



ASSOCIATION OF OREGON
COMMUNITY MENTAL
HEALTH PROGRAMS



August 10, 2022

Annaliese Dolph, Policy Advisor
Office of the House Speaker Dan Rayfield

Anna Braun, Senior Advisor to the Senate President
Office of the Senate President Peter Courtney

Dear Ms. Dolph and Ms. Braun:

The signers to this letter continue to find consensus and value in a proposed statutory framework that would establish an indemnification framework such that the State of Oregon retains the risk exposure created when courts find a defendant unable to aid and assist in their own defense. Specifically, we want to ensure that the local service providers for tasks outlined in ORS 161.365 and ORS 161.370 would receive a state-provided defense in the event they are named in a lawsuit.

We initially came together as a stakeholder group in the early part of the 2021 Oregon Legislature and were able to gain the introduction of SB 198, which ultimately advanced out of the Senate Judiciary Committee to the Joint Ways and Means Committee. That measure would have mimicked the existing indemnification framework that is established for Deputy District Attorney's when and if they are named in civil litigation. We find the analogy to the Deputy District Attorney framework appropriate, as statewide policy formerly ensured that criminal defendants deemed lacking fitness to proceed were ordered into the confines of the State Hospital for treatment to restore their competency to stand trial.

We find that a significant risk shift has occurred, from the state to local governments and community mental health programs. The origins of this risk shift ultimately can be traced to the US Supreme Court decision *Olmstead v L.C.* (1999), which then led to the United States Department of Justice and Oregon Health Authority's agreement known as the Oregon Performance Plan. That 2016 agreement required

Oregon to take actions to lessen the reliance on institutionalization, and it was at that point that the Oregon Health Authority began to take steps within the Legislature to evolve community-based treatments. The aid and assist framework saw significant reform in 2019 with the passage of SB 24, and more recently the 2021 Legislature passed SB 295 which is actually a mandate that defendants charged with a misdemeanor who are found unable to aid and assist in their own defense must be treated in the community.

We find that these measures were passed without adequately addressing the aforementioned risk shift. While SB 295 made several positive changes with respect to risk mitigation, it places community mental health programs and program partners in a very precarious position should litigation arise from the actions of a defendant who has been ordered into community restoration. Concurrent to the activities of the 2021 Legislature, the Oregon Health Authority did provide a mechanism for community mental health programs to be reimbursed for additional commercial liability insurance for the duration of the current biennium. However, that reimbursement mechanism was only resourced for \$5M, and it was not a comprehensive program for all of the parties to community restoration procedures and has been unilaterally sunset by the Oregon Health Authority as of June 30, 2022.

These risks are not imaginary. Lane County is a defendant in a civil suit arising from a tragic outcome from a municipal court ordered behavioral treatment placement, there have been (Police) Officer Involved Shootings of community restoration defendants in several counties that have resulted in civil litigation and at least one sexual assault case arising from a defendant being treated in the community. Indeed the State Hospital itself is having to adjust its internal policies due to assaults and injuries occurring inside its four walls, and so it should not be a surprise that similar incidents can and do occur when a person is ordered into community treatment.

We find this situation to be urgent. The Dr. Pinals Neutral Expert report identifies both the high number of defendants that cycle through the existing aid and assist process, and stakeholders' concern over the burden of this new risk exposure. Her recommendations include a statutory term for fitness to proceed placements ordered into the State Hospital and into Community Restoration. We find there are additional risk mitigation measures the Legislature should consider, including:

- Ensuring a timely mechanism for alerting the court to a defendant who does not participate in community restoration obligations, with a concurrent acknowledgement by the court that the local treatment responsibility is ceased.
- Ensuring that residential facilities are exempt from landlord tenant assumptions such that police can immediately remove a defendant who is not participating in restoration and treatment obligations.

With or without these above described risk mitigation requirements, we seek the underlying backstop of an indemnification framework. We recognize that an underlying principle in our society is an equal access to justice, and thus an indemnification framework, whereby the state of Oregon is able to insert itself as a defendant to replace the providers who are carrying out state policies, maintains the access to justice principle.

While this policy may come with a fiscal impact in the course of the legislative process, we ask that you recognize this same fiscal impact existed prior to shifting the state's risk onto local providers.

We stand ready to work with you to evolve either a piece of an omnibus behavioral health bill, or as a stand-alone measure, and hope you will appreciate the urgency and necessity of action on this issue during the 2023 Legislative Session.