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Report to the 2007 Legislative Assembly

Juvenile Code Revision Work Group: Juvenile PSRB Clean-Up
SB 328

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Report Approved at Oregon Law Commission Meeting on
December 4, 2006

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I. Introductory Summary

This proposed bill provides that another group of juveniles who make a successful mental disease or defect defense may be placed under the Juvenile PSRB's jurisdiction. The bill would add coverage of juveniles whose mental defect is manifested as mental retardation that exists concurrently with qualitative deficits in activities of daily living. Present law is silent as to disposition for these juveniles who are successful with a mental disease or defect defense. The bill also clarifies the roles of the Juvenile PSRB and the DHS with respect to jurisdiction, placement, and security oversight.

II. History of the Project / Statement of the Problem Area

The Oregon Law Commission (based on the recommendations of the Commission's Juvenile Code Revision Work Group[1]) recommends retooling the juvenile mental disease and defect provisions passed into law during the 2005 Legislative Session. See ORS 419C.520 et seq. Current ORS provisions are based on SB 232 (2005), recommended by the Oregon Law Commission last session. That bill was recommended after several years of research, analysis, and collaboration of interested persons.[2] However, the Commission's recommended bill was amended during the waning hours of the 2005 session so as to delete the developmental disability of mental retardation as one of the listed serious mental conditions that would automatically qualify for disposition of jurisdiction to the juvenile panel of the Psychiatric Security Review Board (PSRB) when a successful mental disease or defect defense (commonly referred to as the insanity defense) was made. The amendment was made last session to lower the fiscal impact of the bill in a tight budget year and was requested by the Department of Humans Services, Seniors and People with Disabilities Division. That Division provides services to mentally retarded and developmentally disabled persons.

Juveniles with mental retardation can still raise the defense under present law, but if successful with the defense, the disposition would not be to transfer jurisdiction of the juvenile to the juvenile panel of the Psychiatric Security Review Board. Rather, the law is presently silent regarding disposition. Since such juveniles have not been adjudicated of an offense if successful with the defense (found not guilty except for insanity if this were adult court), they cannot be placed in the custody of the Oregon Youth Authority (youth correctional facility). Historically, such juveniles have been placed informally into the custody of the child welfare agency or released to their parents. Some maintain that child welfare cannot presently provide the level of

[1] This work group is comprised of over 60 Work Group members with prosecution, defense, juvenile department, judicial, and agency experience. The Work Group is chaired by Commissioner, Sen. Kate Brown.

[2] See Juvenile Code Revision: Juvenile Panel of The Psychiatric Security Review Board (PSRB) SB 232 Report, available on the Commission's website:
http://willamette.edu/wucl/oregonlawcommission/home/Biennial%20Report%2003-05.pdf
(See Appendix D)

community protection needed in many cases. In addition, due to the silence of the present statutes, defense attorneys, prosecutors, and judges alike are hesitant to raise or allow the mental disease or defect defense due to a concern for the safety of the community. That is, such juveniles may end up in a correctional facility rather than a mental health facility. Present law raises constitutional questions due to the different treatment of these juveniles.

The Department of Human Services (DHS) is required by SB 232 (2005) to report back to the 2007 legislature with a proposed solution for these mentally retarded juveniles, too. The Juvenile Code Revision Work Group, however, did not support a provision in the DHS recommended bill draft (SB 164) that would place a cap on the number of juveniles who could be served. That is, if another juvenile were to be committed and the cap was already reached, the Juvenile PSRB would have to select a juvenile to release. A cap would place the Board in an awkward public safety position as the Juvenile PSRB has jurisdiction responsibility. There were other minor wording issues that the Work Group had with the DHS bill. Due to timing, the Department submitted its bill draft for purposes of the Governor's recommended budget, but compromises and reconciliation with the Commission's recommended bill are still probable. Since this was a Law Commission project originally, the Juvenile Code Revision Work Group felt strongly that it should recommend a fix this session and not rely entirely on DHS' bill.

III. Objective of the Proposal/ Section Analysis

The Commission recommends making the Juvenile PSRB jurisdiction statutes also applicable to juveniles who have the mental defect of mental retardation-- providing the same disposition and procedures. In other words, the recommendation is that the deletion made last session should be removed. Treatment differences, definition issues, and federal dollar match differences were reconsidered this interim for these juveniles. These considerations are now reflected in the accompanying bill.

The proposed bill does the following key things:

1) Reworks the definition of "serious mental condition" to clearly include mental retardation if that mental defect exists concurrently with qualitative deficits in activities of daily living and deletes ORS 419C.520(2)(b) which had taken out mental retardation from the definition of mental disease or defect. The new proposed text actually uses the term "mental retardation" instead of putting in IQ scores or only using the phrase "significantly subaverage intellectual function" because "mental retardation" is the recognized medical term. Using the term "mental retardation" will also make it clearer to judges and lawyers as to which juveniles might even qualify for that "serious mental condition." See present 419C.520(2)(b) (proposed deleted), and proposed ORS 419C.520(3)(d)(A), (B)(ii).

2) Provides a definition of "Activities of Daily Living," modeling it after ORS

410.600-- the DHS definition used for Seniors. The difference in definitions is only that "communicating" is added and "cognition" is deleted. This is intended to track better what is needed for juveniles. See proposed ORS 419C.520(3)(d)(B)(i).

3) Adds "secure intensive community inpatient facility" to ORS 419C.529(2)(a). This addition will require DHS to designate a secure facility for all initial commitments by the court (could be up to 90 days). This secure facility placement will be pending a hearing by the juvenile panel of the PSRB. That is, there is a gap between when the court orders commitment to the Juvenile PSRB (after finding a successful defense) and when the Board must meet for a hearing. The Board has jurisdiction and thus public safety responsibility from the initial commitment. Requiring a secure facility initially and then allowing DHS in consultation with the Board to later designate a different facility (perhaps less secure) gives DHS maximum discretion on designation (except for the first 90 days), and seems to get at the security concerns and responsibility issues of the PSRB. DHS has been particularly concerned about having enough secure beds for juveniles with mental retardation that would fall under the Board's jurisdiction. ORS 161.327(1)(B) already uses this term, "secure intensive community inpatient facility" and the only facility used today that meets this definition is the Children's Farm Home in Corvallis. There is no security or lock requirements elsewhere in the ORS Chapter 419C juvenile sections for placement and this would so require, but for only the initial placement.

4) Adds a new provision (See Section 2 of SB 328) to give the Board clear authority to review all DHS placements on public safety grounds. That is, DHS will designate the placement/facility, and only if the Board finds the designation (on a case by case basis) so inappropriate as to create a substantial danger to others, will DHS have to alter placement. DHS's designation authority is also clarified by adding a list of factors to take into account when making its designations. See Section 4, adding (6) to ORS 419C.529. This list notes the balancing the Department must consider: the needs of the juvenile, the resources of the department, and the safety of the public. This gives DHS maximum flexibility for choosing facilities and the Group believes this obviates, to a large degree, the need for a cap in statute. This new provision is modeled after ORS 419C.478(2), (5) and ORS 419C.492 which give juvenile courts review authority in delinquency cases but maintains placement authority with OYA and DHS. Note that throughout ORS Chapter 419C, DHS gets to "designate" the facility or hospital for placement. See ORS 419C.532(5), 419C.538(4), (5). Despite the several statements in present law of "hospital or facility designated by the Department of Human Services," apparently some people have read that to mean that the designation is made once by DHS and that there is but one facility—i.e. the Children's Farm Home. That is, some people have read the statute to not allow for designation on a case by case basis. (This interpretation is probably because of how the designations in ORS 161.327 have been handled in practice--i.e. state hospital for adults and farm home for children.) Legislative Counsel has added "on an individual case basis" throughout the bill to clarify this point. That is, placement could be at the Children's Farm Home, Albertina Kerr, etc.

5) Adds "developmental disabilities treatment provider" throughout the Mental Disease or Defect section of ORS Chapter 419C to acknowledge that there are mental health treatment providers and special treatment providers for those with developmental disabilities.

IV. Amendments Needed

The phrase **"the young person or"** on page 1, line 11 of SB 328 should be deleted. The juvenile's needs are taken into account for treatment, etc. but the correct standard for a "substantial danger" determination is substantial danger to others. See Section 4(1) and Section 4(6). The mistake was not noticed when the bill was presession filed.

The phrase **"or developmental disability"** on page 2, line 3 of SB 328 should be deleted. It is an unintentional mistake in the bill draft and we are not sure where it originated. Developmental disabilities encompass many disabilities and it would be overbroad to include such mental defects in the definition of serious mental condition that can always be put within the Juvenile PSRB's jurisdiction.