

Promising Practices for Serving Persons with Mental Illness in the Right Place under the Right Legal Jurisdiction



Oregon
Health
Authority



Disclaimer

These slides are not legal advice and are not an authoritative summary of the laws.

Attendees are encouraged to review the applicable statutes and legislative bills in their entirety.



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The Oregon State Hospital: Salem



The Oregon State Hospital: Junction City



OSH Census by Commitment Type (As of 7/26/2021)

Commitment Type / Legal Status	#	%
Aid & Assist	370	60.2%
Court Order (161.370)	370	60.2%
Guilty Except for Insanity (GEI)	232	37.7%
GEI - T1 (161.327)	83	13.5%
GEI - T2 (161.327)	64	10.4%
Civil Commitment - PSRB (CCP) (426.701)	11	1.8%
Civil Commitment - PSRB (CCP) (426.702)	7	1.1%
Revocation of Conditional Release - T1 (161.336)	48	7.8%
Revocation of Conditional Release - T2 (161.336)	17	2.8%
Juvenile PSRB (419C.530)	2	0.3%
Civil	13	2.1%
Civil Commitment (426.130)	9	1.5%
Voluntary by Guardian (426.220)	4	0.7%
Total	615	100.0%

The Neuropsychiatric/Geriatric units include a mix of the commitment types listed above. These units housed 64 patients on 7/26/21.



OSH Aid & Assist Census by County (As of 7/24/2021)

ORS 161.370 Patients at OSH on 7/24/21			
County	Count of Patients	Population (2015 estimates)	Patients per 100,000 Population
Multnomah	61	768,418	7.94
Washington	48	556,210	8.63
Marion	44	323,259	13.61
Lane	36	357,060	10.08
Jackson	30	208,363	14.40
Clackamas	23	389,438	5.91
Douglas	16	107,194	14.93
Coos	13	62,775	20.71
Deschutes	11	166,622	6.60
Lincoln	11	46,347	23.73
Linn	9	118,971	7.56
Benton	7	86,495	8.09
Clatsop	7	37,382	18.73
Klamath	7	65,972	10.61
Josephine	6	83,409	7.19
Polk	6	77,264	7.77
Umatilla	6	76,738	7.82
Yamhill	5	101,119	4.94
Columbia	4	49,389	8.10
Curry	4	22,338	17.91
Tillamook	4	25,430	15.73
Hood River	3	22,749	13.19
Malheur	2	30,551	6.55
Wasco	2	25,492	7.85
Jefferson	1	22,061	4.53
Morrow	1	11,204	8.93
Sherman	1	1,795	55.71
Baker		16,052	0.00
Crook		20,956	0.00
Gilliam		1,883	0.00
Grant		7,276	0.00
Harney		7,229	0.00
Lake		7,842	0.00
Union		25,745	0.00
Wallowa		6,857	0.00
Wheeler		1,348	0.00
Total	368	3,939,233	9.34

Percent change in census from 1/1/12 to 7/1/21

- Aid & Assist (ORS 161.370) **+227%**
 - From 1/1/12 through 6/30/21

37.3% of all new Aid & Assist admissions were patients charged with crimes no higher than **misdemeanors**

- Guilty Except for Insanity **-22%**



2021 Legislative Session

- To address the census crisis at OSH and problems with the aid and assist statutes, stakeholders in the Aid and Assist Workgroup collaborated on Legislative Concept 489 (2020), which became SB 295.
- The Oregon Judicial Department submitted Legislative Concept 489 representing the consensus of the Aid and Assist Workgroup.
- SB 295 reorganizes and amends the aid and assist statutes, ORS 161.365 and ORS 161.370.
- SB 295 included an emergency clause, which made it effective when the Governor signed it on June 23, 2021.

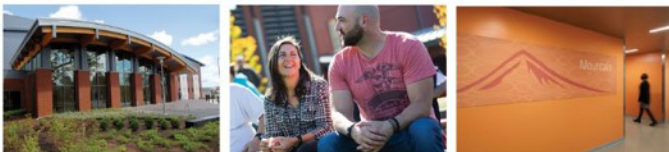
Objectives of the legislation

SB 295 focuses on:

- Reorganizing and Restructuring of statutes related to fitness to proceed
- Defining terms, such as “hospital level of care” & “public safety concerns”.
- Clarifying roles (*i.e.* courts, forensic evaluators, community mental health programs (CMHP))
- Actively engaging the community mental health program (CMHP)
- Collaboration of all parties
- Consideration of Actions other than hospital commitment

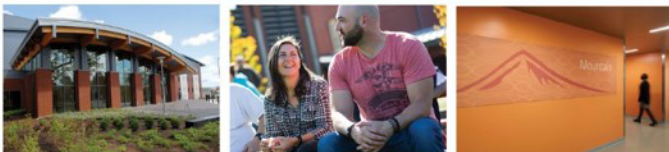
Hospitalization: Not Always Better

- Someone with mental illness at OSH who could be better served in the community may lose:
 - Housing
 - Support (family, friends, pets)
 - Financial benefits
 - School enrollment
 - Employment
 - Mental health care and other therapeutic support
- **Sometimes OSH cannot medicate unfit defendants**



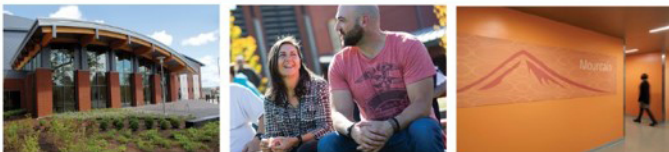
Restorative services in community?

- When a defendant is unable to aid and assist in their own defense (ORS 161.370), it is essential for attorneys and judges to communicate with community mental health to find out whether the defendant may be restored in the community
- If the community can support a particular client, the court may order the client directly to community restoration and avoid jail and the hospital



Potential Restoration Services

- Mental Health Treatment
- Substance Use Treatment
- Assertive Community Treatment (ACT)
- Forensic Assertive Community Treatment (FACT)
- Housing
- Medication
- Skills Training
- Peer Supports



Actions Other Than OSH Commitment

When a defendant is found unable to aid and assist pursuant to ORS 161.370, the court must order an appropriate “action” based upon:

- the primary and secondary release criteria,
- the least restrictive option appropriate for the defendant,
- the needs of the defendant and
- the interests of justice.

See ORS 161.370 as amended by SB 295 (2021) (Section 7).

Actions Other Than OSH Commitment

Actions listed in ORS 161.370 include, *but are not limited to*:

- Commitment for defendant to gain or regain fitness to proceed
- **An order to engage in community restoration services**
- Commencement of a **civil commitment** proceeding
- Commencement of a **protective proceeding** (such as guardianship)
- Dismissal of charges

See ORS 161.370 as amended by SB 295 (2021) (Section 7).

Civil Commitments – ORS 426 and OAR 309-033

A Notice of Mental Illness may be received by the court in the following ways:

- Initiating a Civil Commitment Investigation
- Public Petition or sometimes called a Two-Party Petition – when the allegedly mentally ill person (AMIP) resides in the community
- Hospital Hold, performed by a Licensed Independent Practitioner (LIP) – where the AMIP is admitted to a level 1 facility under a physician’s determination of an emergency due to a mental disorder
- Director’s Hold, in conjunction with an LIP to a non-hospital facility. The AMIP is admitted to a level 1 non-hospital facility under a physician’s agreement with a CMHP Director/Designee determination of an emergency due to a mental disorder.
- Any Magistrate, or Warrant of Detention – Based upon the recommendation of the CMHP or magistrate’s findings during other court processes, the AMIP is taken into custody and transported to a hospital for evaluation by a LIP.

Actions Other Than OSH Commitment

Civil Commitment – Implementation Clarifications

Civil commitment processes are independent of community resources

Commitment, recommitment, conditional release or trial visit determinations or revocations

- **Do not rely on medical necessity criteria** for access to
 - Community psychiatric hospitals
 - Oregon State Hospital access or waitlist criteria
 - Residential treatment or adult foster home availability, local or state-wide
 - Community service availability such as outpatient, case management, intensive services, Assertive Community Treatment (ACT), mobile crisis, etc

Community resource delivery and development is the responsibility of

- CCOs – if the person is a CCO member by contract with OHA
- CMHPs – if the person has no insurance by contract with OHA

Aid and Assist (“.370”) Promising Practices to Ensure Client is Served in the Right Place Under the Right Jurisdiction:

- Dedicated Deputy District Attorney to oversee Aid and Assist cases
- Dedicated judge to oversee Aid and Assist cases
- Dedicated docket for Aid and Assist cases, with community stakeholders present & engaged
- Dedicated staff to provide restoration services and case management throughout the Fitness to Proceed process
- Partnerships with local and regional service providers
- Collaboration between CMHP, judiciary, DA’s office, defense bar, and others as needed

Aid and Assist (“370”) Promising Practices to Ensure Client is Served in the Right Place Under the Right Jurisdiction (continued):

- Development of a process map between CMHP, judiciary, DA’s office, and defense bar around Aid and Assist roles, responsibilities, and timelines
- Sequential Intercept Model (SIM) mapping and adoption
- Mobile Crisis Units
- CMHP representation at court hearings
- Mental Health Crisis Center

Aid and Assist (“.370”) Promising Practices to Ensure Client is Served in the Right Place Under the Right Jurisdiction (continued):

- Contracted Certified Forensic Evaluators (CFE)
- Coordination with the Oregon State Hospital around admissions, discharges, and transition planning
- Development of housing resources at various levels of care with appropriate wraparound services
- Use of videoconference, when appropriate, for CFE Evaluations

SB 295 Definition Changes

“Public safety concerns” means that the defendant presents a risk to self or to the public if not hospitalized or in custody.

The term **“dangerousness”** has been removed from statute.

“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 **supervision by pretrial services**.

See ORS 161.370 as amended by SB 295 (2021) (Section 2).

Definition Changes (continued)

“Hospital level of care” means that a defendant requires the type of care provided by an inpatient hospital in order to gain or regain fitness to proceed.

- **Note that a Hospital Level of Care recommendation is required before sending someone to OSH.**

Recommendation of Hospital Level of Care

A recommendation by a certified evaluator that a defendant requires a HLOC is based on the defendant's acuity of symptoms, based on:

- Current diagnosis and symptomology;
- Ability to engage in treatment;
- Present safety concerns; **and**
- Other pertinent information known to the evaluator.

The evaluator may defer to the treatment team for a HLOC recommendation.

See ORS 161.370 as amended by SB 295 (2021) (Section 3).

Determination of Community Restoration Services

Determination by a CMHP Director or designee that appropriate community restoration services are not present and available in the community **must**:

- Include information concerning the specific services needed in the community; **and**
- Specify the necessary services that are not present and available in the community

See ORS 161.370 as amended by SB 295 (2021) (Section 3).

Determination of Community Restoration Services

If the defendant is charged with any of the following offenses, the court is not required to, but may in its discretion, order a county mental health consultation:

- Aggravated murder;
- Murder in any degree;
- Attempted murder;
- Manslaughter;
- Aggravated vehicular homicide;
- Arson in the first degree;
- Assault in the first or second degree;
- Kidnapping in the first or second degree;
- Rape in the first degree;
- Sodomy in the first degree;
- Unlawful sexual penetration in the first degree;
- Robbery in the first or second degree.

See SB 295 (2021) Section 6.

Changes to ORS 161.365

Examination of Defendant

When a court doubts a defendant's fitness to proceed under ORS 161.360:

- The court may call any witness to assist it in reaching its decision.
- Unless the defendant is charged with one of the crimes listed in the previous slide, the court must order a CMHP director or designee to consult with the defendant and any local entity that would be responsible for providing community restoration services and **determine whether appropriate community restoration services are present and available in the community.**

See SB 295 (2021) Section 6.

Changes to ORS 161.365 Examination of Defendant

ORS 161.365(7)(a) adds that a **municipal court shall order the city to pay** for a court ordered psychiatric or psychological examination upon motion of the court or a financially eligible defendant.

Reports or documents submitted to the court by a certified evaluator, CMHP director or designee, or OSH are **confidential**.

The court shall ensure that an order entered under ORS 161.370 is **provided within 1 judicial day** to any entity ordered to provide restoration services.

See ORS 161.370 as amended by SB 295 (2021) (Section 3).

*Note that court orders involving OSH should be sent to **OSH.courtorders@dhsoha.state.or.us**

Changes to ORS 161.370(2)

Removes references to “supervising” and “services and supervision...” and replaces them with “**treating**” and “**appropriate community restoration services are present and available**”.

If the parties agree to the appropriate action, the court may enter an order after making all the finding required by law.

If the parties do not agree to the appropriate action, the court and parties shall **have a hearing** to consider the appropriate action and make a determination.

Changes to ORS 161.370(2)

If the court determines that the appropriate action in the case is an order for the defendant to engage in community restoration services, but **the defendant has a pending criminal case, warrant or hold in one or more other jurisdictions**, the other jurisdictions shall, **within two judicial days of becoming aware of the proceeding under this section, communicate with the court and the other jurisdictions**, if applicable, to develop a plan to address the interests of all jurisdictions in the defendant in a timely manner.

See SB 295 (2021) Section 7.

Changes to ORS 161.370(3)

If the most serious offense is a felony, the court shall commit defendant to OSH if:

- Defendant requires a HLOC due to public safety concerns or acuity of symptoms; **AND**
- The appropriate community restoration services are not present and available in the community.

If the court does not order commitment, the court shall proceed in accordance with ORS 161.370(2)(c) as amended by SB 295 (2021) Section 7 to determine and order an appropriate action.

Changes to ORS 161.370(4)

If the most serious offense is a misdemeanor, the court may **not** commit defendant to OSH unless the court:

- Receives a HLOC recommendation from a certified evaluator; **AND**
- Receives a recommendation from a CMHP director or designee that appropriate community restoration services are not present and available in the community; **OR**
- Determines that the defendant requires a HLOC after making written findings regarding:
 - Defendant requiring a HLOC due to the acuity of the symptoms of the defendant's qualifying mental disorder,
 - public safety concerns,
 - And the appropriate community restoration services not present and available in the community.

See SB 295 (2021) Section 7.

Changes to ORS 161.370(6)

If the court does not order commitment under ORS 161.370(3) or (4), is precluded by (5) or determines other care would best suit the defendant and the community, the court will release defendant pursuant to an order that the defendant engage in community restoration services until the defendant has gained or regained fitness to proceed.

The court may not order the defendant to engage in community restoration services in another county (unless the services are a statewide resource such as a residential facility) without permission from the other county.

Changes to ORS 161.370(6)

The court may order a CMHP director to provide status reports to the court on defendant's progress in gaining or regaining fitness to proceed.

A CMHP director shall provide a status report if the defendant is not complying with court-ordered restoration services.

A CMHP director coordinating the defendant's treatment shall notify the court if the defendant gains or regains fitness to proceed.

- The notice will be filed with the court and may be filed electronically.
- The court clerk shall cause copies to be delivered to the DA and defense counsel

The court may put conditions it deems appropriate on a defendant's community release, such as requiring the defendant to report regularly for examination by OSH or a certified evaluator.

Changes to ORS 161.372 Involuntary Medication

If, while the defendant is at OSH **after commitment** under ORS 161.370, the superintendent determines that medication is the recommended treatment in order to allow the defendant to gain or regain fitness to proceed, the defendant is refusing to take the recommended medication and the defendant cannot be involuntarily medicated without a court order, the superintendent shall submit a report of the determination to the court.

Reports, motion and orders concerning the involuntary medication of a defendant are confidential and may be made available only to the specified entities in ORS 161.372(4)(a)(A)-(B) and 161.372(4)(c).

Resources: Community Mental Health Programs

- OAR 309-088-0125 requires CMHPs to submit reports within five days of OSH's (9)(b) notice.
- Courts may see a CMHP report even without a court order. (SB 24 requires that courts still order it.)
- Links to the new CMHP consult template and OARs are on the OSH website:

<https://www.oregon.gov/oha/OSH/LEGAL/Pages/information-mental-health-providers.aspx>

Resources

The OSH website provides resources such as:

- Order Templates (which will be updated soon with the OJD templates that OJD is developing)
- List of Certified Evaluators
- Legal Skills Curriculum

Resources: Administrative Rules

- [Addictions and Mental Health: Mental Health Evaluators](#) – OAR 309-090
- [Oregon State Hospital's Informed Consent](#) – OAR 309-114
- [Placement of Defendants Who Lack Fitness to Proceed](#) – OAR 309 -088
- [Psychiatric Security Review Board \(PSRB\)](#) – OAR 859

Resources

- Read SB 295 – Enrolled version:
<https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/SB295/Enrolled>
- The Oregon Center on Behavioral Health and Justice Integration:
<http://www.ocbhji.org/about/>
- DRO Website: <https://www.droregon.org/>
- DRO Aid and Assist video:
<https://www.youtube.com/watch?v=xfLfdU8Nu9s>

Questions

If you have any questions, please contact:

- **Oregon State Hospital Legal Affairs**
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- **Oregon Judicial Department**
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