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**TEMPORARY ADMINISTRATIVE ORDER**  
INCLUDING STATEMENT OF NEED & JUSTIFICATION

**BHS 18-2021**

CHAPTER 309  
OREGON HEALTH AUTHORITY  
HEALTH SYSTEMS DIVISION: BEHAVIORAL HEALTH SERVICES

**FILED**  
08/18/2021 9:22 AM  
ARCHIVES DIVISION  
SECRETARY OF STATE  
& LEGISLATIVE COUNSEL

FILING CAPTION: Updating Aid and Assist rules to align with recent changes to the applicable statutes

EFFECTIVE DATE: 08/18/2021 THROUGH 02/13/2022

AGENCY APPROVED DATE: 08/17/2021

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Filed By:  
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**NEED FOR THE RULE(S):**

The division needs to amend these rules to align them with recent changes in statute from Senate Bill 295 from the 2021 legislative session. There are definitions within the rules that no longer apply and there are new processes that need to be defined. Senate Bill 295 has an emergency clause, and the new statutory language became active June 23, 2021.

**JUSTIFICATION OF TEMPORARY FILING:**

(1) Describe the specific consequences that result from the failure to immediately adopt, amend or suspend the rule(s): The consequences for not amending the current rules are that we will have rules in direct conflict with the statutes that they are based on. Additionally, new processes will be without definition causing complications with the new requirements.

(2) who would suffer these consequences: Community mental health programs, courts, defense attorneys, prosecutors, and defendants.

(3) why or how failure to immediately take rulemaking action would cause these consequences: These rules would remain in contradiction to the statutes they reference and would lead to confusion and violations of the new statutory requirements.

(4) how the temporary action will avoid or mitigate those consequences: The temporary rule process will allow for the rules to align with the statutes and clarify any new or changed processes while a permanent rule process takes place.

**DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:**

RULES:

309-088-0105, 309-088-0115, 309-088-0125

AMEND: 309-088-0105

RULE TITLE: Purpose and Scope

RULE SUMMARY: Portions removed that no longer align with the current statutory language in ORS 161.365 or 161.370.

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) need to be committed to the State Hospital or remain in jail, but instead should be served in the least restrictive environment that is clinically indicated.

(2) These rules establish the standards for community consultations to occur and encourages collaboration between the Court, State Hospital, Community Mental Health Program (CMHP), and parties to the case to the extent permitted by law.

STATUTORY/OTHER AUTHORITY: ORS 413.042, ORS 430.640, SB 295 (2021)

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

AMEND: 309-088-0115

RULE TITLE: Definitions

RULE SUMMARY: Removed and adjusted definitions to align with other changes made in OAR 309-088-0125 due to recent ORS changes from the legislative session.

RULE TEXT:

- (1) "Acuity of symptoms" means intensity and severity of symptoms.
- (2) "Authority" means the Oregon Health Authority.
- (3) "Behavioral Health Treatment" means treatment for mental health, substance use disorder, and problem gambling.
- (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) "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.
- (6) "CMHP Director" means the director of a CMHP, or designee, who operates or contracts for all services under contract with the Authority.
- (7) "Community Consultation" means a report provided to the court determining, if the defendant were to be released into the community, whether community restoration services are present and available in the community. The community 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 309-090.
- (8) "Community Restoration Services" means services and treatment necessary to safely allow a defendant to gain or regain fitness to proceed in the community, which may include but are not limited to:
  - (a) Legal skills training;
  - (b) Medication management;
  - (c) Case management;
  - (d) Behavioral health treatment;
  - (e) Peer services;
  - (f) Supported employment;
  - (g) Psychiatric and medical treatment;
  - (h) Incidental support such as purchase of food, clothing, or transportation;
  - (i) Linkages to benefits and community resources such as SNAP, housing or shelter, Medicaid enrollment, and cash assistance; and
  - (j) Supervision by pretrial services.
- (9) "Court" means the court with jurisdiction regarding defendant's fitness to proceed.
- (10) "Fitness to Proceed" means the same as having capacity.
- (11) "Hospital level of care" means inpatient psychiatric assessment or stabilization in a locked and secured, institution seven days per week, and a 24-hour, onsite psychiatrist available to address behavioral emergencies and order emergency involuntary psychiatric medication, seclusion, restraint, or other interventions necessary to protect the defendant and others.
- (12) "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.
- (13) "Judicial Day" means a day when court is open.

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

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

(16) "Superintendent" means the chief executive officer of a state hospital, or designee, or an individual authorized by the superintendent to act in the superintendent's capacity.

(17) "Unable to Aid and Assist" means the same as "incapacitated," as defined in these rules.

STATUTORY/OTHER AUTHORITY: ORS 413.042, ORS 430.640, SB 295 (2021)

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

RULE TITLE: CMHP Responsibilities

RULE SUMMARY: Changes made to the administrative rules as required to align the rules to recently changed Oregon Revised Statutes (ORS) from the recent legislative session. Primary changes were to change specific timelines and language, add processes for newly added ORS requirements, and remove language that is no longer part of the ORS. One additional change was made to allow for all community consultations to be completed either through an in-person meeting or via video conference to align with telehealth changes due to the COVID-19 pandemic.

RULE TEXT:

- (1) When ordered by the court, the CMHP director shall consult with the defendant and with any local entity that would be responsible for providing community restoration services to the defendant if the defendant were to be released in the community, to determine whether appropriate community restoration services are present and available in the community.
- (2) If the CMHP director determines that appropriate community restoration services are not present and available in the community, the community consultation shall include information concerning the specific services necessary to safely allow the defendant to gain or regain fitness to proceed in the community and must specify the necessary services that are not present and available in the community.
- (3) Within two judicial days after receipt of the court's community consultation order, the CMHP director shall send acknowledgement to the court of having received the order for a community consultation.
- (4) Community Consultations shall occur through either an in-person meeting or video conference depending on the defendant's individual clinical needs.
- (5) Within five judicial days of receiving the community consultation order the CMHP director shall:
  - (a) Review available records related to defendant's medical or service needs;
  - (b) Consult with the defendant to assess whether appropriate community restoration services are present and available in the community;
  - (c) Consult with any local agency that would be responsible for providing Community Restoration Services to the defendant if the defendant were to be released in the community; and
  - (d) Submit to the court and parties a findings report describing the outcome of the community consultation regarding whether appropriate community restoration services are present and available in the community. 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>.
- (6) The CMHP director shall individually assess what services each defendant requires to gain capacity. Incapacitation does not automatically mean that legal skills training is necessary to gain capacity.
- (7) The CMHP director shall provide a status report to the court if, after receipt of the findings reports, the court orders the defendant to participate in community restoration services, and:
  - (a) The defendant's mental health acuity of symptoms increases;
  - (b) There are concerns about whether the defendant may continue to be safely restored in the community;
  - (c) If the defendant is not complying with court-ordered restoration services;
  - (d) If the defendant gains or regains fitness to proceed; or
  - (e) As ordered by the court.
- (8) If the CMHP director determines that the community restoration services that would mitigate any risk posed by the defendant are present and available in the community, the community mental health program director may file notice of the determination with the court. If the CMHP director files such a determination with the court, the CMHP shall utilize the standardized community consultation template available at <http://www.oregon.gov/oha/OSH/LEGAL/Pages/information-mental-health-providers.aspx> and titled "Consultation Report Template".
- (9) Throughout any period of commitment of the defendant, in order to facilitate an efficient transition to treatment in

the community when ordered, the CMHP director shall at least every 30 days:

(a) Review the available community restoration services to identify if community restoration services have become present and available as outlined in OAR 309-088-0125(1). If community restoration services that the defendant requires have become available refer to OAR 309-088-0125(9) on how to proceed.

(b) Communicate with the superintendent of the state mental hospital or director of the facility by:

(A) Attending a treatment team meeting; and

(B) Speaking with the Qualified Mental Health Professional assigned to the defendant

(C) Communicate with the defendant about transition planning.

STATUTORY/OTHER AUTHORITY: ORS 413.042, ORS 430.640, SB 295 (2021)

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