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Juvenile Code Revision Work Group:

Juvenile Aid and Assist Report

HB 2836

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From the Offices of the Executive Director
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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.