

OFFICE OF THE SECRETARY OF STATE

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ARCHIVES DIVISION

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NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

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

FILED

11/29/2021 12:03 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Updating Aid and Assist rules to align with statutory changes and update rule content.

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 12/21/2021 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

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500 Summer Street
Salem, OR 97301

Filed By:
Hanna Christensen
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 12/16/2021

TIME: 9:00 AM - 9:45 AM

OFFICER: Hanna Christensen

ADDRESS: Oregon Health Authority
Due to Covid-19 will be held virtually
salem, OR 97301

SPECIAL INSTRUCTIONS:

<https://www.zoomgov.com/j/1613513995?pwd=bXF5MWtPMmNvTVNzZlZlc5L25RcEhndz09> , Phone (669) 254-5252
Passcode: 117564

NEED FOR THE RULE(S)

These rules provide updates needed to provide standardization and clarification to better support the defendants who fall within the fitness to proceed jurisdiction and to make the current temporary rules permanent to align with the changed ORS 161.365 and .370 from SB 295 2021.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

SB 295 2021 - <https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/SB295>

FISCAL AND ECONOMIC IMPACT:

CMHP representatives who attended the RAC have identified that implementation of these rules will increase staffing costs related to care coordination and administrative requirement tracking/reporting. When asked to quantify the increase, some CMHP RAC participants said the increase could be as high as 40%.

Courts may see an increase in reports from the CMHP, but there is not an expected fiscal impact on the courts due to this potential increase.

OSH may see an increase in coordination outreach and engagement from the CMHP's, but there is not an expected

fiscal impact on OSH due to this potential increase.

There is an indeterminant fiscal impact to the general population of Oregon related to the proposed rule changes.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s).

Community Mental Health Providers (CMHP), Courts

(2) Effect on Small Businesses:

(a) Estimate the number and type of small businesses subject to the rule(s);

36 Oregon county CMHP's, Courts, Circuit Court – 27 judicial districts, Municipal Courts – Over 130 courts according to the Oregon Municipal Judges Association

(b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s);

CMHP: Increases in: Reports to the court, Corrective action plan reporting to OHA, Sending community consultations to OHA, Tracking engagement during commitment requirements. Courts: Increased receipt and processing of reports from the CMHP reporting on changes to the defendant.

(c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

RAC participants estimated an increase in CMHP staffing required to fulfill responsibilities for coordination while clients are in commitment in addition to completing restoration related referrals. RAC participants discussed an expected increase of around 40% in staffing costs. Additional feedback was that medium sized counties will most likely need to dedicate a specific staff to only handling the required coordination and referrals while individuals are in commitment.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Attendees of the RAC included representatives from various hospital systems, The Oregon Center for Behavioral Health and Justice Integration, AOCMHP, and a representative sample of CMHP's from across the state. Feedback from this group was incorporated into the proposed rules.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

309-088-0105, 309-088-0115, 309-088-0125, 309-088-0130, 309-088-0135, 309-088-0145

AMEND: 309-088-0105

RULE SUMMARY: These rules provide updates needed to provide standardization and clarification to better support the defendants who fall within the fitness to proceed jurisdiction and to make the current temporary rules permanent to align with the changed ORS 161.365 and .370 from SB 295 2021.

CHANGES TO RULE:

309-088-0105

Purpose and Scope

(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. ~~The statute requires that "when the court has reason to doubt the defendant's fitness to proceed by reason of incapacity as described in ORS 161.360, the court may call any witness to its assistance in reaching its decision and shall order that a community mental health program director or designee consult with the defendant to determine whether services and supervision necessary to safely restore the defendant's fitness to proceed are available in the community."~~¶

(2) These rules establish the standards for community consultations to occur and encourages collaboration between the Court, State Hospital, Community Mental Health Program (CMHP), tribal entities, Coordinated Care Organizations (CCO), 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 SUMMARY: These rules provide updates needed to provide standardization and clarification to better support the defendants who fall within the fitness to proceed jurisdiction and to make the current temporary rules permanent to align with the changed ORS 161.365 and .370 from SB 295 2021.

CHANGES TO RULE:

309-088-0115

Definitions

- (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) "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, tribal entities, CCO, 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, in collaboration with the defendant's attorney, to assess fitness to proceed;¶
 - (b) Coordinating or providing transportation to and from the forensic evaluations and court appearances in this case; and¶
 - (c) Communication of court ordered requirements, limitations, and court dates to the defendant as clinically indicated.¶
- (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, tribal resources, 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 309-014.¶
- (68) ~~"CMHP Director" means the director of a CMHP, or designee, who operates or contracts for all services under contract with the Authority.¶~~
- (7) ~~"Consultation" means a meeting between the CMHP and the director's designee.¶~~
- (9) "Community Consultation" means a consultation where the CMHP Director consults with the defendant and with any local entity that would be responsible for providing community restoration services to the defendant if the defendant ~~and were~~ the least restrictive conditions appropriate to assist the court ~~in~~ be released in the community, which includes tribal entities and the defendant's CCO, to determine whether the services and supervision necessary to safely restore the defendant's fitness to proceed are available in appropriate community restoration services are present and available in the community. A report generated from that consultation is then provided to the court that ordered the Community Consultation. 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 309-090.¶
- (810) "Court" means the court with jurisdiction regarding defendant's fitness to proceed.¶
- (9) ~~"Dangerous" or "Dangerousness" means a significant safety concern to self or others, while the defendant is being restored to trial competency, even wimmunity Restoration Services" means services and treatment necessary to safely allow a defendant to gain or regain fitness to proceed in the community services or supports. An opinion regarding dangerousness is not an opinion on whether services, supervision, or supports are available in the community.~~¶
- (10) "Fitness to Proceed" means the same as having, which may include but are not limited to:¶
 - (a) Behavioral health treatment;¶
 - (b) Case management;¶

(c) Incidental supports;

(d) Legal skills training;

(e) Linkages to benefits;

(f) Medical treatment related to capacity;

(11) "Hospital level of care" means inpatient psychiatric assessment or stabilization in a locked and secured, institution with 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;

(h) Peer-delivered services; and

(i) Vocational services.

(11) "Court" means the court with jurisdiction regarding defendant's fitness to proceed.

(12) "Fitness to protect the defendant and others" means the same as having capacity.

(123) "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.

(134) "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.

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

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

(157) "Services" may include but are not limited to:

(a) Legal skills training; Medicaid;

(b) Social Security;

(c) Aging and People with Disabilities Services;

(d) Supplemental Nutrition Assistance Program; and

(e) 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; and

(i) Linkages to benefits and community resources such as SNAP, housing or shelter, Medicaid housing.

(18) "Medical Treatment Related to Capacity" means the management and care of a defendant to combat disease or disorder that is related to their capacity.

(19) "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.

(20) "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.

(21) "Qualified Mental Health Professional (QMHP)" means an individual who meets the qualification requirements outlined in OAR 309-019-0125.

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

(23) "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.

(24) "Supervision" means oversight of an individual's participation in treatment.

(19) "Unable to Aid and Assist" means the same as "incapacitated," as defined in these rules. Vocational Services" means employment support services that leads to competitive integrated employment. The Division encourages the use of fidelity IPS Supported Employment for providing vocational services.

Statutory/Other Authority: ORS 413.042, ORS 430.640, ~~ORS 161.370~~ SB 295 (2021)

Statutes/Other Implemented: ORS 430.640, ORS 161.370, ORS 161.365, ORS 430.630

RULE SUMMARY: These rules provide updates needed to provide standardization and clarification to better support the defendants who fall within the fitness to proceed jurisdiction and to make the current temporary rules permanent to align with the changed ORS 161.365 and .370 from SB 295 2021.

CHANGES TO RULE:

309-088-0125

CMHP Responsibility Consultations

~~(1) When the court has reason to doubt a defendant's fitness to proceed ordered by the court the CMHP director shall consult with the defendant and with any local entity that would by reason of incapacity, under ORS 161.365, the court shall order a CMHP director responsible for providing community restoration services to consult with the defendant if the defendant in order to determine whether services and supervision necessary to safely restore the defendant's fitness to proceed are to be released in the community, which includes tribal entities and the defendant's CCO, to determine whether appropriate community restoration services are present and available in the community.~~ ¶

~~(2) Within two judicial days after receipt of the court's community consultation order, the CMHP director 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 shall send acknowledgement to the court of having received the order for consultation.~~ ¶

~~(3) Initial 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) Community Consultations shall occur through either an in-person meeting, and any follow-up consultations may occur through teleconference or video conference or video conference depending on the defendant's individual clinical needs.~~ ¶

~~(4) Within seven judicial days of receiving the community consultation order if the defendant is in custody or ten judicial days if they are out of custody, the CMHP director shall:~~ ¶

~~(a) Review available records related to defendant's medical or service needs;~~ ¶

~~(b) Consult with the defendant to assess whether services and supervision necessary to safely 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;~~ ¶

~~(ed) Submit to the court and parties a findings report describing the outcome of the community consultation regarding whether services and supervision necessary to safely restore the defendant's fitness to proceed are 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>.~~ ¶

~~(5; and~~ ¶

~~(e) Submit copies of the findings report described in OAR 309-088-0125(5)(d) and 309-088-0125(9) to the Authority by emailing AidandAssistAdmin@dhs.oha.state.or.us.~~ ¶

~~(5) The Community Consultation required in OAR 309-088-0125 shall be completed by a Qualified Mental Health Professional.~~ ¶

~~(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.~~ ¶

~~(6) The consultation shall occur and the findings report shall be submitted to the court before the issuance of an order under ORS 161.370.~~ ¶

~~(7) If after receipt of the findings reports, the court orders the defendant to participate in services and supervision in the community, and the defendant's mental health later increases in acuity, 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 there are concerns about whether the defendant may continue to be safely restored in the community:~~ ¶

~~(a) The court may authorize the CMHP to conduct additional consultations and submit a new findings report to the court; and~~ ¶

~~(b) The court may order later that the defendant be comm 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 to the State Hospital for treatment.~~ ¶

~~(8) If after receipt of the findings report, the court commits the defendant to the custody of the superintendent of the State Hospital;~~

~~(a) The court may authorize the CMHP to conduct additional consultations and submit a new findings report to the court; and~~

~~(b) The court m"Consultation Report Template".~~

~~(8) Any CMHP that has not met one or more of the requirements in OAR 309-088-0125(1) through (7), OAR 309-088-0130(1) through (4), and OAR 309-088-0145(1) through (3) shall submit a written plan of correction to OHA within 7 judicial days order later that the defendant participate in services and supervision in the community.~~

~~(9) Each CMHP director shall provide the Authority with a quarterly report, available under "Other Reporting Requirements" at <http://www.oregon.gov/OHA/HSD/AMH/Pages/Reporting-Requirements.aspx> 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, coutlining the following information for each consultation:~~

~~(a) Defendant's name;~~

~~(b) Gender;~~

~~(c) Date of birth;~~

~~(d) Electronic health record identification number;~~

~~(e) SID number;~~

~~(f) Consultation referral date;~~

~~(g) Consultation face-to-face date;~~

~~(h) Date the findingsnty 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 resport was provided to the court;~~

~~(i) Recommendation from the findings report providnsible to complete future step(s) to prevent recurrence;~~

~~(d) be signed and dated toby the courtCMHP Director or designee; and~~

~~(je) The court's determination on defendant's placementbe submitted to the Authority by emailing it to AidandAssistAdmin@dhsosha.state.or.us.~~

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

ADOPT: 309-088-0130

RULE SUMMARY: These rules provide updates needed to provide standardization and clarification to better support the defendants who fall within the fitness to proceed jurisdiction and to make the current temporary rules permanent to align with the changed ORS 161.365 and .370 from SB 295 2021.

CHANGES TO RULE:

309-088-0130

CMHP Responsibilities During Commitment

(1) Within 7 judicial days of receiving notice from the Oregon State Hospital that a defendant has been admitted to the Oregon State Hospital under ORS 161.370, the CMHP director shall notify OSH of the name and contact information of the person designated to work with the State Hospital on behalf of the CMHP director regarding the individual. ¶

(2) The person designated as required in OAR 309-088-0130(1) shall be the CMHP point of contact for the State Hospital until the State Hospital is informed by the CMHP of a newly designated person. ¶

(3) The CMHP Director is responsible for care coordination and completion of any community restoration service related referrals while an individual is in commitment until the defendant is returned to their county of responsibility or county of residence and the relevant commitment order is dismissed by the judge. ¶

(4) 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(7) 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; or¶

(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 430.630, ORS 430.640, ORS 161.365, ORS 161.370

REPEAL: 309-088-0135

RULE SUMMARY: This rule is being repealed because it uses old statutory language that has changed and it this rule section covers CMHP, so references to what the court may do are being removed.

CHANGES TO RULE:

~~309-088-0135~~

~~Discharge from the State Hospital for Community Restoration~~

~~(1) This rule applies when a defendant has been committed to the custody of the superintendent of the State Hospital.¶~~

~~(2) The superintendent shall file notice with the court if it is determined that a defendant committed under ORS 161.370 is no longer a danger to self or others as a result of mental illness or defect, or that the services and supervision necessary to restore the defendant's fitness to proceed become available in the community. The superintendent 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 court may authorize the CMHP to conduct additional consultations and submit a new findings report to the court.¶~~

~~(4) The committing court may vacate the order of commitment and use the process described in ORS 161.370(6)(b) and ORS 161.370(3) to order that the defendant be released on supervision to the community for further restoration subject to conditions that the court determines are appropriate.~~

~~Statutory/Other Authority: ORS 413.042, ORS 430.630, ORS 430.640~~

~~Statutes/Other Implemented: ORS 430.640~~

ADOPT: 309-088-0145

RULE SUMMARY: These rules provide updates needed to provide standardization and clarification to better support the defendants who fall within the fitness to proceed jurisdiction and to make the current temporary rules permanent to align with the changed ORS 161.365 and .370 from SB 295 2021.

CHANGES TO RULE:

309-088-0145

CMHP Responsibilities During Community Restoration

(1) When the court has ordered that a defendant participate in community restoration, the CMHP from the county of responsible for attempting to restore 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) Community restoration services; and¶

(b) Care coordination.¶

(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.¶

(3) 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 to the point of changing their level of care recommendation; ¶

(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.

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