate:**
This bill does not affect local governments' service levels or shared revenues sufficient to trigger Section 15, Article XI of the Oregon Constitution.

**Analysis:**
House Bill 2836 codifies the conditions, standards and procedures for determining if individuals under 18 years of age in a delinquency petition are fit to proceed (able to aid and assist in their defense). The bill [1] outlines procedures for filing in raising the issue of fitness and fitness evaluations; [2] modifies procedures for written objections; [3] specifies that the Oregon Health Authority will consult with the Department of Human Services in the placement of youths undergoing court-ordered placement for restorative services; [4] defines the conditions and procedures for removing a youth from current placement for the purposes of a fitness to proceed evaluation and restorative services; and [4] clarifies conditions for extending the detention of youths undergoing fitness to proceed evaluations and restorative services. Certain sections of the bill become operative on January 1, 2014. The bill declares an emergency and is effective on passage.

Currently, Oregon law has no uniform procedure for determining fitness in juvenile proceedings and does not specify options for the court when a youth is found unfit to proceed. This bill outlines a definition of unfit, and provides the statutory structure and timelines for raising the issue of fitness, obtaining fitness evaluations, challenging evaluations and administrating restorative services in cases involving a person who is under 18 years in a delinquency petition. The bill also specifies qualifications for evaluators and reporting requirements for evaluations.

This bill has an expenditure impact on the Oregon Health Authority. The fiscal impact of this bill on the Public Defense Services Commission, Department of Justice, District Attorneys and counties is indeterminate dependent on whether or not this bill would result in an increase in requests for fitness evaluations and/or challenges to fitness evaluations including appeals.

Oregon Health Authority (OHA)
OHA estimates the total expenditure impact of this bill to be approximately $869,386 General Fund and 0.75 FTE for the 2013-15 biennium and $913,139 General Fund and 1.00 FTE for the 2015-17 biennium. This amount includes personal services and contract costs to provide restorative services as detailed below:

The bill requires OHA to:

1. Formalize and administer the fitness to proceed evaluation process including (a) developing training standards for psychiatrists, licensed psychologists and licensed clinical social workers conducting fitness evaluations; (b) developing guidelines for conducting evaluations; and (c) providing courts with a list of qualified evaluators.
2. Oversee a program to provide restorative services to youths who have been determined unfit to proceed and have been determined by the courts to have the potential to gain or regain fitness to proceed in the foreseeable future. OHA is directed to provide or arrange for the provision of restorative services within 30 days after receiving a court order. OHA is required to develop qualifications and standards for persons providing restorative services.

To carry out these provisions, OHA anticipates establishing one Operations Policy Analyst 2 position [0.75 FTE and $143,352 General Fund for the 18 months of the 2013-15 biennium, and 1.00 FTE and $178,160 General Fund for the 2015-17 biennium] to coordinate both the evaluation and the restorative services components of this bill.

Restorative services typically consist of educational type services to teach youths about the nature of the alleged offense and the juvenile process. In some instances, restorative services could include medication or other treatment to address a mental health issues. OHA estimates contract cost of the restorative services program to be approximately $706,250 General Fund for the 2013-15 biennium and $720,875 for the 2015-17 biennium. This amount is based on the following assumptions: Using the Juvenile Code Revision Work Group review of profiles of youth who passed through the Oregon system in the last two years and statistics from comparable states including Michigan, Connecticut and Virginia, OHA speculates that approximately 40 to 45 youths would require restorative services each year. Again, based on expenditures from comparable states, OHA infers the cost of restorative services to be $7,500 per year per youth served for contracted time and materials. OHA reports that restorative services are not eligible for federal matching funds because they are not considered treatment services but psycho-educational services for the court process. In current practice, restorative services are not available to youths. Because restorative services are limited to helping a youth regain fitness to proceed in court proceedings, they are not considered mental health treatment medically driven by a diagnosis. Therefore they are not covered under the Oregon Health Plan or Healthy Kids.

Section 10 (8) of the bill states that if the court orders placement for restorative services, the court may specify the type of care, supervision, security or services to be provided by the authority to any youth placed in the custody of the Department of Human Services or to the parents/guardians of the youth. The authority, in consultation with DHS, may place the youth in any facility authorized to accept the youth and provide the necessary services and care. Passage of this bill could result in either a decrease or increase in placement of youths in the secure children/adolescent residential program as mandatory clients. According to OHA, this is the most restrictive and costly level of care with an average monthly rate of $15,318 per client. Although at this time, the number of youths diverted from this program, or entering this program as a mandatory client, as a result of this bill is indeterminate, note that one additional youth would have a fiscal impact of about $367,632 (37% General Fund / 63% Federal Funds) per biennium on the OHA budget.

In addition, costs for the actual fitness to proceed evaluations are not included in the OHA portion of the fiscal because in current practice these costs are typically incurred by the Public Defense Services Commission or counties, and the bill specifies that these costs continue to be the responsibility of the Public Defense Services Commission or counties. See analysis below.

District Attorneys and Counties

House Bill 2836 has an indeterminate impact on District Attorneys and counties. The bill specifies that if a county court determines that a youth is financially eligible, the county is required to pay all fees and costs associated with the court ordered fitness evaluation. Counties anticipate minimal fiscal impact based on the assumption that county involvement in delinquency petitions as outlined in the bill would be rare. However, the bill also states the county is required to pay all fees and costs associated with the court ordered fitness evaluation if an evaluation is ordered at the request of a district attorney or juvenile

department. In addition, the bill stipulates that after an evaluation is conducted at the request of the youth, the state shall have the right to seek an independent evaluation at its own expense. It is not known whether this bill would result in an increase in requests for fitness evaluations and/or challenges to fitness evaluations.

The bill clarifies conditions for extending the detention of youths undergoing fitness to proceed evaluations and restorative services. If the length of stay in a juvenile detention facility is extended under the amendments to ORS 419C.150 made by section 12 of this bill, the costs of the extended stay will be the responsibility of the county. At this time, the fiscal impact of this provision is indeterminate depending on the number of cases and the amount of time the length of stay is extended in each case, if any. Note that juvenile detention is a very expensive resource, and most counties must contract with another county to obtain them. In rare instances, a bed may not be available at all or only in a distant location, adding transportation and other related costs.

Oregon Judicial Department (OJD)

House Bill 2836 has an indeterminate, but anticipated to be absorbable, fiscal impact on the Oregon Judicial Department. This bill requires the circuit court to determine financial eligibility to pay the fees and costs of fitness to proceed evaluations, enter orders for payment if a youth is found financially eligible, and carry out the appeals process. The bill also requires the court to make written findings if a youth must be removed from the youth's current placement for the purpose of an evaluation. These requirements will require modifications of forms and processes, as well as additional training, and may increase workload for staff and judges.

Public Defense Services Commission (PDSC)

House Bill 2836 has an indeterminate fiscal impact on PDSC. The bill stipulates that if a circuit court determines that a youth is financially eligible, the public defense services executive director is required to pay all fees and costs associated with the court ordered fitness evaluation. Under current practice, attorneys may request that PDSC approve the expenditure of funds for a fitness to proceed examination (also known as Aid and Assist hearings) as being reasonable and necessary for adequate representation of a youth in a delinquency proceeding. PDSC reports that the Commission is currently expending funds for fitness to proceed examinations in delinquency matters. PDSC estimates the cost for a fitness to proceed evaluation at about $1,500 per examination. PDSC cannot estimate the number of additional fitness to proceed evaluations, if any, that might result from the enactment of this bill, but the agency anticipates the fiscal impact to be minimal.

Department of Justice (DOJ)

House Bill 2836 has a minimal impact on the Department of Justice. DOJ does not expect passage of this bill to result in additional workload. The department anticipates that with passage of this bill, DOJ would provide routine legal advice for OHA in development of rules and contracts necessary to carry out the authority's obligations.

Oregon Youth Authority (OYA)

House Bill 2836 has no fiscal impact on the Oregon Youth Authority. The bill specifies that OHA, PDSC and counties have the financial responsibility for fitness to proceed evaluations and restorative services.

**Other States—Oregon is behind and out of step with practice in other states**

Oregon is the only western state without a procedure allowing juveniles to raise the issue of fitness to proceed. Within the last three years California, Idaho, and Utah have enacted a statute providing a procedure for juveniles. Arizona has been following a statutory procedure since 1996. Washington, Montana, and Nevada have relied on both the US Constitution and state law to find a due process right requiring juveniles to be competent before facing a trial. The attached chart explains in more detail what these other states have done. Oregon needs an aid and assist procedure specifically designed for juveniles in order to catch up with its neighboring states and meet the requirements of the US Constitution.

**Western States Chart –Juvenile Aid and Assist (Competency)**

| | Statutory procedure or judicial direction | |
|---|---|---|
| **Oregon** | **No** | **No juvenile competency statute or directive case law guiding juvenile court determinations.** |
| **Washington** | **Yes** | **The Washington Court of Appeals held that adult competency determinations apply to juveniles. *State v. E.C.*, 83 Wash. App. 523, 528, 922 P.2d 152, 155 (1996).** |
| **California** | **Yes** | **The juvenile's counsel or the court can challenge a juvenile's competency. Proceedings are suspended if the juvenile's competency is in doubt. California Welfare and Institutions Code §709 (enacted 2010).** |
| **Idaho** | **Yes** | **A party can request in writing that a juvenile be evaluated to determine competency to proceed, or the court can order an evaluation on its own. The proceedings are stayed if there is good cause to believe the juvenile is incompetent to proceed. Idaho Code Ann. § 20-519A (enacted 2011).** |
| **Nevada** | **Yes** | **In relying on the U.S. Constitution, the Nevada Supreme Court found that juveniles have a due process right to be competent to aid and assist as part of the right to counsel. *Matter of Two Minor Children*, 95 Nev. 225, 231, 592 P.2d 166, 169 (Nev. 1979).** |
| **Montana** | **Yes** | **The Montana Supreme Court relied on the U.S. and Montana Constitutions in finding that a juvenile has a due process right to be competent to stand trial. Incompetence can be based on a mental disease or defect, but not on immaturity. *In re G.T.M.*, 354 Mont. 197, 203, 222 P.3d 626, 630 (Mt. 2009).** |
| **Utah** | **Yes** | **Counsel can make a motion to inquire into a juvenile's competency or the court can do so on its own. The proceedings are stayed upon the filing of the motion. Utah Code § 78A-6-1301 (enacted 2012).** |
| **Arizona** | **Yes** | **A party or the court can make a motion to require an evaluation to determine competency. If the juvenile is incompetent to proceed, the juvenile shall not participate in the proceeding. Ariz. Rev. Stat. § 8-291.01 (enacted 1996).** |