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TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

BHS 9-2019
CHAPTER 309
OREGON HEALTH AUTHORITY
HEALTH SYSTEMS DIVISION: BEHAVIORAL HEALTH SERVICES

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ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Defining Minimum Standards for Restoration Services and Implementation of SB 24 2019

EFFECTIVE DATE: 07/16/2019 THROUGH 01/11/2020

AGENCY APPROVED DATE: 07/16/2019

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NEED FOR THE RULE(S):

The Division needs to amend/adopt these rules to implement minimum service requirements for individuals receiving restoration services who lack fitness to proceed with their criminal cases and to implement changes required in SB 24 2019, that became effective 7/15/19.

JUSTIFICATION OF TEMPORARY FILING:

The Authority finds that failure to act promptly will result in serious prejudice to the public interest, the Authority, and recipients of Medicaid benefits. These rules need to be adopted promptly so that the Authority may put in place rules that define minimum service requirements for individuals receiving restoration services who lack fitness to proceed with their criminal cases. Additionally, SB 24 2019 became effective 7/15/19 and changes to these rules are required to implement the legislative changes effecting ORS 161.365 and ORS 161.370.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

SB 24 2019, <https://olis.leg.state.or.us/liz/2019R1/Measures/Overview/SB24>

RULES:

309-088-0105, 309-088-0115, 309-088-0125, 309-088-0135, 309-088-0145

AMEND: 309-088-0105

RULE TITLE: Purpose and Scope

RULE SUMMARY: This OAR rule making process is being completed to move the minimum standards for restoration services from service element contract to Oregon Administrative Rule. The intent is to provide guidance on what services are required to be provided to individuals who lack capacity to proceed with their criminal case.

RULE TEXT:

(1) Oregon Revised Statutes (ORS) 161.365 and 161.370 recognize that not all criminal defendants who lack fitness to proceed (commonly known as Aid and Assist defendants) require commitment to the Oregon State Hospital or

incarceration, but instead shall be served in the least restrictive environment that is clinically indicated.

(2) These rules establish the standards for community consultations and services to restore a defendant's fitness to proceed. These rules encourage collaboration between the Court, the Oregon State Hospital, Community Mental Health Programs, and parties of the case to the extent permitted by law.

STATUTORY/OTHER AUTHORITY: ORS 413.042, ORS 430.640, ORS 161.370

STATUTES/OTHER IMPLEMENTED: ORS 430.630, ORS 430.640, ORS 161.370, ORS 161.365

RULE TITLE: Definitions

RULE SUMMARY: This OAR rule making process is being completed to move the minimum standards for restoration services from service element contract to Oregon Administrative Rule. The intent is to provide guidance on what services are required to be provided to individuals who lack capacity to proceed with their criminal case.

RULE TEXT:

- (1) "Acuity of symptoms" means intensity and severity of psychiatric symptoms.
- (2) "Authority" means the Oregon Health Authority.
- (3) "Behavioral Health Treatment" means treatment for mental health and substance use disorder.
- (4) "Capacity" means that the defendant is able to:
 - (a) Understand the nature of the proceedings against the defendant;
 - (b) Assist and cooperate with the counsel of the defendant; and
 - (c) Participate in the defense of the defendant.
- (5) "Care Coordination" means a process-oriented activity to facilitate ongoing communication and collaboration to meet multiple needs including facilitating communication between natural supports, community resources, and involved providers and agencies; organizing, facilitating and participating in client staffing meetings; and providing for continuity of care by creating linkages to and managing transitions between levels of care. Care coordination shall occur with the jurisdictional court or other designated agencies within the criminal justice system, State Hospital, CMHP, the Authority, and parties to the case to the extent permitted by law. Care coordination shall include, but is not limited to:
 - (a) Coordination of periodic forensic evaluations to assess fitness to proceed, which shall include coordination of transportation or transportation to and from the forensic evaluation; and
 - (b) Communication of court ordered requirements, limitations, and court dates to the defendant;
 - (c) Reporting of the defendant's compliance and progress through monthly reports to the court; and
 - (d) Providing interim quarterly reports for communicating current status of defendants to the Authority and the court.
- (6) "Case Management" means the services provided to assist individuals who reside in a community setting or are transitioning to a community setting in gaining access to needed medical, social, educational, entitlement, and other applicable services.
- (7) "Community Mental Health Program (CMHP)" means the organization of various services for individuals with a mental health diagnosis or substance use disorders operated by or contractually affiliated with a local mental health authority and operated in a specific geographic area of the state under an agreement with the Division pursuant to OAR chapter 309, division 014.
- (8) "CMHP Director" means the director of a CMHP, or the director's designee.
- (9) "Consultation" means a meeting between the CMHP and the defendant under the least restrictive conditions appropriate to assist the court in determining whether the services and supervision necessary to safely restore the defendant's fitness to proceed are available in the community. This consultation is not an examination regarding fitness to proceed and, therefore, does not need to be completed by a Certified Forensic Evaluator pursuant to ORS 161.365 and OAR Chapter 309, Division 090.
- (10) "Court" means the court with jurisdiction regarding the defendant's fitness to proceed.
- (11) "Crisis Services" means services that provide supportive interventions and information for individuals in an urgent or emergent situation.
- (12) "Dangerous" or "Dangerousness" means a substantial likelihood that physical harm will be inflicted by an individual upon his own person or upon another individual, or that physical harm will occur to an individual from their inability to care for themselves. An assessment of dangerousness may take into account threats, including verbal threats or attempts to commit suicide or inflict physical harm on him or herself, or may include information about historical patterns of behavior as those patterns relate to the current risk of harm; or behavior which has caused physical harm or which would place a reasonable person in reasonable fear of sustaining physical harm. The fact that an individual was

charged with a crime or diagnosed with a mental illness is not alone sufficient to establish an individual's dangerousness.

(13) "Fitness to Proceed" means the same as having capacity.

(14) "Incapacitated" means the defendant is unable to:

- (a) Understand the nature of the proceedings against the defendant;
- (b) Assist and cooperate with the counsel of the defendant; or
- (c) Participate in the defense of the defendant.

(15) "Hospital level of care" means inpatient psychiatric assessment or stabilization in a secure, locked institution with seven days per week, 24-hour supervision by registered nurse staffing and a 24-hour, onsite psychiatrist available to address behavioral emergencies and approve involuntary psychiatric medication, emergency medication, seclusion, restraint, or other interventions.

(16) "Incidental Supports" means the provision of items that are not the direct provision of services. Incidental supports may include things such as clothing, food, and medication.

(17) "Judicial Day" means a day when court is open.

(18) "Legal Skills Training" means training on courtroom procedures, roles, language, and potential outcomes of the court process.

(19) "Linkages to Benefits" means assisting an individual obtain benefits for which they are eligible, including but not limited to: Medicaid, Social Security, Aging and People with Disabilities Services, Supplemental Nutrition Assistance Program, and housing.

(20) "Medical Treatment" means the management and care of a patient to combat disease or disorder.

(21) "Medication Management" means the prescribing and administering and reviewing of medications and their side effects, including both pharmacological management as well as supports and training to the individual.

(22) "Peer-Delivered Services" means community-based services and supports provided by peers and peer support specialists to individuals with similar lived experience. These services are intended to support individuals in engaging with ongoing treatment and to live successfully in the community.

(23) "Restoration Services" means a collection of services that may assist in restoring an individual's capacity.

Restoration services may include, but are not limited to:

- (a) Behavioral health treatment;
- (b) Medication management;
- (c) Case management;
- (d) Peer-delivered services;
- (e) Crisis services;
- (f) Medical treatment;
- (g) Legal skills training;
- (h) Incidental support; and
- (i) Linkages to benefits.

(24) "Services" shall include, but are not limited to:

- (a) Restoration services; and
- (b) Care coordination.

(25) "State Hospital" means the Oregon State Hospital system, including all campuses.

(26) "Superintendent" means the chief executive officer of a state hospital, or the superintendent's designee.

(27) "Supervision" means monitoring options based upon the defendant's risk factors. Supervision may include, but are not limited to:

- (a) Appointments with providers of medical or other services;
- (b) Substance use testing;
- (c) Random home visits;
- (d) Reports to the court; and

(e) Other conditions determined by the court.

STATUTORY/OTHER AUTHORITY: ORS 413.042, ORS 430.640, ORS 161.370

STATUTES/OTHER IMPLEMENTED: ORS 430.640, ORS 161.370, ORS 161.365

AMEND: 309-088-0125

RULE TITLE: CMHP Responsibilities

RULE SUMMARY: This OAR rule making process is being completed to move the minimum standards for restoration services from service element contract to Oregon Administrative Rule. The intent is to provide guidance on what services are required to be provided to individuals who lack capacity to proceed with their criminal case.

RULE TEXT:

- (1) Within two judicial days after receipt of a court's community consultation order, the CMHP director shall send acknowledgement to the court of having received the order for consultation.
- (2) Consultations shall occur through a face-to-face meeting, either in-person or via telehealth, as clinically appropriate.
- (3) Within five judicial days after a notice under ORS 161.370(9)(b)(A) is issued the CMHP director shall:
 - (a) Review available records related to the defendant's medical or service needs;
 - (b) Consult with the defendant and with any local entity that would be responsible for supervising the defendant if the defendant were to be released in the community, to assess whether services and supervision necessary to safely allow the defendant to gain or regain fitness to proceed are available in the community;
 - (c) Consult with the defendant to assess whether they are dangerous to self or others as a result of a qualifying mental disorder and whether they require a hospital level of care due to their dangerousness and the acuity of symptoms of their qualifying mental disorder; and
 - (d) Submit to the court a findings report describing the outcome of the community consultation. The findings report shall be completed using the "Consultation Report Template" available at <http://www.oregon.gov/oha/OSH/LEGAL/Pages/information-mental-health-providers.aspx>, as updated on 7/16/2019.
- (4) Within five judicial days after a community consultation order under ORS 161.365(1)(a) or ORS 161.370 if the defendant is in custody (or eight judicial days if they are out of custody), the CMHP director shall:
 - (a) Review available records related to the defendant's medical or service needs;
 - (b) Consult with the defendant and with any local entity that would be responsible for supervising the defendant if the defendant were to be released in the community, to assess whether services and supervision necessary to safely allow the defendant to gain or regain fitness to proceed are available in the community;
 - (c) Consult with the defendant to assess whether they are dangerous to self or others as a result of a qualifying mental disorder and whether they require a hospital level of care due to their dangerousness and the acuity of symptoms of their qualifying mental disorder; and
 - (d) Submit to the court a findings report describing the outcome of the community consultation. The findings report shall be completed using the "Consultation Report Template" available at <http://www.oregon.gov/oha/OSH/LEGAL/Pages/information-mental-health-providers.aspx>, as updated on 7/16/2019.
- (5) The community consultation shall be completed by a Qualified Mental Health Professional (QMHP), as defined in OAR 309-019-0125 (10).
- (6) The CMHP director shall individually assess what services each defendant requires to gain or regain capacity. Incapacitation does not automatically mean that legal skills training is necessary to gain or regain capacity.
- (7) If the court orders the defendant to the community to participate in restoration services and supervision, the CMHP director shall:
 - (a) Notify the court if the defendant's mental health acuity increases, or there are other concerns about the defendant's ability to safely remain in community-based restoration;
 - (b) Provide the court with monthly updates on the defendant's progress in gaining or regaining fitness to proceed which shall include, but are not limited to:
 - (A) The defendant's adherence to the community restoration release agreement; and
 - (B) Any information that may impact the defendant's release in to community based restoration.
- (8) If the court orders the defendant to a facility designated by the Authority to participate in restoration services and supervision, the CMHP director shall:

(a) Attend monthly Inter-Disciplinary Team meetings, either in person or by telephone, regarding the restoration of the defendant; and

(b) Conduct ongoing discharge planning, in collaboration with the director of the facility, in preparation for efficient transition to community-based restoration when ordered.

(9) If the court orders the defendant to the State Hospital to participate in restoration services and supervision, the CMHP director shall:

(a) Attend at least monthly Inter-Disciplinary Team meetings, either in person or by telephone, regarding the restoration of the defendant; and

(b) Conduct ongoing discharge planning, in collaboration with the Superintendent, in preparation for efficient transition to community-based restoration when ordered.

(10) Any CMHP that has not met one or more of the requirements in OAR 309-088-0125(3) or OAR 309-088-0125(4) shall submit a written plan of correction to OHA within 7 judicial days of discovering that it has not met one or more of the requirements. Plans of corrections shall:

(a) identify the requirement(s) that was not met and the date, name of the corresponding defendant, county court of jurisdiction, and case number;

(b) describe the reason(s) for not meeting the requirement(s);

(c) describe the step(s) that the CMHP has taken to prevent recurrence, or describe the timeline and person responsible to complete future step(s) to prevent recurrence;

(d) be signed and dated by the CMHP Director or designee;

(e) be submitted to OHA, addressed to:

Aid and Assist Coordinator

Adult Mental Health Unit

Oregon Health Authority

500 Summer St NE

Salem, OR 97301-1079.

STATUTORY/OTHER AUTHORITY: ORS 430.640, ORS 161.370, ORS 413.042

STATUTES/OTHER IMPLEMENTED: ORS 430.640, ORS 430.630, ORS 161.370, ORS 161.365

AMEND: 309-088-0135

RULE TITLE: Discharge from the State Hospital for Community Restoration

RULE SUMMARY: This OAR rule making process is being completed to move the minimum standards for restoration services from service element contract to Oregon Administrative Rule. The intent is to provide guidance on what services are required to be provided to individuals who lack capacity to proceed with their criminal case.

RULE TEXT:

- (1) This rule applies when a defendant is committed to the custody of the superintendent of the State Hospital or director of a facility designated by the Oregon Health Authority.
- (2) The superintendent or director shall file notice with the court if it is determined that a defendant committed under ORS 161.370 is no longer dangerous to self or others as a result of a qualifying mental disorder, that a hospital level of care is not necessary due to the defendant's dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder, or that the services and supervision necessary to allow the defendant to gain or regain fitness to proceed are available in the community. The superintendent or director shall:
 - (a) Consider the safety of the defendant and the public; and
 - (b) To the extent permitted or required by law or by court order, discuss with the CMHP the availability of services, supports, and supervision in the community.
- (3) The Authority or director may request the CMHP to conduct additional community consultations.

STATUTORY/OTHER AUTHORITY: ORS 413.042, ORS 430.630, ORS 430.640

STATUTES/OTHER IMPLEMENTED: ORS 430.640, ORS 161.365, ORS 161.370

ADOPT: 309-088-0145

RULE TITLE: Restoration

RULE SUMMARY: This OAR rule making process is being completed to move the minimum standards for restoration services from service element contract to Oregon Administrative Rule. The intent is to provide guidance on what services are required to be provided to individuals who lack capacity to proceed with their criminal case.

RULE TEXT:

(1) The CMHP responsible for restoring a defendant's fitness to proceed shall make an individualized assessment to determine what services are necessary to allow the defendant to gain or regain fitness. The CMHP shall provide the identified services, or coordinate the provision of the identified services, which shall include but are not limited to:

- (a) Restoration services;
- (b) Care coordination; and
- (c) Supervision.

(2) A defendant found to lack capacity does not automatically require legal skills training to gain or regain capacity. The individualized assessment required in OAR 309-088-0145 (1) should be utilized to decide whether the defendant requires legal skills training as part of their restoration services.

STATUTORY/OTHER AUTHORITY: ORS 413.042, ORS 430.630, ORS 430.640

STATUTES/OTHER IMPLEMENTED: ORS 430.630, ORS 430.640, ORS 161.365, ORS 161.370