



Sept. 16, 2022

## Mosman Ruling Frequently Asked Questions

At a hearing on August 29, 2022, Federal District Court Judge Michael Mosman issued a ruling intended to bring OSH into compliance with the Mink Order, which requires OSH to admit and assist patients for competence restoration within seven days. The order was sought by Disability Rights Oregon (DRO) and Metropolitan Public Defender (MPD) and is designed to reduce time to admission for people waiting for hospital care while in jail by: (1) prioritizing forensic admissions until the hospital reaches compliance with the Mink order, and (2) limiting the length of restoration in alignment with national trends.

Below is a list of frequently asked questions related to the ruling. This includes questions asked during a virtual townhall held on September 6, 2022, by Oregon Health Authority (OHA) with Disability Rights Oregon (DRO) and Metropolitan Public Defender (MPD) during OHA's regularly scheduled Behavioral Health stakeholder meeting.

### 1. What is changing for aid and assist patients charged with misdemeanors?

The new federal court order states that for aid and assist patients whose most serious charge is a misdemeanor, the maximum duration of commitment at OSH is the maximum permissible sentence for the underlying offense or 90 days – whichever is shorter.

Before the new federal court order, patients under aid and assist orders could remain at OSH for three years or the maximum sentence the court could have imposed if the defendant had been convicted – whichever is shorter.

Before the court order and under the court order, OSH may discharge aid and assist patients sooner when they are determined to be either “able” or “never able” to aid and assist in their own defense, or if the court places them on community restoration.

### 2. What about aid and assist patients charged with felonies?

For aid and assist patients whose most serious charge is a felony, the maximum duration of commitment for restoration is 6 months, unless the felony meets the definition of a “violent felony” under ORS 137.700(2) in which case the maximum duration of commitment for restoration shall be one year.

Before the ruling, patients under aid and assist orders could stay for up to three years, or the amount of time equal to the maximum sentence the court could have imposed if the defendant had been convicted – whichever is shorter.

Before the court order and under the court order, OSH may discharge aid and assist patients sooner when they are determined to be either “able” or “never able” to aid and assist in their own defense, or if the court places them on community restoration.

### **3. Is OHA counting days spent in jail pre-commitment against the time limits under the Order and not just after the aid and assist order is signed?**

The lengths of inpatient restoration at OSH set out in the federal order include only the time that the person is at OSH.

### **4. What about patients who are at OSH on multiple .370 orders?**

The patient’s most serious charge determines the patient’s stay limit.

### **5. How many people will be discharged because of the new limits?**

At the time of the federal court order, approximately 120 patients were eligible for discharge and a plan was developed to stagger discharges over several months to give counties at least 30-days’ notice of each patient’s discharge, balancing severity of charges with the burden to the community system. The first round of notices went out to counties or jurisdictions on September 12, 2022.

From August 2021 through July 2022, 68.8% of OSH’s aid and assist patients discharged before reaching the new court-ordered time limits. Specifically, 74.1% of patients charged with non-violent felonies discharged before reaching 180 days, 85.4% of patients charged with violent felonies discharged before reaching 365 days, and 52.5% of patients charged with misdemeanors discharged before 90 days.

Thus, because approximately 70% of OSH’s aid and assist patients already discharge before the new court ordered time frames, the order is expected to impact approximately 30% of aid and assist patient discharges.

### **6. When did the ruling go into effect?**

The Federal Court Order was signed on Sept. 1, 2022. OSH began giving counties 30-day notices on September 12, 2022, to prepare for the transfer of patients.

### **7. How long is the order in place?**

The order states that it “shall terminate upon the Neutral Expert reporting to the Court that OSH/OHA has timely admitted A&A and GEI patients for at least three consecutive months, and that the termination of this Order would not cause the Defendants to fall back out of compliance. For purposes of this Order ‘timely admission’ means within seven days of a State Court order delivered to OSH ordering that the patient be admitted.”

### **8. Does OHA have any plan to appeal the ruling?**

OHA/OSH does not have a plan to appeal the ruling.

### **9. Why doesn’t the court order allow for case-by-case exceptions?**

While the Order does not explicitly allow for exceptions to the time limits, the committing circuit court has options such as committing the person pursuant to ORS 426.701 if a person meets the criteria under ORS 426.701 (commitment of extremely dangerous persons). Additionally, the court may initiate

civil commitment proceedings which can also commit a person for an additional 180 days (or more, if recommitted). Thus, there are mechanisms in place for people who have more serious charges, or who are a danger to themselves or others, to be addressed appropriately. See also Dr. Pinals' June 5, 2022, report concerning other states' maximum lengths of inpatient restoration.

**10. It seems that this will lead to more patients found 'never able,' and civilly committed as an "Extremely Dangerous Person" under ORS 426.701. This means they will likely still be committed to OSH, but with even more open hospitalization timelines. Thoughts on this outcome?**

ORS 426.701 criteria are fairly narrow; most aid and assist patients will not fall within its parameters. OHA/OSH will closely monitor the numbers of these types of commitments as well as the number of "never able" findings, in order to determine if changes need to be sought to the court order, statutes, or processes.

**11. Will discharged patients be returned to their originating county?**

Patients that meet their restoration limits as a result of this order will be discharged to the county that committed them to OSH – meaning the county that charged them with crimes.

**12. Why are the number of releases for certain counties for October presented in a slide on Sept. 6, different than the 30-day notices that were recently sent out for the October discharges?**

These lists are dynamic and change from day to day. Those planned for discharges in October may be discharged early under normal statutory avenues (e.g., able finding, community restoration under ORS 161.371). This might move someone lower down on the list to the October discharges.

**13. Where will a patient be released if their committing county does not have any secure residential treatment facility (SRTF) capacity?**

Not every person who is appropriate for community restoration requires an SRTF level of care. If, upon return to the committing county, the court determines that the person is still unfit but restorable in a community restoration placement, and an SRTF is the appropriate level of care, but there is not an SRTF bed available, the court may determine the appropriate action under ORS 161.370(2)(c): Place the person in community restoration, with the CMHPs locating the most appropriate placement and, if necessary, wrap-around supports; initiate civil commitment; appoint a guardian; or dismiss the charges. This is the same process that occurred under ORS 161.370 and .371 when someone reached end of jurisdiction and still required a locked facility. If the District Attorney determines that the person fits the criteria for an extremely dangerous person commitment under ORS 426.701, they may also petition for that commitment.

**14. Will OSH discharge patients to the street?**

OSH will continue its practice of discharging persons back to the committing county. The reason the person is returned to the county is because the court will still need to make findings under ORS 161.370(2) for those who have reached the end of the inpatient restoration period at OSH, and ORS 161.371(3) and (4) for persons whom OSH has determined are "ready to place" and no longer

need a hospital level of care. If the person is discharged based solely on the end of the length of inpatient restoration set out in the federal order, the court will still need to follow ORS 161.370(2)(c) and determine whether the person should be placed on community restoration, civilly committed, appointed a guardian, or that the case should be dismissed – except that pursuant to the federal order, it may not recommit the person under that statute.

### **15. Will there be deferral or dismissal of criminal charges at end of jurisdiction?**

The court that committed the person to OSH will decide how to proceed. The court's options include dismissal of charges, but that is not required.

### **16. If someone reaches the end of jurisdiction under the order, but is too dangerous to be released to the community, will OHA make treatment available in the jails?**

OHA/OSH is not providing treatment in jails at this time.

### **17. What is the notification process? What is the patient's disposition? Who receives the notification?**

OSH will electronically file a notification letter in the Oregon Judicial Department's electronic filing service 30 days before the required discharge date. If the defense attorney and deputy district attorney are attached to the case electronically, they will automatically receive the e-filing at the same time as the court. OSH will email the notification letter to the county mental health office when it e-files the notification with the court. OSH will email municipal courts 30 days before the required discharge date, because they are not part of the Judicial Department's electronic filing service.

### **18. Does OHA plan to notify victims of the pending discharges so that they can safety-plan?**

OHA defers to the Oregon Judicial Department regarding its procedures. Under current law (ORS 161.371(5)), OSH is required to notify the committing court of the defendant's impending discharge 30 days before the date on which OSH is required to discharge the defendant. Under Judge Mosman's order, OSH will continue to provide 30-days advance notice to the committing court, consistent with the new timeframes. Victim notification is not part OSH's statutory obligations or process. OSH cannot legally provide information about its patients unless permitted or required by law.

### **19. When in the process are the District Attorneys notified of who (by name) will be released?**

OSH is required to notify the committing court of the defendant's impending discharge 30 days before the date on which OSH is required to discharge the defendant. This notification is filed in e-court, which notifies the parties of the impending discharge at least 30 days prior to discharge. Under Judge Mosman's order, OSH will continue to provide 30-days advance notice to the committing court, consistent with the new timeframes.

If the District Attorney's office is properly attached to the defendant's case in the Oregon Judicial Department's e-filing system, that office will receive notice at the same time as the court, when OSH e-files the notice.

## **20. Can a person be found “able” or “never able” to aid and assist in their own defense after the notification is sent?**

Yes, if an evaluation is completed after the notification is sent. This will depend upon whether their mental health has substantially changed since they were last evaluated.

## **21. When people are discharged, will they come with a “never able” or “able” finding? Will you discharge persons with a “not able” finding? Can a person being discharged be placed on community restoration?**

When the person is committed to OSH under ORS 161.370, they are evaluated by an OSH evaluator. That evaluation is not altered by the federal order. In other words, the evaluator will still opine that the person is able, not able, never able or never able without medications. That remains unchanged. As such, the court may order the person to community restoration if it makes appropriate findings. Every aid and assist patient discharged pursuant to the federal court order will have been evaluated at least once before they are discharged.

## **22. What will happen to clients who are not stable when the clock expires?**

The same process will be followed that occurred prior to the federal court order. When a person reaches their maximum length of inpatient restoration at OSH pursuant to the federal order, they are returned to the committing court. The court then makes a determination under ORS 161.370(2)(c), which can include initiation of civil commitment where the person poses a risk to themselves or others or is unable to provide for their own basic needs, or the court may appoint a guardian who may also assist with placement and care. The court may also place the person in community restoration with wrap-around supports. Finally, the court may dismiss the charges if it finds this is in the interest of justice. See ORS 161.370(2). A remaining option is available for District Attorneys who have determined that the person meets extremely dangerous person criteria pursuant to ORS 426.701. If they make this determination, they can file a petition for an Extremely Dangerous Person (EDP) commitment.

## **23. Will the changes result in some individuals who frequently go through competency restoration services to return to OSH more often?**

OHA/OSH continuously monitors recidivism and will be aware of any increase or decrease in recidivism based upon Judge Mosman’s order.

## **24. If someone is released and placed on community restoration and ends up needing to go back up again to a higher level of care does the clock restart?**

No. The federal court order limits the maximum lengths of inpatient restoration at OSH to 90 days (misdemeanors), 6 months (non-BM 11 felonies), and 1 year (B M11 felonies). Thus, after that length of inpatient restoration at OSH has run, the court may not recommit the person to OSH. Instead, the court could place the person in a higher level of community placement. For instance, if the person was in the community at home or at a residential treatment home but needed a higher level of care, the court could place the person at an SRTF.



## **25. What happens when the court receives an evaluation that the person is restorable after the length of the stay has run its course?**

The court may order the person to community restoration.

The federal order does impact the timing for “Ready to Place” (RTP) letters and the RTP process outlined in ORS 161.371 still applies. Under that process, OSH files a notice that the person no longer needs a hospital level of care and provides recommendations regarding the type of appropriate community restoration (LOCUS score). Under the provisions of ORS 161.371, upon notice, the court orders the county mental health program to conduct an evaluation, which must be filed with the court within 5 days. The court then is required to have a hearing within 10 days to determine the appropriate action – community restoration placement, initiation of civil commitment or guardianship, or dismissal of charges. The new federal order does not impact this process – except if the person’s commitment is about to end based on the federal order (for instance, the person is charged with misdemeanors and is at day 60). Then, the court would address both the RTP notice and the end of commitment issue under the federal order.

## **26. What consideration is given to differing conditions rather than the court ordered timelines?**

The timeframes included in Judge Mosman’s ruling are based on national data and clinical averages for restoration timelines. The ruling does not mean that if someone needs treatment that they will not receive it. The ruling focuses on pre-trial defendants.

## **27. Will OSH be able to complete a START risk assessment or something similar in order to provide clinical programs with a picture of the client’s clinical and safety risk factors?**

OSH will not be completing STARTs for aid and assist patients, but OSH will continue to work collaboratively with courts and counties to provide clinical and risk information.

## **28. May a court hold a discharged patient in custody with a hearing every seven days awaiting community placement?**

OSH defers to the Oregon Judicial Department regarding its procedures. Courts will still need to determine whether the person should be placed in community restoration, or whether civil commitment or guardianship should be initiated, or whether the charges should be dismissed. The federal order does not indicate what the state court procedures should be in determining the appropriate action under ORS 161.370(2), other than setting out the maximum length of inpatient restoration at OSH.

## **29. There are many patients 65 and older with medical complexity, neurocognitive impairment, inability to care for themselves, and no resources at end of jurisdiction (EOJ): is there a plan to avoid return to the streets?**

CMHPs and CCOs will continue to be responsible for locating and connecting appropriate supports for individuals in the community. There may be additional resources through Aging and Persons with Disabilities and/or the Office of Developmental Disability Services.

### **30. Does the order speak to those who have bail set at the time of discharge?**

#### **Will people who are not restored within the relevant time frame be held in custody?**

The federal order does not address bail or custody. OSH defers to the Oregon Judicial Department regarding its procedures in determining whether the person should be placed in community restoration, or whether civil commitment or guardianship should be initiated, or whether the charges should be dismissed. The federal order does not indicate what the state court procedures should be in determining the appropriate action under ORS 161.370(2), other than setting out the maximum length of inpatient restoration at OSH.

### **31. Defendants found unable to aid and assist in their own defense are on pre-trial release, correct? So, isn't the ball back in the circuit court hands on what happens to the patient?**

OSH defers to the Oregon Judicial Department regarding its procedures in determining whether the person should be placed in community restoration, or whether civil commitment or guardianship should be initiated, or whether the charges should be dismissed. The federal order does not indicate what the state court procedures should be in determining the appropriate action under ORS 161.370(2), other than setting out the maximum length of inpatient restoration at OSH.

### **32. If an individual charged with a Ballot Measure 11 crime is discharged, will their charges be dismissed similar to a never able finding, or will they be ordered to participate in community restoration?**

The person is discharged back to the committing court, where the court determines under ORS 161.370(2)(c) what the appropriate action is: community restoration, or whether civil commitment or guardianship should be initiated, or whether the charges should be dismissed. Of course, if the prosecuting attorney has assessed that the person meets criteria for commitment of an extremely dangerous person under ORS 426.701, the attorney may file a petition for this type of commitment. The federal order does not indicate what the state court procedures should be in determining the appropriate action under ORS 161.370(2)(c), other than setting out the maximum length of inpatient restoration at OSH.

### **33. Does OHA have any plans to assist with community-based evaluations to determine whether patients discharged to community restoration are being restored?**

OHA has delegated to and contracted with Community Mental Health Programs (CMHP) the coordination of periodic assessments of capacity to aid and assist with the appropriate court. In addition, OSH's Forensic Evaluation Service (FES) assists with community evaluations by conducting hundreds of community restoration evaluations every year due to court orders requiring FES to conduct community restoration evaluations.

### **34. Will OHA offer any form of indemnification for the potential liability if a person released as a part of this process causes harm in the community?**

No. OHA/OSH continue to work with CMHPs to ensure appropriate care is provided to individuals discharged from OSH. Also, OHA has given CMHPs additional funds to purchase gap insurance.

### **35. Does this mean there will be more availability for civil commit patients?**

No. The court order states that OSH “shall not admit persons civilly committed unless they meet the criteria in the civil admission expedited admissions policy.” OSH must comply with this order.

If there are open OSH beds available in the future, the federal court order would need to be modified in order to admit people under civil commitment.

### **36. Are there any talks about increasing the number of beds at OSH? Is that a possibility in the future?**

The Oregon State Legislature recently approved funding to staff the remaining two vacant OSH units on the OSH Junction City campus. Both units are now open. OSH no longer has any vacant units on either campus. The Legislature would have to approve the building of another hospital to create more hospital beds. We are not aware of any talks to build another hospital.

### **37. When will the additional secure residential treatment facilities (SRTF) Cottage beds at the Junction City Campus be opened?**

Columbia Care will open the first SRTF cottage soon and the second SRTF cottage will open in the following months.

### **38. Do OSH’s SRTFs fall under these maximum stay limits?**

The three SRTF units on the OSH Salem campus treat patients under ORS 161.370 that no longer meet HLOC criteria, and those units fall under the new maximum stay limits. The OSH Junction City campus does not provide treatment for patients under ORS 161.370.

### **39. Will the State provide more standardized guidelines about residential treatment beds?**

Of the residential beds in Oregon, the state runs about 15% of them. Private providers have the authority to turn away patients, and not enough of the residential providers have been able to structure themselves to serve and assist patients. We are actively seeking providers willing to serve this population through the current housing grant application process (RFGA.) Funding residential programs specific to this population is also complicated by short length of stays and variability in medical necessity. For example, a court may order someone to a level of care that isn’t deemed medically necessary by OHA’s Independent and Qualified Agent (IQA). We have addressed this issue in the new RFGA.

### **40. Does this order change the assessment of needed beds in the community?**

The assessment of bed need was an estimate and remains an unchanged goal.

### **41. Does OHA have plans to seek additional funding from the Legislature in 2023 for community restoration programs and to expand community services?**

OHA has plans to seek additional funding from the 2023 legislature.



**42. Is there a plan for equitable distribution of the funds between metropolitan and rural areas – where there are typically limited resources?**

Yes, the Aid and Assist RFA looked at rural communities and increased funding to meet community needs.

**43. If OSH has said that a patient cannot be restored unless s(h)e is involuntarily medicated, will OSH keep the patient if the Sell (involuntary medication) hearing results in court ordered medications?**

OSH will follow the federal order regarding length of inpatient restoration at OSH. If the court issues a “Sell” order requiring that the patient be medicated, OSH will continue treating the person for the length of inpatient restoration permitted in the federal court order (1 year for BM11s, 6 months for non-BM11 felonies, and 90 days for misdemeanors).