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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: MENTAL HEALTH SERVICES

FILED
12/05/2017 11:48 AM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Adopt Permanent Rules Implementing Community Consultations for Individuals Unable to Aid in Their Criminal Defense

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 01/22/2018 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 St NE
Salem, OR 97301

Filed By:
Sandy Cafourek
Rules Coordinator

HEARING(S)

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

DATE: 01/19/2018

TIME: 10:30 AM - 11:30 AM

OFFICER: Sandy Cafourek

ADDRESS: Human Service Building
500 Summer St. NE, Salem, OR 97301
Room 137A
Salem, OR 97301

SPECIAL INSTRUCTIONS:

Send written public comments to:
hsd.rules@dhsosha.state.or.us

NEED FOR THE RULE(S):

The Division needs to adopt these rules to implement a minimum standard and process for a community consultation to be completed by the local community mental health provider to aid in the placement of individuals in the appropriate level of service and supervision.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

HB 2420 2015 - <https://olis.leg.state.or.us/liz/2015R1/Measures/Overview/HB2420>

FISCAL AND ECONOMIC IMPACT:

The Division is unable to determine if the proposed rule adoption would have a fiscal impact. These rules provide a rule structure to implement statutory requirements already in place, ORS 161.365 and 161.370. It is unknown if community stakeholders will use existing resources to implement the rules or need to utilize new resources. The primary effect of

these rules will be to implement timelines and minimum requirements for completing the statutory requirements.

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. Impact on state agencies, units of local government and the public (ORS 183.335(2)(b)(E)): Adopting these rules will have minimal fiscal impact on the Authority, other state agencies, units of local government, the public, or businesses, including small businesses.

2. Cost of compliance effect on small business (ORS 183.336): There are no small businesses, as that term is defined in ORS 183.310 (10).

a. Estimate the number of small businesses and types of business and industries with small businesses subject to the rule: N/A

b. Projected reporting, recordkeeping and other administrative activities required for compliance, including costs of professional services: N/A

c. Equipment, supplies, labor and increased administration required for compliance: N/A

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

There were no small businesses, as that term is defined in ORS 183.310 (10), involved with the development of this rule.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

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

ADOPT: 309-088-0105

RULE SUMMARY: Adopt Rule to implement community consultations due to HB 2420.

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), and parties to the case to the extent permitted by law.

Statutory/Other Authority: ORS 413.042, ORS 430.640

Statutes/Other Implemented: ORS 430.630, ORS 430.640

ADOPT: 309-088-0115

RULE SUMMARY: Adopt Rule to implement community consultations due to HB 2420.

CHANGES TO RULE:

309-088-0115

Definitions

(1) "Authority" means the Oregon Health Authority.¶

(2) "Behavioral Health Treatment" means treatment for mental health, substance use disorder, and problem gambling.¶

(3) "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.¶

(4) "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.¶

(5) "CMHP Director" means the director of a CMHP, or designee, who operates or contracts for all services under contract with the Authority.¶

(6) "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 309-090.¶

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

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

(9) "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.¶

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

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

(12) "Services" 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; and¶

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

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

(14) "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..¶

(15) "Supervision" means monitoring options based upon the defendant's risk factors including but not be limited to recognizance release, release to family members or other third parties, substance use testing, appointments

with providers, random home visits, court ordered participation with services, reports to the court, or other conditions determined by the court.

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

Statutory/Other Authority: ORS 413.042, ORS 430.640

Statutes/Other Implemented: ORS 430.640

ADOPT: 309-088-0125

RULE SUMMARY: Adopt rule to implement community consultations due to HB 2420.

CHANGES TO RULE:

309-088-0125

CMHP Responsibilities

- (1) When the court has reason to doubt a defendant's fitness to proceed by reason of incapacity, the court shall order a CMHP director to consult with the defendant in order to determine whether services and supervision necessary to safely restore the defendant's fitness to proceed are available in the community. ¶
- (2) 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 consultation. ¶
- (3) Initial consultation must occur through an in-person meeting, and any follow-up consultations may occur through teleconference or video conference. ¶
- (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 restore the defendant's fitness to proceed are available in the community; ¶
 - (c) Submit to the court a findings report describing the outcome of the consultation regarding whether services and supervision necessary to safely restore the defendant's fitness to proceed are available in the community. The findings report must be completed using the "Consultation Report Template" available at <http://www.oregon.gov/oha/OSH/LEGAL/Pages/information-mental-health-providers.aspx>. ¶
- (5) The CMHP director must 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 must occur and the findings report must 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, or there are concerns about whether the defendant may continue to be safely restored in the community: ¶
 - (a) Nothing in this rule prevents the court from authorizing the CMHP to conduct additional consultations and submitting a new findings report to the court; and ¶
 - (b) The court may later order that the defendant be committed 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 may later order that the defendant participate in services and supervision in the community. ¶
- (9) Each CMHP director shall provide the Authority with a quarterly report outlining the following information for each consultation: ¶
 - (a) Defendant's name: ¶
 - (b) Gender: ¶
 - (c) Date of birth: ¶
 - (d) Electronic Health Record identification number or MOTS identification number: ¶
 - (e) SID number: ¶
 - (f) Consultation referral date: ¶
 - (g) Consultation face-to-face date: ¶
 - (h) Date the findings report was provided to the court: ¶
 - (i) Recommendation from the findings report provided to the court; and ¶
 - (j) The court's determination on defendant's placement.

Statutory/Other Authority: ORS 413.042, ORS 430.640

Statutes/Other Implemented: ORS 430.630, ORS 430.640

ADOPT: 309-088-0135

RULE SUMMARY: Adopt rule to implement community consultations due to HB 2420.

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 must 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) Nothing in this rule prevents the Court from authorizing the CMHP to conduct additional consultations and submitting a new findings report to the Court.¶

(4) Nothing in this section prevents the committing Court from vacating the order of commitment under ORS 161.370(2)(a) and using 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, ORS 161.365

Statutes/Other Implemented: ORS 161.365, ORS 161.370, ORS 161.360