

Report to the Colorado General Assembly

Legislative Oversight
Committee
Concerning the
Treatment of Persons
with Mental Illness in
the Criminal and
Juvenile Justice
Systems

Prepared by

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Legislative Oversight Committee Concerning the Treatment of Persons with Mental Illness in the Criminal and Juvenile Justice Systems

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January 2015

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January 2015

To Members of the Sixty-ninth General Assembly:

Submitted herewith is the final report of the Legislative Oversight Committee Concerning the Treatment of Persons with Mental Illness in the Criminal and Juvenile Justice Systems. This committee was created pursuant to Article 1.9 of Title 18, Colorado Revised Statutes. The purpose of this committee is to oversee an advisory task force that studies and makes recommendations concerning the treatment of persons with mental illness who are involved in the criminal and juvenile justice systems in Colorado.

At its meeting on October 15, 2014, the Legislative Council reviewed the report of this committee. A motion to forward this report and the bill therein for consideration in the 2015 session was approved.

Sincerely,

/s/ Representative Mark Ferrandino Chairman

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This report is also available on line at:

http://www.colorado.gov/lcs/MICJS

Committee Charge

Pursuant to Article 1.9 of Title 18, Colorado Revised Statutes, a legislative oversight committee and an advisory task force concerning the treatment of persons with mental illness in the criminal and juvenile justice systems are established.

History

The advisory task force and legislative oversight committee first met in the summer of 1999. In 2000, the task force and oversight committee were reauthorized, and the reestablished task force met on a monthly basis through June 2003. The General Assembly considered legislation to continue the study of the mentally ill in the justice system beyond the 2003 repeal date, but the bill failed. In FY 2003-04, the task force continued its meetings and discussion at the request of the oversight committee. The task force and oversight committee were reauthorized and reestablished in 2004 through the passage of Senate Bill 04-037 and again in 2009 with the passage of House Bill 09-1021. The oversight committee was subject to Senate Bill 10-213, which suspended interim activities during the 2010 interim. During the 2014 legislative session, the task force and legislative oversight committee were once again reauthorized and reestablished by Senate Bill 14-021. The committee and advisory task force are set to repeal on July 1, 2020.

General Charge

The committee is responsible for appointing a task force that represents all areas of the state and is diverse in ethnicity, culture, and gender. The task force is directed to examine the identification, diagnosis, and treatment of persons with mental illness who are involved in the criminal and juvenile justice systems, including the examination of liability, safety, and cost as they relate to these issues.

Advisory Task Force Charge

General Charge

The authorizing legislation directs the task force, after July 1, 2014, to consider, at a minimum, the following issues:

- housing for a person with mental illness after his or her release from the criminal and juvenile justice system;
- · medication consistency, delivery, and availability;
- best practices for suicide prevention, within and outside of correctional facilities;
- treatment of co-occurring disorders;
- awareness of and training for enhanced staff safety, including expanding training opportunities for providers; and
- enhanced data collection related to issues affecting persons with mental illness in the criminal and juvenile justice systems.



The legislation authorizes the task force to work with other task forces, committees, or organizations that are pursuing policy initiatives similar to those listed above. The task force is required to consider developing relationships with other groups to facilitate policy-making opportunities through collaborative efforts.

Recommendations and Reports

The task force is required to submit a report of its findings and recommendations to the legislative oversight committee annually by October 1. All legislative proposals of the task force must note the policy issues involved, the agencies responsible for implementing the changes, and the funding sources required for such implementation. The task force recommended one piece of legislation to the legislative oversight committee during the 2014 interim. The oversight committee is required to submit an annual report to the General Assembly by January 15 of each year regarding the recommended legislation resulting from the work of the task force.

Membership

Table 1 lists the members of the advisory task force and the agencies they represent. The advisory task force consists of 32 members, 4 of whom are appointed by the Chief Justice of the Colorado Supreme Court. The 28 remaining members are appointed by the chair and vice-chair of the legislative oversight committee.



Table 1 Advisory Task Force Members

State or Private Agency	Rep	resentative(s) and Affiliation(s)
Department of Public Safety (1)	Peggy Heil	Division of Criminal Justice
Department of Corrections (2)	Kerry Pruett	Mental Health Programs Administrator
	Walt Pesterfield	Division of Parole
Local Law Enforcement (2)	Rebecca Spiess	Undersheriff, Mesa County Sheriff's Office
	Clif Northam	Commander, El Paso County Sheriff's Office
Department of Human Services (5)	Marc Condojani	Division of Behavioral Health
	Ashley Tunstall	Division of Youth Corrections
	Melinda Cox	Division of Child Welfare
	Michele Manchester	Colorado Mental Health Institute at Pueblo
	Moe Keller	Mental Health Planning and Advisory Council
County Department of Social Services (1)	Susan Walton, chair	Park County Department of Human Services
Department of Education (1)	Michael Ramirez	Teaching and Learning Unit
State Attorney General's Office (1)	Janet Drake	Senior Assistant Attorney General
District Attorneys (1)	Dave Young	17th Judicial District Attorney's Office
Criminal Defense Bar (2)	Karen Knickerbocker	Office of the Colorado State Public Defender
	Gina Shimeall	18th Judicial District Mental Health Court
Practicing Mental Health Professionals (2)	Fernando Martinez	San Luis Valley Mental Health Center
	Lisa Thompson	Colorado Coalition for the Homeless
Community Mental Health Centers in Colorado (1)	Harriet Hall	Jefferson Center for Mental Health
Person with Knowledge of Public Benefits and Public Housing in Colorado (1)	Pat Coyle	Colorado Department of Local Affairs, Division of Housing
Colorado Department of Health Care Policy & Financing (1)	Camille Harding, co- chair	Clinical Services Office
Practicing Forensic Professional (1)	Richard Martinez, M.D.	Colorado Office of Behavioral Health/UCDSOM
Members of the Public (3)	Bethe Feltman	Member with a mental illness who has been involved in the Colorado criminal justice system
	Deirdre Parker	Parent of a child who has a mental illness and who has been involved in the Colorado criminal justice system
	Barbara Stephenson	Member with an adult family member who has a mental illness and who has been involved in the Colorado criminal justice system
Office of the Child's Representative (1)	Sheri Danz	Deputy Director
Office of the Alternate Defense Counsel (1)	Kathy McGuire	Private attorney
Colorado Department of Labor and Employment (1)	Patrick Teegarden	Director of Policy and Legislation
Judicial Branch (4)	Brenidy Rice	Division of Planning and Analysis
	Judge K.J. Moore	1st Judicial District
	Susan Colling	Juvenile Programs Coordinator, Probation Services
	Tobin Wright	Chief Probation Officer in the 16th Judicial District



Committee Activities

The legislative oversight committee met twice in 2014 to monitor and examine the work, findings, and recommendations of the task force. Specifically, the committee:

- made appointments to fill vacancies on the task force;
- heard a presentation on housing efforts throughout the state to assist people with mental illness who are involved in the criminal justice system; and
- · considered legislation recommended by the task force.

Housing Issues

At the September 12 meeting of the legislative oversight committee, Pat Coyle, director of the Division of Housing in the Department of Local Affairs and task force member, and Susan Walton, task force chair, presented on efforts to provide housing assistance to people with mental illness who are involved in the criminal justice system. Ms. Walton referenced the merger of the Division of Housing and the Division of Human Services in Boulder County. Mr. Coyle discussed the benefits that stable housing provides to an individual, including employment and education possibilities.

Mr. Coyle outlined the Colorado Second-Chance Act Housing and Reentry Program (C-SCHARP). He stated that the U.S. Department of Justice provided the Colorado Department of Local Affairs grants in 2010 and 2013 for C-SCHARP for intensive supportive services for previous offenders with co-occurring substance abuse and mental health disorders. He discussed how the Division of Housing partners with mental health providers, human services systems, and the parole system to provide supportive services to individuals so that landlords do not have to provide those services.

Mr. Coyle stated that felons can be housed in public housing, but federal law prohibits someone from living in public housing if he or she has been convicted of producing methamphetamines, arson, or certain sex offenses. Mr. Coyle said that local housing authorities can place additional restrictions on their properties. Mr. Coyle discussed housing options in rural areas, and referenced Southwest Transitions in Durango that provides transitional housing and services for homeless offenders on parole. He discussed connecting housing programs with job programs. Ms. Walton discussed expanding existing programs that are working, and possibly expanding budgets for these successful programs. Mr. Coyle referenced the existing General Fund funding for housing vouchers for individuals needing behavioral health services. Ms. Walton discussed using various moneys for housing individuals with mental illness who have been involved in the criminal justice system more effectively.

Advisory Task Force Activities

The task force met monthly in 2014. Each month the task force received updates from various task force members on the implementation of the Affordable Care Act, medication consistency efforts that are being led by the Behavioral Health Transformation Council, and the legislative session that included the status of Senate Bill 14-021 and House Bill 14-1025, which were bills proposed by the task force. The task force regularly discussed the following areas of study with which they are charged: the safety of staff who work with individuals with a mental



illness; housing; and data collection. Additionally, the task force heard presentations on information and data sharing, staff safety, innovative housing practices, and the jail-based behavioral health services program.

Information and Data Sharing

Enhanced data collection related to issues affecting persons with mental illness in the criminal and juvenile justice systems is one of the areas the task force is charged with studying. Throughout the year the task force heard a number of presentations concerning data and information sharing efforts by various agencies.

Colorado Children and Youth Information Sharing (CCYIS) Initiative. In January, Meg Williams of the Department of Public Safety presented on the Colorado Children and Youth Information Sharing (CCYIS) Initiative, which is a collaboration between the Department of Education, Department of Health Care Policy and Financing, Department of Human Services, Department of Public Health and Environment, Department of Public Safety, and Judicial Department. The original purpose of the CCYIS Initiative was to determine how different technology systems manage information on juveniles in the criminal justice system. The focus of the CCYIS Initiative shifted to whether the information being gathered is used legally, ethically, and efficiently. The CCYIS Initiative developed a consent form that is intended to become a standard for all agencies in the state. In addition, the CCYIS Initiative is cross-referencing other state databases to track specific cases of children through jurisdictions.

Health information exchange and health information technology. In October, Camille Harding from the Department of Health Care Policy and Financing, and Kate Kiefert, Colorado Health Implementation Coordinator in the Office of the Governor, presented on the health information exchange and health information technology. An integrated system to share offender management, parole management, and electronic health record data is currently being developed to enable more information sharing between agencies. This system would address three areas of need in the criminal justice and health care systems by providing a single view of a patient, sharing of formularies, and aligning price schedules.

Ms Harding presented data collected from the Department of Health Care Policy and Financing through the Colorado Opportunity Project, which is a partnership to analyze gaps and align data sources around various populations. The department worked with the Brookings Institute to identify outcome indicators. The presentation included data on prescription drug use of children under 18 and the teen birth rate in Colorado. Ms. Harding said that the Office of Behavioral Health in the Department of Human Services uses a different data set for performance measurements than the Department of Health Care Policy and Financing, but they are working to align these data sets.

Denver Crime Prevention and Control Commission. In October, Regina Huerter from the City and County of Denver gave a presentation to the task force entitled *Filling the Gaps: Developing a Community Crisis Continuum* (Addendum A). The presentation provided information on the history and work of the Denver Crime Prevention and Control Commission, which started in 2005. The commission is made up of several standing committees with many stakeholders. Beginning in 2006, the commission has used a data-guided approach to figure out gaps in services and develop and analyze evidence-based practices. Ms. Huerter provided information about the data collected in one month, which included how many people were in custody, how many are on Medicaid, and how many are on psychotropic medication.



Data matching project. In November, the task force heard a presentation from Peggy Heil of the Division of Criminal Justice in the Department of Public Safety about a data matching project that is being conducted in partnership with the Department of Public Safety, the Department of Health Care Policy and Financing, the Governor's Office, and Behavioral Health Transformation Council. For this effort, Ms. Heil has been gathering information about existing data sets. Ms. Heil referenced a report entitled Measuring Behavioral Health: Fulfilling Colorado's Commitment to Become the Healthiest State: A Report by the Colorado Cross-Agency Collaborative, which can be accessed at: http://www.cohealthinfo.com/wp-content/uploads/2014/08/CO-OPP_Behavioral_Health_report-Final-11_14_14.pdf The data matching project group is analyzing where information can be shared between agencies. The group's first task is to determine what information is being collected, and then it can address how to affect the continuity of care for persons with mental illness or drug use in the criminal justice system.

Jail Issues Related to the Safety of Staff who Work with Individuals with Mental Illness

Awareness of and training for enhanced staff safety is one of the issues the task force is charged with studying. The task force received regular updates on this issue from its members who are involved in law enforcement and also received a presentation on this issue from the Boulder County Sheriff's Department.

In August, Chief Bruce Haas of the Boulder County Sheriff's Department presented on staff safety in jail settings. He discussed the limited options available to law enforcement when encountering someone with a mental health issue. The options are usually either placement in a hospital or jail. According to Chief Haas, many law enforcement officers in Boulder have received crisis intervention training, and the Boulder County Sheriff's Department is also reviewing other training programs used in Arizona and Texas as possible models. Chief Haas briefed the task force on the booking and post-booking processes, which includes a mental health assessment. The Boulder County Sheriff's Department has collected data regarding people with mental illness who are jailed, including the length of time a person with mental health issues spends in jail versus those who are not diagnosed with a mental illness.

Chief Haas outlined challenges in housing persons with mental health issues within the jail, especially because of overcrowding issues. The Boulder County Sheriff's Department is studying the use of special housing units and has created a mental health team. Chief Haas discussed the continuity of care in place in Boulder County when individuals are released from jail. Chief Haas volunteered to provide data about diagnoses, clearances, suicide attempts, and competency evaluations to members of the MICJS Task Force.

Innovative Practices in Housing in Boulder County

Housing for a person with a mental illness after his or her release from the criminal or juvenile justice system is one of the issues the task force is charged with studying. In September, Frank Alexander, Director of the Boulder County Housing and Human Services Division, presented to the task force on innovative practices in housing in Boulder County. The Boulder human services agency and Boulder housing authority merged in 2009, and the merger was the first of its kind in the United States. The premise behind the merger was that multiple systems created a disconnected process for people to attain the services they need. The Boulder County Housing and Human Services Division studied a cross-section of the population and merged housing and human service functions with a focus on allocating housing resources in an integrative management fashion.



Mr. Alexander reviewed Boulder County's goals and implementation strategies to achieve common principles across systems and populations. He provided information about how the county's child welfare practices have reduced the out-of-home placement rate and also reduced the need for legal involvement for these families, thus allowing families to focus on prevention and move to self-sufficiency quicker. He discussed the tenant-based rental program in Boulder County, which is based on school districts.

Mr. Alexander noted that the use of General Fund resources is the best way to get started with this undertaking. He recommended against using federal funding for such a project, because it is not as flexible. Mr. Alexander recommended pursuing additional funding for the Division of Housing in the Department of Local Affairs. Pat Coyle from the Division of Housing in the Department of Local Affairs noted that the current housing market prevents people who have housing vouchers from finding available housing units. He said that the least costly programs are education programs for landlords to help eliminate their concerns. Mr. Coyle reiterated Mr. Alexander's assertions that landlords are an essential part of collaboration and that building housing for specific communities takes a lot of time and is extremely costly.

Jail-based Behavioral Health Services Program

In November, Jagruti Shah of the Office of Behavioral Health in the Department of Human Services presented on the jail-based behavioral health services (JBBS) program that is a result of the enactment of House Bill 10-1352. The goal of the JBBS program is to provide appropriate behavioral health services to inmates along with continuity of care within the community after an inmate is released from incarceration.

The JBBS program is in 33 county jails across the state, and there are plans to expand the program to 7 additional county jails in FY 2014-15. In FY 2013-14, there were 3,265 admissions to the JBBS program, with 2,356 successful discharges and 390 unsuccessful discharges from the program. The majority of treatment services offered through the JBBS program include assessments and evaluations, program eligibility determination, individual therapy, transition tracking, case management services, substance use disorder treatment services, and mental health treatment services.

The JBBS Program Annual Report can be accessed at: http://www.colorado.gov/cs/Satellite/CDHS-BehavioralHealth/CBON/1251647517387.

Juvenile Competency

For several years the task force has discussed issues concerning juvenile justice and the standard for measuring competency in juveniles. A work group of both advisory task force members and non-task force members was formed to develop a bill draft to address a juvenile's competency to proceed with a trial. Over the summer, the work group met to draft a bill proposal concerning juvenile competency. The work group used House Bill 14-1025, which was postponed indefinitely, as a basis for the new proposal. In August, the work group brought forth a bill draft to the advisory task force. The task force met twice in August to discuss and finalize the bill draft. The bill draft was presented to the legislative oversight committee in September, and approved for introduction during the 2015 legislative session. There was discussion about the bill at the November advisory task force meeting. The December 18 advisory task force meeting was dedicated to discussing the juvenile competency legislation and included discussion of potential amendments to the bill. Addendum B is a memorandum that was prepared by Legislative Council Staff on juvenile competency statutes and model legislation.

Summary of Recommendations

As a result of the discussion and deliberation of the task force, the legislative oversight committee recommends the following bill for consideration in the 2015 legislative session. At its meeting on October 15, 2014, the Legislative Council approved the bill for introduction.

Bill A — Juvenile Competency To Proceed in Criminal Justice

Bill A establishes a juvenile-specific definition of "incompetent to proceed" for juveniles involved in the juvenile justice system, as well as special definitions for "developmental disability," "intellectual disability," "mental capacity," and "mental disability" when used in this context. The bill clarifies the procedures for establishing incompetency and restoration of competency.



Resource Materials

Meeting summaries are prepared for each meeting of the committee and contain all handouts provided to the committee. The summaries of meetings and attachments are available at the Division of Archives, 1313 Sherman Street, Denver (303-866-2055). The listing below contains the dates of committee meetings and the topics discussed at those meetings. Meeting summaries are also available on our website at:

http://www.colorado.gov/lcs/MICJS

Meeting Date and Topics Discussed

Legislative Oversight Committee

March 21, 2014

- Consideration of advisory task force appointments
- Discussion of advisory task activities

September 12, 2014

- Consideration of proposed legislation
- Discussion of advisory task force activities
- Presentation on housing issues

Advisory Task Force

January 16, 2014

- ◆ Review of 2014 legislation proposed by the task force
- ♦ Affordable Care Act update
- Presentation on information sharing
- Discussion of task force vacancies
- Discussion concerning prioritizing topics of study for the task force

February 20, 2014

- ◆ Review of 2014 legislation proposed by the task force
- Legislative update on bills concerning the task force



- ♦ Affordable Care Act update
- Discussion concerning process for prioritizing topics of study for the task force
- Follow-up discussion concerning information sharing presentation
- Discussion of task force vacancies

March 20, 2014

- Legislative update on bills concerning the task force
- ♦ Affordable Care Act update
- Discussion of the Behavioral Health Transformation Council work on medication formulation
- Update on topic area safety of staff who work with individuals with a mental illness
- Discussion of topics of study for the task force

April 17, 2014

- Legislative update on bills concerning the task force
- ♦ Affordable Care Act update
- ◆ Update on the March 21 Legislative Oversight Committee
- ◆ Discussion of the Behavioral Health Transformation Council work on medication consistency
- Update on topic area safety of staff who work with individuals with a mental illness

May 15, 2014

- ♦ Update on Senate Bill 14-021
- ♦ Legislative session update
- ♦ Affordable Care Act update
- Discussion of updating the task force membership booklet
- Update on topic area safety of staff who work with individuals with a mental illness
- Discussion of topics of study

June 19, 2014

- ♦ Update on Senate Bill 14-021
- Affordable Care Act update
- Discussion of topics of study
- Discussion of the Behavioral Health Transformation Council's Medication Consistency Group
- Update on topic area safety of staff who work with individuals with a mental illness



- Update on Juvenile Competency Workgroup
- Update on Housing Subcommittee
- Update on topic area safety of staff who work with individuals with a mental illness
- Discussion of the Behavioral Health Transformation Council's Medication Consistency Group
- ♦ Affordable Care Act update
- ♦ Discussion of task force membership
- ♦ Discussion of topics of study

August 21, 2014

- Update on housing issues
- Update on topic area safety of staff who work with individuals with a mental illness
- ♦ Update on juvenile competency legislation

August 28, 2014

♦ Discussion of juvenile competency legislation

September 18, 2014

- Presentation on innovative practices in housing in Boulder County
- Discussion and approval of candidates for task force membership
- ◆ Update on September 12, 2014, Legislative Oversight Committee meeting
- Discussion of the Behavioral Health Transformation Council's Medication Consistency Group
- ♦ Affordable Care Act update
- Discussion of topics of study
- ♦ Election of task force chair and co-chair

October 16, 2014

- Presentation on health information exchange and health information technology
- Presentation on filling the gaps: developing a community crisis continuum
- Discussion on juvenile competency legislation
- Discussion of the Behavioral Health Transformation Council's Medication Consistency Group
- ♦ Affordable Care Act update
- Discussion and approval of candidates for task force membership



November 20, 2014

- Presentation on jail-based behavioral health services implementation support
- ♦ Update on topic area data and information sharing
- ♦ Discussion of juvenile competency legislation
- ◆ Discussion of the Behavioral Health Transformation Council's Medication Consistency Group
- ♦ Affordable Care Act update
- ♦ Discussion of candidate for task force membership

December 18, 2014

♦ Discussion of juvenile competency legislation



First Regular Session Seventieth General Assembly STATE OF COLORADO

BILL A

LLS NO. 15-0058.01 Jane Ritter x4342

HOUSE BILL

HOUSE SPONSORSHIP

Rosenthal,

SENATE SPONSORSHIP

Newell,

House Committees

Senate Committees

A BILL FOR AN ACT

101 CONCERNING COMPETENCY TO PROCEED FOR JUVENILES INVOLVED IN 102 THE JUVENILE JUSTICE SYSTEM.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at http://www.leg.state.co.us/billsummaries.)

Legislative Oversight Committee for the Treatment of Persons with Mental Illness Who Are Involved in the Criminal Justice Systems. The bill establishes a juvenile-specific definition of "incompetent to proceed" for juveniles involved in the juvenile justice

system, as well as specific definitions for "developmental disability", "intellectual disability", "mental capacity", and "mental disability" when used in this context. The bill clarifies the procedures for establishing incompetency, as well as for establishing the restoration of competency.

1 Be it enacted by the General Assembly of the State of Colorado: 2 **SECTION 1.** In Colorado Revised Statutes, 19-2-103, add (5.5), 3 (9.5), (9.6), (12.3), (12.4), and (14.3) as follows: 4 **19-2-103. Definitions.** For purposes of this article: (5.5) "DEVELOPMENTAL DISABILITY" MEANS A DISABILITY THAT 5 6 IS MANIFESTED BEFORE THE PERSON REACHES HIS OR HER TWENTY-FIRST BIRTHDAY, THAT CONSTITUTES A SUBSTANTIAL DISABILITY TO THE 7 8 AFFECTED INDIVIDUAL, AND THAT IS ATTRIBUTABLE TO AN INTELLECTUAL 9 DISABILITY OR OTHER NEUROLOGICAL CONDITIONS WHEN THOSE 10 CONDITIONS RESULT IN IMPAIRMENT OF GENERAL INTELLECTUAL 11 FUNCTIONING OR ADAPTIVE BEHAVIOR SIMILAR TO THAT OF A PERSON 12 WITH AN INTELLECTUAL DISABILITY. UNLESS OTHERWISE SPECIFICALLY 13 STATED, THE FEDERAL DEFINITION OF "DEVELOPMENTAL DISABILITY", 42 14 U.S.C. SEC. 15001 ET SEQ., SHALL NOT APPLY. 15 (9.5) "INCOMPETENT TO PROCEED" MEANS THAT A JUVENILE DOES 16 NOT HAVE SUFFICIENT PRESENT ABILITY TO CONSULT WITH HIS OR HER 17 ATTORNEY WITH A REASONABLE DEGREE OF RATIONAL UNDERSTANDING 18 IN ORDER TO ASSIST IN THE DEFENSE OR THAT HE OR SHE DOES NOT HAVE 19 A RATIONAL AS WELL AS A FACTUAL UNDERSTANDING OF THE 20 PROCEEDINGS AGAINST HIM OR HER. 21 "INTELLECTUAL DISABILITY" MEANS A DISORDER WITH (9.6)22 ONSET DURING THE DEVELOPMENTAL PERIOD THAT INCLUDES BOTH 23 INTELLECTUAL AND ADAPTIVE FUNCTIONING DEFICITS IN CONCEPTUAL,

1	SOCIAL, AND PRACTICAL DOMAINS AND INCLUDES THE FOLLOWING
2	CRITERIA:
3	(a) DEFICITS IN INTELLECTUAL FUNCTIONS, SUCH AS REASONING,
4	PROBLEM SOLVING, PLANNING, ABSTRACT THINKING JUDGMENT,
5	ACADEMIC LEARNING, AND LEARNING FROM EXPERIENCE, CONFIRMED BY
6	BOTH CLINICAL ASSESSMENT AND INDIVIDUALIZED, STANDARDIZED
7	INTELLIGENCE TESTING;
8	(b) DEFICITS IN ADAPTIVE FUNCTIONING THAT RESULT IN A
9	FAILURE TO MEET DEVELOPMENTAL AND SOCIO-CULTURAL STANDARDS
10	FOR PERSONAL INDEPENDENCE AND SOCIAL RESPONSIBILITY. WITHOUT
11	ONGOING SUPPORT, THE ADAPTIVE DEFICITS LIMIT FUNCTIONING IN ONE OR
12	MORE ACTIVITIES OF DAILY LIFE, SUCH AS COMMUNICATION, SOCIAL
13	PARTICIPATION, AND INDEPENDENT LIVING, ACROSS MULTIPLE
14	ENVIRONMENTS, SUCH AS HOME, SCHOOL, WORK, AND COMMUNITY; AND
15	(c) THE ONSET OF INTELLECTUAL AND ADAPTIVE DEFICITS DURING
16	THE DEVELOPMENTAL PERIOD.
17	(12.3) "MENTAL CAPACITY" MEANS A JUVENILE'S CAPACITY TO
18	MEET ALL OF THE FOLLOWING CRITERIA:
19	(a) Comprehend and appreciate the charges or
20	ALLEGATIONS AGAINST HIM OR HER;
21	(b) Understand the adversarial nature of the
22	PROCEEDINGS, INCLUDING THE ROLE OF THE JUDGE, THE DEFENDANT'S
23	ATTORNEY, THE PROSECUTING ATTORNEY, THE DEFENDANT'S GUARDIAN
24	AD LITEM, IF APPLICABLE, OR WITNESSES, AND BE ABLE TO ASSIST IN HIS

(c) COMPREHEND AND APPRECIATE THE CONSEQUENCES THAT MAY BE IMPOSED BY THE COURT OR RESULT FROM THE PROCEEDINGS;

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28

OR HER DEFENSE;

(d) DISCLOSE TO COUNSEL FACTS PERTINENT TO THE PROCEEDINGS

DRAFT

17

1	AT ISSUE;
2	(e) DISPLAY APPROPRIATE COURTROOM BEHAVIOR; AND
3	(f) TESTIFY RELEVANTLY.
4	(12.4) "MENTAL DISABILITY" MEANS A SUBSTANTIAL DISORDER OF
5	THOUGHT, MOOD, PERCEPTION, OR COGNITIVE ABILITY THAT RESULTS IN
6	MARKED FUNCTIONAL DISABILITY AND SIGNIFICANTLY INTERFERES WITH
7	ADAPTIVE BEHAVIOR. "MENTAL DISABILITY" DOES NOT INCLUDE ACUTE
8	INTOXICATION FROM ALCOHOL OR OTHER SUBSTANCES, ANY CONDITION
9	MANIFESTED ONLY BY ANTISOCIAL BEHAVIOR, OR ANY SUBSTANCE ABUSE
10	IMPAIRMENT RESULTING FROM RECENT USE OR WITHDRAWAL. HOWEVER,
11	SUBSTANCE ABUSE THAT RESULTS IN A LONG-TERM, SUBSTANTIAL
12	DISORDER OF THOUGHT, MOOD, OR COGNITIVE ABILITY MAY CONSTITUTE
13	A MENTAL DISABILITY.
14	(14.3) "RESTORATION TO COMPETENCY HEARING" MEANS A
15	HEARING TO DETERMINE WHETHER A DEFENDANT WHO HAS PREVIOUSLY
16	BEEN DETERMINED TO BE INCOMPETENT TO PROCEED HAS ACHIEVED OR IS
17	RESTORED TO COMPETENCY.
18	SECTION 2. In Colorado Revised Statutes, add 19-2-1300.2 as
19	follows:
20	19-2-1300.2. Legislative declaration. (1) THE GENERAL
21	ASSEMBLY FINDS AND DECLARES THAT:
22	(a) The juvenile justice system is civil in nature and
23	FOCUSED ON TREATMENT RATHER THAN PUNISHMENT;
24	(b) It is crucial to avoid the negative consequences of
25	PROSECUTION WHENEVER NECESSARY AND POSSIBLE, AND TO PROMOTE
26	MENTAL HEALTH TREATMENT PATHWAYS FOR JUVENILES IN THE JUVENILE
27	JUSTICE SYSTEM;
28	(c) JUVENILES DIFFER IN SIGNIFICANT AND SUBSTANTIVE WAYS

1	FROM ADULTS; THEREFORE, DIFFERENT STANDARDS FOR COMPETENCY ARE
2	NECESSARY FOR JUVENILES AND ADULTS;
3	(d) JUVENILES, LIKE ADULTS, ARE PRESUMED COMPETENT TO
4	PROCEED UNTIL SUCH TIME AS THEY ARE FOUND INCOMPETENT TO
5	PROCEED THROUGH A FORMAL COMPETENCY EVALUATION; AND
6	(e) AGE ALONE IS NOT DETERMINATIVE OF INCOMPETENCE
7	WITHOUT A FINDING THAT THE YOUTH ACTUALLY LACKS THE RELEVANT
8	CAPACITIES FOR COMPETENCE.
9	SECTION 3. In Colorado Revised Statutes, 19-2-1301, amend
10	(2) as follows:
11	19-2-1301. Incompetency to proceed - effect - how and when
12	raised. (2) A juvenile shall not be tried or sentenced if the juvenile is
13	incompetent to proceed, as defined in section 16-8.5-101 (11), C.R.S.
14	19-2-103 (9.5), at that stage of the proceedings against him or her. A
15	DETERMINATION OF COMPETENCY MUST INCLUDE AN EVALUATION OF
16	DEVELOPMENTAL DISABILITIES, MENTAL DISABILITIES, AND MENTAL
17	CAPACITY.
18	SECTION 4. In Colorado Revised Statutes, 19-2-1302, amend
19	(3), (4) (a), and (4) (c) as follows:
20	19-2-1302. Determination of incompetency to proceed. (3) If
21	the question of a juvenile's incompetency to proceed is raised after a jury
22	is impaneled to try the issues raised by a plea of not guilty or after the
23	court as the finder of fact begins to hear evidence and the court
24	determines that the juvenile is incompetent to proceed or orders the
25	juvenile referred for a competency examination, the court may declare a
26	mistrial. If the court declares a mistrial under these circumstances, the
27	juvenile shall MUST not be deemed to have been placed in jeopardy with
28	regard to the charges at issue. The juvenile may be tried on, and

19

sentenced if adjudicated for, the same charges after he or she has ACHIEVED OR been found to be restored to competency.

- (4) (a) If the court orders a competency evaluation, the court shall order that the competency evaluation be conducted in the least-restrictive environment, INCLUDING HOME OR COMMUNITY PLACEMENT IF APPROPRIATE, taking into account the public safety and the best interests of the juvenile.
- (c) The competency evaluation shall MUST, at a minimum, include an opinion regarding whether the juvenile is competent INCOMPETENT to proceed as defined in section 16-8.5-101 (4), C.R.S. 19-2-103 (9.5). If the evaluation concludes the juvenile is incompetent to proceed, the evaluation shall MUST include a recommendation as to whether THERE IS A LIKELIHOOD THAT the juvenile may ACHIEVE OR be restored to competency and identify appropriate services to restore the juvenile to competency.
- SECTION 5. In Colorado Revised Statutes, 19-2-1304, amend
 17 (1) and (3) as follows:
 - **19-2-1304. Restoration to competency hearing.** (1) The court may order a restoration TO COMPETENCY hearing, as defined in section 16-8.5-101 (13), C.R.S. 19-2-103 (14.3), at any time on its own motion, on motion of the prosecuting attorney, or on motion of the juvenile. The court shall order a RESTORATION OF COMPETENCY hearing if a mental health professional who has been treating the juvenile files a report certifying that the juvenile is mentally competent to proceed.
 - (3) At the RESTORATION TO COMPETENCY hearing, the court shall determine whether the juvenile HAS ACHIEVED OR is restored to competency.

SECTION 6. In Colorado Revised Statutes, 19-2-1305, amend

(1)	and ((2)) as	fol	lov	ws:

19-2-1305. Procedure after restoration to competency hearing.

- (1) If a juvenile is found to be HAVE ACHIEVED OR BEEN restored to competency after a RESTORATION TO COMPETENCY hearing, as provided in section 19-2-1304, or by the court during a review, as provided in section 19-2-1303 (2), the court shall resume or recommence the trial or sentencing proceeding or order the sentence carried out. The court may credit any time the juvenile spent in confinement or detention while incompetent TO PROCEED against any term of commitment imposed after ACHIEVEMENT OF OR restoration to competency.
- (2) If the court determines that the juvenile remains mentally incompetent to proceed and the delinquency petition is not dismissed, the court may continue or modify any orders entered at the time of the original determination of incompetency or enter any new order necessary to facilitate the juvenile's ACHIEVEMENT OF OR restoration to mental competency.

SECTION 7. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Criminal Justice Mental Health Filling the Gaps: Developing a Continuum

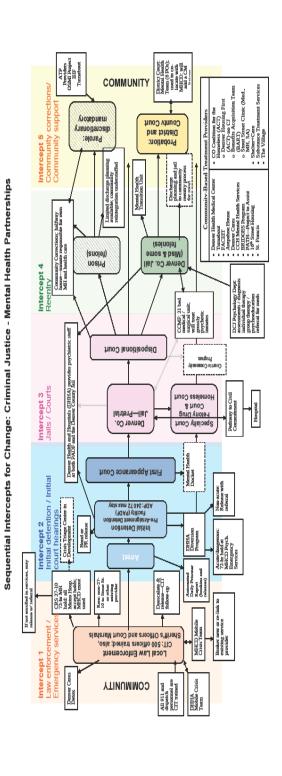
Denver's Crime Prevention and Control Commission

MICJS

October 16, 2014

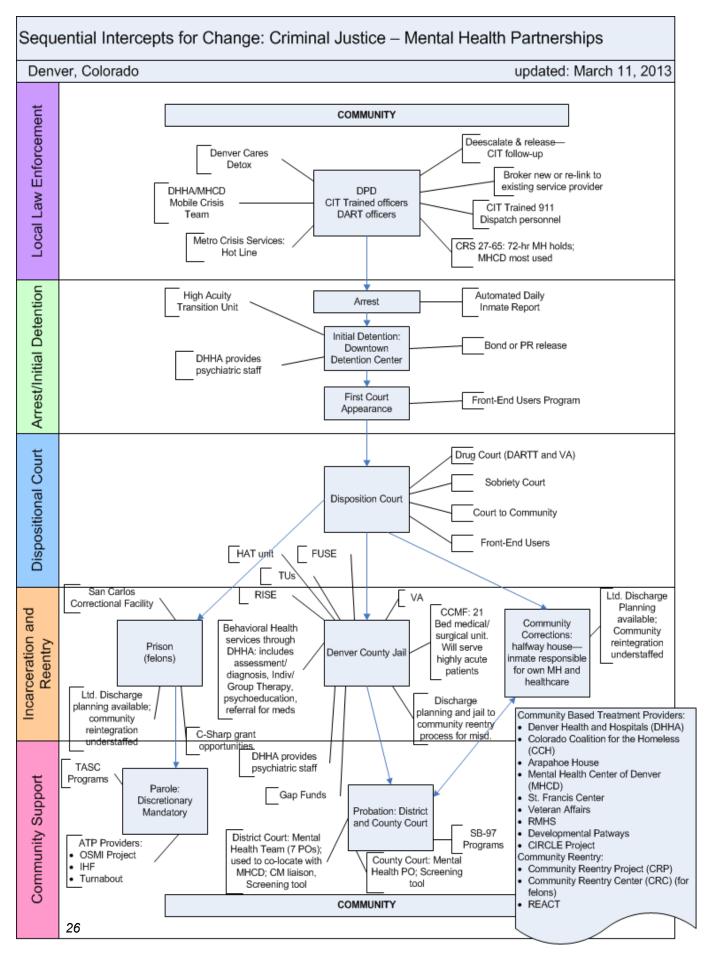
2005-2006

- **CPCC** was seated September 2005
- Mental Health Standing Committee
- substance abuse treatment providers and hospital/detox Criminal justice system, homeless, mental health and
- Sequential Intercept Model, Aug 2006; updated



Mental Health and Criminal Justice Sequential Intercept Mode

- ☐ Law Enforcement / Emergency Services
- Post Arrest: Initial Detention /Court / Diversion
- Post Initial Hearings: Jail, Probation and Prison
- ☐ Reentry: Hospital, Jail, Prison
- Community Correction and Community Support



Building Infrastructure and Implementation

2006 - 2013

Denver Scope

Over 38,000 jail bookings per year

Average daily pop: 2200 RC

-20-26% - appox. 450 persons w/Axis one per day

DATA, DATA, DATA

\$\$\$\$\$\$

Juvenile and adult

Mental Health Population in Denver

<u>E</u>

- Psychotropic Medication Use at DDC/DCJ
- February 2013
- Total Population:

2047

Population on all Medication:

1279

Population on Psychotropic Medication:

099

Population on Antipsychotic Medications:

229

Jail Bookings

(Jan- June 2014)

About 2400+ people are booked into the jail /mo (14,685 over 6 months)

- 20.3% (n=2981) with mental health alerts

First Qtr breakdown (Jan – March 2014)

1785 with mental health alert (22%) total n=8018

XO3A- Extreme

Active Alert - 171 (9%)

X03B-Severe

Active Alert - 214 (12%)

X03C- Moderate

Active Alert - 153 (9%)

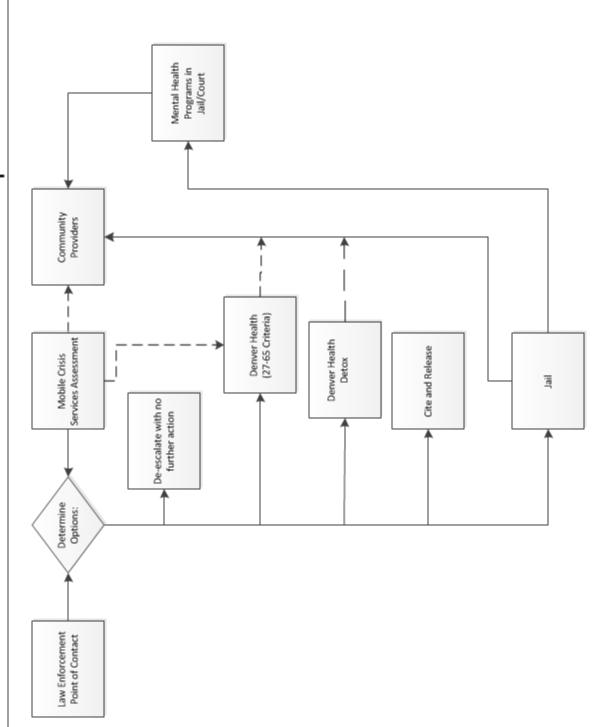
X03D-Mild

Active Alert - 1247 (70%)

General Process

- Use data to guide to identify pressure points. and areas of change.
- Identify costs
- Use Intercept model to structure the area of work
- Use LEAN processes to identify waste
- Use stakeholders to identify the ideal state
- Maximize and leverage resources
- Participate at all levels to ensure coordination

Current Law Enforcement Mental Health Responses



Law Enforcement/Ist Responder

- •
- –Denver Police trained/retrained; over %
- DART/CERT Officers
- Sheriff trainings
- Mobile Crisis DHHA, MHCD, DPD
- MACC Mental Health Jail Task Force
- Intercept model completed in Denver Metro Area

Addressing the Inmate Population: Facility

- Transition Units (Male 2007; Female 2008)
- Clinicians services and release coordination
- 63% reduction of violence w/in the facility
- \$ Federal, City
- High Acuity Unit, 2011
- (addictions and trauma)2011; \$ State HB 1352 RISE - Recovery in a Secure Environment

Inmate Population: Reentry

- Transitions Jail to Community (TJC; 2008)
- Women's Community Reentry (2011)
- FUSE (2010)
- GAP funds 30 day prescription (20
- Jail Intake / Release Reports (2007)

Community Supervision

Dedicated Units with

Community Corrections

Pre-trial

Probation

PHASE Day Reporting

Problem Solving COURTS

- Drug Court specialty docket
- Sobriety Court
- Court 2 Community
- Front End User Court

General Infrastructure

- Release of Information (2011)
- Mental Health First Aid (2014)
- Informed Improves Criminal Justice System SAMHSA's GAINS: How Being Trauma-Responses, (2012)
- Motivational Interviewing- training / coaching (2012)
- Considerations for assaults within facilities (2012)

Current Areas of Work

- Crisis stabilization
- Co Responder Harm Reduction
- Discharge / hand off process
- Regional Coordination
- Homeless / housing –SIB
- Medication Consistency
- Safety Employee Wellness
- Peer supports and coaching

Future Areas to Tackle

- Competency
- Involuntary meds in jail
- Maintaining Certs

DISCUSSION



Colorado Legislative Council Staff

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MEMORANDUM

October 15, 2014

TO: Interested Persons

FROM: Amanda King, Senior Research Analyst, (303) 866-4332

SUBJECT: Juvenile Competency Statutes and Model Legislation

Summary

This memorandum responds to your request for information about comparative language from other states concerning juvenile competency statutes. Specifically, this memorandum provides lists of juvenile competency laws identified by the National District Attorneys Association and the National Conference of State Legislatures; a summary of the National Center for Juvenile Justice's document on juvenile competency procedures in various states; an overview of the National Juvenile Justice Network's recommendations for policymakers on juvenile competency; and a discussion of the Models for Change guide for lawmakers on developing laws for competency to stand trial in juvenile delinquency proceedings. Additional information about any specific state is available from staff upon request.

National District Attorneys Association

In 2012, the National District Attorneys Association compiled a list of juvenile competency laws. The following 18 states were identified as having juvenile competency laws or court rules: Arizona, California, Colorado, Florida, Georgia, Idaho, Kansas, Louisiana, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, Ohio, Texas, Vermont, and Virginia. The table of contents for the National District Attorneys Association document includes statutory citations for each identified state (Attachment A). The full document provides language from each identified states' juvenile competency laws and can be accessed at:

www.ndaa.org/pdf/Juvenile%20Competency%202012.pdf.

<u>Open records requirements</u>: Pursuant to Section 24-72-202 (6.5)(b), C.R.S., research memoranda and other final products of Legislative Council Staff are considered public records and subject to public inspection unless: a) the research is related to proposed or pending legislation; and b) the legislator requesting the research specifically asks that the research be permanently considered "work product" and not subject to public inspection. If you would like to designate this memorandum to be permanently considered "work product" not subject to public inspection, or if you think additional research is required and this is not a final product, please contact the Legislative Council Librarian at (303) 866-4011 within seven days of the date of the memorandum.

National Conference of State Legislatures

The National Conference of State Legislatures (NCSL) also identified 18 states with juvenile competency laws or court rules. However, the same 18 states do not appear on both lists. Specifically, the National District Attorneys Association list includes Missouri, New Hampshire, New Mexico, and Vermont, but these states do not appear on the NCSL list. Alternatively, Arkansas, Maine, South Dakota, and Wisconsin appear on the NCSL list, but not the National District Attorneys Association list. It is unclear why there is a discrepancy between the information provided by the two organizations, but it does appear that all the states on both lists have juvenile competency laws or court rules in place. Table 1 list the state laws or court rule identified by NCSL as addressing juvenile competency, and includes hyperlinks to the identified laws or court rule.

Table 1
Juvenile Competency Laws

State	Statutory Citation			
Arizona	Ariz. Rev. Stat. § 8-291 et seq.			
Arkansas	Ark. Code § 9-27-502.			
California	Cal. Wel. & Inst. Code § 709.			
Colorado	§ 19-2-1301 et seq., C.R.S.			
Florida	Fla. Stat. § 985.19.			
Georgia	Ga. Code Ann. § 15-11-650 et seq.			
Idaho	Idaho Code Ann. §§ 20-519A to 20-519D.			
Kansas	Kan. Stat. Ann. §§ 38-2348, 38-2349, and 2350.			
Louisiana	La. Children's Code Ann. § 832 et seq.			
Maine	Me. Rev. Stat. Ann. tit. 15, §§ 33318-A and 3818-B.			
Maryland	Md. Code, C. & J.P. § 3-8A-17 et seq.			
Minnesota	Minn. R. Juv. Del. P. Rule 20.01.			
Nebraska	Neb. Rev. Stat. § 43-258.			
Ohio	Ohio Rev. Code Ann. § 2152.51 et seq.			
South Dakota	S.D. Codified Laws § 26-7A-32.1 et seq.			
Texas	Tex. Fa. Code § 51.20.			
Virginia	Va. Code Ann. § 16.1-356 et seq.			
Wisconsin	Wis. Stat. § 938.295.			

Source: National Conference of State Legislatures.

The National Center for Juvenile Justice

The National Center for Juvenile Justice (NCJJ) published a document in October 2013 on juvenile competency procedures (Attachment B). According to the NCJJ, all but six states have procedures under which juvenile competency to stand trail is decided. Those six states are Alaska, Hawaii, Mississippi, Oklahoma, Oregon, and Rhode Island. Juvenile competency procedures can be outlined in state law, court rules, and case law. The NCJJ document provides an overview of the *Dusky* standard. The NCJJ document discusses the *Dusky* standard related to the juvenile competency procedures in Arizona, Georgia, Kentucky, North Dakota, and Wyoming. Of particular interest might be the following definition that was recently enacted in Georgia:

§15-11-651. Definitions. (3) "Incompetent to proceed" means lacking sufficient present ability to understand the nature and object of the proceedings, to comprehend his or her own situation in relation to the proceedings, and to assist his or her attorney in the preparation and presentation of his or her case in all adjudication, disposition, or transfer hearings. Such term shall include consideration of a child's age or immaturity.

According to the NCJJ document, states use a variety of factors to determine whether or not a juvenile meets the *Dusky* standard, and outlines the factors in Arkansas, Idaho, Maine, and North Dakota law. In some states, such as Georgia, Idaho, Maine, Maryland, and Vermont, age is a factor in deciding whether a juvenile is competent or not. In other states, such as Arizona, Connecticut, Delaware, Montana, and Virginia, age alone does not render a juvenile incompetent. Other states, such as Arkansas, Michigan, and Ohio include age as a factor in certain circumstances.

The NCJJ document provides information on the application of juvenile competency laws to situations involving the transfer of a juvenile case to a criminal court. Specifically, Georgia, Kentucky, Louisiana, and Maryland are listed as states where this is a factor. Additionally, the document discusses the transfer procedures in Connecticut, Maine, Nevada, South Dakota, Texas, and Virginia.

The NCJJ document references recently enacted juvenile competency laws in Connecticut, Delaware, Georgia, Idaho, Maine, Michigan, Ohio, South Dakota, Utah, and West Virginia; recent case law in Colorado and Louisiana; and selected definitions in Delaware, Louisiana, and Maryland.

National Juvenile Justice Network

According to the National Juvenile Justice Network (NJJN), every state except Oklahoma recognizes that juveniles in juvenile court must be competent to stand trial.³ However, not all states have established competency standards for use in juvenile court.

¹The National Center for Juvenile Justice is the private, nonprofit research division of the National Council of Juvenile and Family Court Judges.

²The *Dusky* standard is taken from a U.S. Supreme Court case. Under the *Dusky* standard, the defendant must have the ability to consult with his or her attorney and have a rational and factual understanding of the proceedings against him or her. *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, L.Ed.2d 824 (1960).

³The National Juvenile Justice Network is a membership-based organization promoting the reform of America's juvenile justice system.

In 2012, the NJJN issued a policy update entitled *Competency to Stand Trial in Juvenile Court: Recommendations for Policymakers* (Attachment C). The recommendations draw from another document, *Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers*, which is discussed later in this memorandum. The NJJN policy update specifies the following factors as ones state policymakers should consider when developing competency statutes: defining competence; due process considerations; competence evaluation by mental health examiners; and remediation and legal disposition of incompetent defenders.

Defining competence. According to the NJJN, juvenile competency laws should instruct the court to consider a juvenile's mental illness, intellectual disability, and developmental maturity when determining whether a juvenile is competent to stand trial in juvenile court. While laws addressing adult competency usually declare someone incompetent on the basis of either mental illness or intellectual disability, juvenile competency evaluations often reveal developmental immaturity as a third reason for incompetence. Developmental immaturity restricts a juveniles ability to understand and reason, even in the absence of a mental illness or intellectual disability.

The NJJN states that state laws should include cognitive thresholds that juveniles must meet to be found competent. These may include factual understanding, rational understanding, the ability to assist counsel, and the ability to make decisions. The NJJN recommends using broad categories to allow judges discretion when deciding whether or not a juvenile satisfies the thresholds. It discourages referencing specific abilities, such as the ability to disclose relevant facts to his or her attorney.

Due process considerations. According to the NJJN recommendations, juveniles should be permitted to exercise their right to counsel prior to any competency evaluation and should be protected against the use of any self-incriminating statements made during the evaluation. The recommendation suggests using the protections afforded to adults in criminal competency evaluations for guidance, as well as protections afforded to juveniles undergoing other mental or behavioral health evaluations.

Competence evaluations by mental health examiners. The NJJN recommendations outline several factors for juvenile competency evaluations. The evaluations should be performed by an examiner with training and experience in child psychology or psychiatry. The evaluators should have appropriate training in forensic specialization, and states should provide continuing education to these professionals. The evaluations should be conducted in the least restrictive setting appropriate. Finally, the evaluations should be performed within a reasonable time period, and the recommendation suggests that evaluations can be appropriately completed by a qualified professional within two to three weeks of when the evaluation is ordered.

The recommendation states that the laws should provide guidance to the court and to the examiners on the competency evaluation report contents. Additionally, the laws should offer more direction than merely a list of the content areas, but should still leave some discretion to the courts and evaluators. The following five content areas for the evaluation report are specified in the recommendation:

- assessment of the juvenile's mental disorder and intellectual disability;
- assessment of the juvenile's developmental status;
- assessment of how the juvenile's mental disorder, intellectual disability, or developmental maturity affects his or her abilities associated with competence to stand trial;

- causes of the juvenile's deficits, if any, in his or her abilities associated with competence to stand trial; and
- potential for remediation of the juvenile's abilities associated with competence to stand trial

Remediation and legal disposition of incompetent defendants. The NJJN recommends that state laws instruct the courts to determine the most appropriate placement or services for the juvenile based on the particular reasons underlying the juvenile's incompetence. It proposes that this time should be referred to as remediation, rather than restoration, because it does not imply that the juvenile was once competent and will over time be restored to that status. It also recommends that during the time of remediation, the juvenile should be placed in the least restrictive setting available. The recommendation also states that laws should provide a length of time allowed for remediation and include a periodic review of remediation progress. The recommendation suggests looking at a state's criminal code for guidance on the length of time permitted for remediation and advises that when incompetence cannot be remediated, a decision must be made about the legal disposition of the case that balances the interest of the juvenile, the state, and the public. Finally, the recommendation states that when a juvenile cannot be remediated and the case is dismissed, the laws should include provisions to allow a court to transfer a case to the state's child welfare system. This will allow the court to address public safety concerns and order appropriate services for the juvenile.

Models for Change

In 2011, Models for Change published *Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers* by Kimberly Larson, Ph.D., J.D., Thomas Grisso, Ph.D., and the National Youth Screening and Assessment Project.⁴ This guide can be found at: http://modelsforchange.net/publications/330. As was stated previously, this publication was the basis for the NJJN policy update entitled *Competency to Stand Trial in Juvenile Court: Recommendations for Policymakers.* However, the full guide published by Models for Changes provides a more in-depth discussion of definitions of competence to stand trial and other related topics. Specific to the definitions, the Models for Change guide outlines the following factors: psychological predicates for incompetence; relation of the predicate of developmental immaturity to incompetence; functional ability associated with competence (incompetence); and degree of defendant ability required in delinquency proceedings.

Psychological predicates for incompetence. The Models for Change guide states that laws should offer a definition of the allowable predicates for incompetence to stand trial. It goes on to explain that a predicate refers to a psychological condition that accounts for or is the cause of a defendant's incapacities in areas that are relevant for competency determinations. The Models of Change guide discusses consideration of specifying allowable mental disorders in statutory definition, and whether developmental immaturity should be included among the allowable predicates. The guide includes examples from California, Florida, and Virginia on allowing or not allowing developmental immaturity as a predicate. Ultimately, the Models of Change guide recommends including developmental immaturity as a predicate for incompetence to stand trial in juvenile court. The guide uses the following California law from the California Welfare and Institutions Code as an illustration of this type of law:

⁴Models for Change is a multi-state initiative working to guide and accelerate advances to make juvenile justice systems more fair, effective, rational, and developmentally appropriate. It is funded by the John D. and Catherine T. MacArthur Foundation.

709. (b) Upon suspension of proceedings, the court shall order that the question of the minor's competence be determined at a hearing. The court shall appoint an expert to evaluate whether the minor suffers from a mental disorder, developmental disability, developmental immaturity, or other condition and, if so, whether the condition or conditions impair the minor's competency. The expert shall have expertise in child and adolescent development, and training in the forensic evaluation of juveniles, and shall be familiar with competency standards and accepted criteria used in evaluating competence. The Judicial Council shall develop and adopt rules for the implementation of these requirements.

Relation of the predicate of developmental immaturity to incompetence. The Models for Change guide states that if developmental immaturity is accepted as a predicate, states should consider how the predicate will be applied. It outlines the following three options: judicial discretion; age-based presumption of incompetence; and *per se* incompetence. After an analysis of the three options, the Models for Change guide recommends a multi-tiered system that combines all three options. It proposes that the division between the tiers be age-based, with juveniles in different tiers receiving different levels of protections.

Functional abilities associated with competence (incompetence). The Models for Change guide recommends that the degree of detail included in statutes concerning the definition of competence to stand trial be determined by the state. The guide goes on to explain that in most states, the definition of competence to stand trial describes the ability to assist counsel in a defense, and the ability to understand or appreciate the nature of the proceedings. However, some states have gone further in defining the abilities that are of concern in competency determinations, which provides more guidance to the courts and examiners. The Models for Change guide discusses various options, including specifically identifying the necessary functional abilities, outlining broad concepts, and not providing further refinement beyond the state's definition similar to the *Dusky* Standard.

After a discussion of the various options, the Models for Change guide recommends defining broader cognitive concepts, rather than functional abilities. The Models for Change guide points to the following Maryland's law as an example of this type of approach:

§3–8A–17.3. (3) In determining whether the child is incompetent to proceed, the qualified expert shall consider the following factors:

- (i) The child's age, maturity level, developmental stage, and decision–making abilities:
 - (ii) The capacity of the child to:
 - 1. Appreciate the allegations against the child;
 - 2. Appreciate the range and nature of allowable dispositions that may be imposed in the proceedings against the child;
 - 3. Understand the roles of the participants and the adversary nature of the legal process:
 - 4. Disclose to counsel facts pertinent to the proceedings at issue;
 - 5. Display appropriate courtroom behavior; and
 - 6. Testify relevantly; and
 - (iii) Any other factors that the qualified expert deems to be relevant.

Degree of defendant ability required in delinquency proceedings. The Models for Change guide encourages states to consider whether juvenile statutes should address the degree of ability required for competence. According to the Models for Change guide, most states' standards describe the types of abilities required, but few address whether the same or a lesser degree of those abilities is required in juvenile court in comparison to criminal court. The Models for Change guide discusses the following four options concerning this issue: same level of ability; lower level of ability; charge-related; and no guidance. After an analysis of the four options, the Models for Change guide does not make a recommendation on this issue, but merely states that the choice should be based on the state's sense of fairness, as well as practical considerations, such as the current state of their laws with regard to the consequences for juveniles who are adjudicated delinquent.



U.S. States with Juvenile Competency Statutes

Please note there may have been changes to this area of law since our last update. Please feel free to contact us at 703-549-9222 to discuss information included in this document.

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National Center for Prosecution of Child Abuse National District Attorneys Association www.ndaa.org

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JJGPS JUVENILE JUSTICE GEOGRAPHY, POLICY, PRACTICE & STATISTICS STATES CAN

Linda A. Szymanski, Esq., Senior Attorney, NCJJ

October 2013

Juvenile Justice GPS (Geography, Policy, Practice, Statistics) is a project to develop an online repository providing state policy makers and system stakeholders with a clear understanding of the juvenile justice landscape in the states. The site layers the most relevant national and state level statistics with information on state laws and practice and charts juvenile justice system change. In a landscape that is highly decentralized and ever-shifting, JJGPS provides an invaluable resource for those wanting to improve the juvenile justice system. We hope that the information will be used as a platform for inspiring change and finding solutions that have been applied in other places.

Juvenile Competency Procedures

Currently, all jurisdictions but the following six have either statutes, court rules or case law outlining the procedures under which juvenile competency to stand trial is decided: Alaska, Hawaii, Mississippi, Oklahoma, Oregon, and Rhode Island.

In fact, Oklahoma has specific case law from the state Court of Criminal Appeals explaining that since juvenile proceedings are not criminal but rehabilitative, it was the intent of the legislature not to have the competency statutes apply to juveniles. (*G.J.I. v. State*, 778 P.2d 485 (1989))

The Dusky Standard

Typically, both juvenile and adult competency statutes are based on the *Dusky* standard, taken from the 1960 United States Supreme Court case. Under that case, "the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." (*Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960))

However, the Wyoming Supreme Court warns that these standards should be applied in the light of juvenile norms. (*In the Interest of SWM v. State*, 299 P.3d 673 (2013))

As an example, Georgia's new definition of juvenile incompetency, effective in 2014, reads: 'Incompetent to proceed' means lacking sufficient present ability to understand the nature and object of the proceedings, to comprehend his or her own situation in relation to the proceedings, and to assist his or her attorney in the preparation and presentation of his or her case in all adjudication, disposition, or transfer hearings.

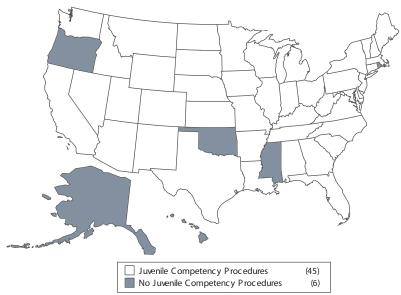
Under the Arizona version of the *Dusky* standard, a juvenile is incompetent if he or she does not have sufficient present ability to consult with the juvenile's lawyer with a reasonable degree of rational understanding or who does not have a rational and factual

understanding of the proceedings against the juvenile.

In Kentucky, incompetency to stand trial under the *Dusky* standard means, as a result of mental condition, lack of capacity to appreciate the nature and consequences of the proceedings against one or to participate rationally in one's own defense.

The test for determining an accused juvenile's competency to stand trial in North Dakota is whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.

States with Juvenile Competency Procedures



Factors Used in Determining the Dusky Standard

States use a variety of factors to reach the determination as to whether or not a juvenile meets the *Dusky* Standard.

For example, in Arkansas, in reaching an opinion about the juvenile's fitness to proceed, the examiner must consider and make written findings regarding an opinion on whether the juvenile's capabilities entail: an ability to understand and appreciate the charges and their seriousness; an ability to understand and realistically appraise the likely outcomes; a reliable episodic memory so that he or she can accurately and reliably relate a sequence of events; an ability to extend thinking into the future; an ability to consider the impact of his or her actions on others; verbal articulation abilities or the ability to express himself or herself in a reasonable and coherent manner; and logical decision-making abilities, particularly multi-factored problem solving or the ability to take several factors into consideration in making a decision.

In Idaho, the examiner or evaluation committee can employ any method of examination that is accepted by the examiner's profession for the examination of juveniles alleged not to be competent, provided that such examination must, at a minimum, include formal assessments of the juvenile in each of the following domains: cognitive functioning; adaptive functioning; clinical functioning; comprehension of relevant forensic issues; and genuineness of effort.

To assist the court's determination of competency in Maine, the State Forensic Service examiner's report must address the juvenile's capacity and ability to: appreciate the range of possible dispositions that can be imposed in the proceedings against the juvenile and recognize how possible dispositions imposed in the proceedings will affect the juvenile; appreciate the impact of the juvenile's actions on others; disclose to counsel facts pertinent to the proceedings at issue including the ability to articulate thoughts; the ability to articulate emotions; and the ability to accurately and reliably relate a sequence of events. The juvenile being tested must also: display logical and autonomous decision making; display appropriate courtroom behavior; testify relevantly at proceedings; and

demonstrate any other capacity or ability either separately sought by the juvenile court or determined by the examiner to be relevant to the juvenile court's determination.

North Dakota case law identifies four, nonexclusive factors relevant to determining whether the evidence before the trial court should reasonably have raised a doubt as to the juvenile's competency: (1) the juvenile's irrational behavior; (2) the juvenile's demeanor before the trial court; (3) any prior medical opinions on the competency of the juvenile to stand trial; and (4) any questioning of the juvenile's competency by counsel before the trial court.

Juvenile's Age as a Factor in Determining the *Dusky* Standard

Some states use the juvenile's age as a factor in deciding his or her competency. For example, the juvenile's age or immaturity can be used as one basis for determining the juvenile's competency in: Georgia, Idaho, Maine, Maryland, Vermont.

State	Legal Authority	Factors	Definitions	Dusky Standard	Age as Factor	Procedures	Recent Law	Transfer Procedure
Alabama				•				
Alaska	_	_		_				
Arizona								
Arkansas								
California								
Colorado				•		-		
Connecticut	•				•	•		
Delaware						-		
Dist. of Columbia								
Florida								
Georgia	•			•	•	•	•	
Hawaii								
Idaho								
Illinois								
Indiana								
lowa	•			•		•		
Kansas						-		
Kentucky	•			•				•
Louisiana	•	•	•	•		-		•
Maine	•	•		•	•	-	•	•
Maryland	•		•	•	•	•		
Massachusetts	_			-				
Michigan	•	•		•	•	-	•	
Minnesota Mississippi	•	•		•		•		

Sometimes this is referred to as "Chronological immaturity," meaning a condition based on a juvenile's chronological age and significant lack of developmental skills when the juvenile has no significant mental illness or mental retardation.

On the other hand, age alone does NOT render a person incompetent in: Arizona, Connecticut, Delaware, Montana, and Virginia.

In Michigan, a juvenile 10 years of age or older is presumed competent to proceed unless the issue of competency is raised by a party. A juvenile younger than age 10 is presumed incompetent to proceed.

In Arkansas, if a juvenile is younger than 13 at the time of the alleged offense and is charged with capital murder or murder in the first degree there is a presumption that the juvenile is unfit to proceed and he or she lacked capacity to possess the necessary mental state required for the offense charged; to conform his or her conduct to the requirements of law; and to appreciate the criminality of his or her conduct. The prosecution must overcome these presumptions by a preponderance of the evidence.

In Ohio, if the juvenile who is the subject of the proceeding is fourteen years of age or older and if the juvenile is not otherwise found to be mentally ill, intellectually disabled, or developmentally disabled, it is rebuttably presumed that the juvenile does not have a lack of mental capacity. This presumption applies only in making a determination as to whether the juvenile has a lack of mental capacity.

Juvenile Competency Statutes Applied to Transfer Statutes

A few jurisdictions specifically mention the applicability of their juvenile competency statute to their statute transfer provisions regarding the trasnsfering a juvenile case to criminal court. The juvenile competency statute specifically applies to the transfer statute in: the District of Columbia, Georgia, Kentucky, Louisiana, and Maryland.

In Nevada, the juvenile court cannot certify a juvenile for criminal proceedings as an adult if the juvenile court specifically finds by clear and convincing evidence that the juvenile is developmentally or mentally

incompetent to understand the situation and the proceedings of the court or to aid the juvenile's attorney in those proceedings.

Under Texas law, a juvenile alleged by petition or found to have engaged in delinquent conduct who as a result of mental illness or mental retardation lacks capacity to understand the proceedings in juvenile court or to assist in the juvenile's own defense is unfit to proceed and must not be subjected to discretionary transfer to criminal court as long as such incapacity endures.

In Virginia, with certain statutory exceptions, if a juvenile 14 years of age or older at the time of an alleged offense is charged with an offense which would be a felony if committed by an adult, the court must, on motion of the attorney for the Commonwealth and prior to a hearing on the merits, hold a transfer hearing and can retain jurisdiction or transfer such juvenile for proper criminal proceedings to the appropriate Circuit Court having criminal jurisdiction of such offenses if committed by an adult. Any transfer to the appropriate Circuit

State	Legal Authority	Factors	Definitions	Dusky Standard	Age as Factor	Procedures	Recent Law	Transfer Procedure
Missouri	•			·				
Montana								
Nebraska								
Nevada								
New Hampshire								
New Jersey		•						
New Mexico								
New York	•					•		
North Carolina	•					•		
North Dakota								
Ohio		•		•	•		•	
Oklahoma								
Oregon								
Pennsylvania	•					•		
Rhode Island								
South Carolina				•				
South Dakota								
Tennessee						•		
Texas								•
Utah								
Vermont		•		•	•			
Virginia				•		•		
Washington						•		
West Virginia						•		
Wisconsin								
Wyoming								

Court must be subject to the following conditions: the juvenile is competent to stand trial, the juvenile is presumed to be competent and the burden is on the party alleging the juvenile is not competent to rebut the presumption by a preponderance of the evidence.

Not-with-standing a finding by the juvenile court in Maine that the juvenile is competent to proceed in a juvenile proceeding, if the juvenile is subsequently bound over for prosecution in the Superior Court or a court with a unified criminal docket, the issue of the juvenile's competency can be revisited.

Likewise in South Dakota, not-withstanding a finding by the court that the juvenile is competent to proceed in a juvenile proceeding, if the juvenile is subsequently transferred to criminal court the issue of the juvenile's competency can be revisited.

In Connecticut, the juvenile competency statute does not apply to a transfer hearing.

Recently Enacted Juvenile Competency Statutes

Recently, several states have enacted new juvenile competency statutes: West Virginia in 2010; Idaho, Maine, and Ohio in 2011; Connecticut, Delaware, and Utah in 2012; Michigan and South Dakota in 2013. New Georgia law will be taking effect in 2014.

Juvenile Competency Definitions

Some state statutes provide valuable definitions. Delaware defines the term *Competency Evaluator* to mean an expert qualified by training and experience to conduct juvenile competency evaluations, familiar with juvenile competency standards, and familiar with juvenile treatment programs and services.

In Louisiana, *Insanity* means a mental disease or mental illness which renders the juvenile incapable of distinguishing between right and wrong with reference to the conduct in question, as a result of which the juvenile is exempt from criminal responsibility.

A Competency Hearing in Maryland means a hearing to determine whether a juvenile alleged to be delinquent is mentally competent to participate in a waiver hearing, an adjudicatory hearing, a disposition hearing, or a violation of probation hearing.

Recent State Case Law

The issue in a 2010 Louisiana appellate court case was whether the juvenile court is divested of jurisdiction when a juvenile is indicted in criminal court at a time when competency proceedings are pending in the juvenile court.

In this case, after the indictment was filed and before the juvenile court held a hearing on the competency issue, the state objected to the juvenile court's exercise of jurisdiction and moved to dismiss the proceedings. The juvenile court denied the state's motion, and said a competency hearing would be conducted to determine the juvenile's capacity to proceed.

The Louisiana appellate court held that in those cases where the competency of the juvenile is raised in juvenile court before the state secures an indictment, the state has no authority to get an indictment until the juvenile has been found competent. If the juvenile is found competent in the juvenile court, trial in the criminal court is not prevented. Only those juveniles who are found incompetent would be shielded from criminal prosecution. (*State in the Interest of T.C.*, 35 So.3d 1088 (2010))

In 2013, the Supreme Court of Colorado held that the differing treatment of indigent juveniles and indigent adult defendants with regard to the entitlement to a second competency evaluation at state expense did not constitute an equal protection violation.

The Colorado high court went on to explain that the divergent purposes of the adult and juvenile justice systems can logically demand divergent procedures and procedural protections. Consequently, the competency procedures applicable in juvenile justice proceedings can validly differ in important ways from those used in the criminal context.

The state high court found that no

Equal Protection violation occurred here. The General Assembly's establishment of a comprehensive system for the rehabilitation of juvenile offenders—which seeks to provide care and guidance, in contrast to the punitive focus of the criminal justice system—provides a rational basis for denial of an initial and second competency evaluation as a right in the juvenile justice system, even though a criminal defendant would be entitled to both.

In order to protect an alleged juvenile offender's welfare in a juvenile justice proceeding, the state has a very different role than it does in a criminal prosecution: that of parens patriae.

In fact, the juvenile competency provisions—unlike the adult provisions—explicitly require the court, prosecution, probation officer, guardian ad litem, defense counsel, and parent or legal guardian to actively safeguard an alleged juvenile offender's right not to be tried or sentenced while incompetent to proceed.

The Colorado Supreme Court concludes that the General Assembly could reasonably and rationally view this arrangement as more conducive to achieving the less adversarial, more intimate, informal and protective proceeding the United States Supreme Court identified as the aspirational goal of the juvenile justice system. (*In the Interest of W.P.*, 295 P.3d 514 (2013))

Linda A. Szymanski, Senior Attorney with the National Center for Juvenile Justice prepared this document with support from the John D. and Catherine T. MacArthur Foundation. Points of view or opinions expressed are those of the author and not necessarily those of the Foundation.

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Competency to Stand Trial in Juvenile Court: Recommendations for Policymakers

POLICY UPDATE | NOVEMBER 2012

ABOUT THIS DOCUMENT

Around the country, the question of whether a defendant is competent to stand trial is being raised more often in juvenile court proceedings. However, most states lack statutory guidance for how competence to stand trial should be applied in juvenile court. Instead, these states apply their adult criminal competence statutes to youth in juvenile court, resulting in frustration, confusion, and uncertainty among judges, prosecutors, and defense counsel. As a result, practitioners and policymakers have become interested in developing competency statutes for use in juvenile court.

To aid states in developing competency statutes for juvenile proceedings, the John D. and Catherine T. MacArthur Foundation's Models for Change initiative published Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers. The 91-page guide provides a comprehensive analysis of statutory components, offering arguments in support of and against drafting options, and concludes with drafting recommendations. This brief policy update is intended to provide an overview of the juvenile court competency issue and to summarize the recommendations from Models for Change. However, in order to fully understand the range of statutory options and their implications, we strongly encourage readers to review the full guide.¹

INTRODUCTION

The United States judicial system is bound by the rights granted to the people in the Constitution. The right to due process and a fair trial, as guaranteed by the Fifth and Sixth Amendments respectively, are commonly thought of as cornerstones of the criminal justice system. However,

¹ The information in this document is drawn from the Models for Change guide, *Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers*, from November 2011, available at http://bit.ly/Tqp7sU. For more information about Models for Change, visit www.modelsforchange.net.

the rights that embody these principles were not always granted to defendants in the juvenile justice system. Even today, youth prosecuted in the juvenile system are not constitutionally guaranteed all of the same protections afforded to defendants in criminal court proceedings.²

When juvenile courts were first established in the late 19th and early 20th centuries, they were founded on the notion that youth in trouble with the law needed help and rehabilitative services, not punishment. As such, the courts were created within civil legal systems, rather than criminal systems, and lacked the majority of the due process protections guaranteed to defendants in criminal court—most notably, the right to counsel. Over time, the ideals of the juvenile justice system deteriorated. Youth were increasingly deprived of their liberty and subject to punishment instead of rehabilitation and treatment. The emerging harshness of the juvenile system began to raise questions about whether or not youths' constitutional rights were being violated. In 1967, the Supreme Court responded to concerns about youth rights in *In re Gault*, and extended to youth defendants in juvenile court proceedings the right to timely notification of the charges filed against a defendant, the right to confront witnesses, the right against self-incrimination, and the right to counsel.³ Although the Court extended other due process protections to defendants in juvenile court following *Gault*, the Court has yet to extend *all* due process rights to youth in the juvenile system. Among these protections is the requirement that a defendant be competent to stand trial.

Competency to stand trial dates back to English common law. Under common law, a defendant was required to have sufficient mental capacity to understand the proceedings against him and to participate in his or her defense. In 1960, the Supreme Court ruled in *Dusky v. U.S.* that competency to stand trial is a constitutional requirement, and a defendant is competent to stand trial if he or she "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and ... a rational as well as a factual understanding of the proceedings against him." To comply with the Supreme Court's holding in *Dusky*, states passed statutes to govern competency determinations in criminal court.

COMPETENCY TO STAND TRIAL IN JUVENILE COURT

Defense attorneys did not begin to raise the question of competency in juvenile court until the 1990's. As new laws were passed to treat youth more harshly and more like adult defendants, defense attorneys started raising competency to protect their clients in juvenile court. Since no juvenile competency standards existed, either in case law or statute, attorneys and courts frequently relied on their state's criminal competency statute as the standard. Currently, all states except Oklahoma now recognize that youth in juvenile court must be competent to stand trial,

² For example, youth in juvenile court are not guaranteed a right to bail, the right to trial by jury, the right to a speedy trial, or the right to represent themselves.

³ *In re Gault,* 387 U.S. 1 (1967).

⁴ Dusky v. United States, 362 U.S. 402 (1960).

even though the Supreme Court has not formally extended this due process requirement to juvenile proceedings. However, not all states legislate or provide guidance on the competency standards to use in juvenile court. In fact, many states, if not most, still employ the same criminal competency statutes used to evaluate adult defendants for youth in juvenile court.

The use of adult competency statutes in juvenile court raises many concerns. Most importantly, criminal statutes were developed for use in determining the competency of adult defendants, and fail to recognize reasons for incompetence that are unique to youth. Criminal competency statutes typically include mental illness and intellectual disability as reasons for incompetence. However, when dealing with youth, a juvenile court should also consider a defendant's developmental maturity when assessing his or her competence to stand trial. These three reasons for incompetence—mental illness, intellectual disability, and developmental maturity—each present challenges when evaluating a youth's competence to stand trial. Moreover, they can also be interrelated, in that a youth's mental illness and/or intellectual disability may be further complicated by his or her developmental immaturity—an issue that is unique to youth.

Mental Illness

Mental illness in youth is difficult to diagnose and treat, as symptoms of mental illness vary with age. A behavior that may be considered symptomatic in someone at one age, which would lead to a diagnosis of mental illness, may be considered normal behavior in someone younger or older, and would not result in a diagnosis. Young people's ongoing development makes it challenging to determine whether a symptom actually exists, or if it is just a behavior that will naturally subside with age. Moreover, a youth's mental illness may be more detrimental to his or her ability to understand the proceedings and participate in his or her defense—rising to the level of incompetence to stand trial—than it might to an adult with the same diagnosis.

Intellectual Disabilities and Cognitive Impairments

Like adults, youth may have a low IQ, learning disability, and/or other neuropsychological impairment that affects their competence. However, some research has shown that youth are more frequently found incompetent based on intellectual deficits than are adults—finding that 58 percent of youth, and only six percent of adults, were found incompetent based on intellectual deficits. In court, these youth may have problems with their memory, learning, and/or processing information, in addition to challenges with abstract reasoning and executive functioning. As a result, they may have difficulty satisfying the factual and rational

⁵ Anette McGaha et al., "Juveniles Adjudicated Incompetent to Proceed: A Descriptive Study of Florida's Competence Restoration Program," *Journal of the American Academy of Psychiatry and the Law*, 29 (2001): 427.

understanding tests of the *Dusky* standard — even though they may not meet the full criteria for some of these intellectual and cognitive diagnoses.

Developmental Maturity

While many adult criminal competency statutes refer to mental illness and intellectual disability as underlying factors for incompetence, none refer to a defendant's developmental maturity—a critical factor to consider when evaluating the competency of a youth to stand trial. The ongoing process of adolescent development can amplify mental illness or intellectual disabilities that are already affecting a youth's competence. And developmental immaturity alone can raise concerns about a youth's competence to stand trial. Neurological, cognitive, and psychosocial development all contribute to a youth's factual and rational level of understanding of the court process. During adolescence, youth may have an unstable sense of self, be emotionally impulsive, and have a decreased ability to make rational and reasonable decisions on their own. Their misperceptions of risk and sometimes faulty perspectives on others demand that courts consider developmental maturity when making a determination about a youth's competence. It would be foolish to neglect these major components of human development when making such determinations.

RECOMMENDATIONS / FACTORS TO CONSIDER

To aid policymakers in this important work, this policy update summarizes a series of statutory factors to consider and drafting recommendations drawn from the Models for Change publication, <u>Developing Statutes for Competence to Stand Trial in Juvenile Delinquency</u>

<u>Proceedings: A Guide for Lawmakers.</u>

Defining Competence

Juvenile competency statutes should instruct the court to consider a youth's mental illness, intellectual disability, and/or developmental maturity when determining whether the youth is competent to stand trial in juvenile court.

• In criminal court, adults are usually declared incompetent for one of two reasons: mental illness or intellectual disability. Competency evaluations of youth however, often reveal a third reason for incompetence—developmental immaturity.

Statutes should provide guidance to the court by including cognitive thresholds that youth must satisfy to be found competent.

- A juvenile competency statute should include cognitive thresholds to represent the concepts articulated by the Supreme Court in *Dusky*, mentioned above. For example, the thresholds might include factual understanding, rational understanding, the ability to assist counsel, and the ability to make decisions.
- Defining the categories broadly, as opposed to using specific abilities such as, "able to disclose relevant facts to his or her attorney," protects youth who may have a factual understanding of the situation, but lack the ability to rationally apply the facts to the bigger picture. For example, a youth may know that he or she is in a courtroom, that there is a judge, a prosecutor, and a defense attorney, but may not comprehend the larger implications of a juvenile court proceeding. Since it is difficult to qualify rational understanding with specific abilities, using broad categories allows judges to use discretion when deciding whether or not a youth satisfies the thresholds.

Due Process Considerations

Youth should be provided a right to counsel prior to any evaluation of competence, as well as during the evaluation.

• A competency evaluation in juvenile court is a critical stage of the proceeding and youth should be entitled to counsel before and during the evaluation under the Sixth Amendment, which guarantees defendants the "assistance of counsel for [their] defense." Similar to competency evaluations in criminal court, competency evaluations in juvenile court may affect the outcome of the case and result in a loss of liberty for the youth involved — hence the importance of counsel.

Youth should be protected against the use of any self-incriminating statements made during a juvenile competency evaluation.

• Self-incriminating statements made by youth during a juvenile competency evaluation, or information contained in the written competency report, should be prohibited from being used as evidence against the youth in future proceedings.

⁶ Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 130 S.Ct. 2011 (2010); J.D.B. v. North Carolina, 131 S.Ct. 2394 (2011); Miller v. Alabama, 132 S.Ct. 2455 (2012).

⁷ U.S. Const. amend. 6.

• States may refer to the level of protection afforded to adults in criminal competency evaluations for guidance, or to the protections afforded to youth undergoing other mental or behavioral health evaluations in juvenile court.

Competence Evaluations by Mental Health Examiners

Evaluations of youth competency in juvenile court should be performed by examiners with training and/or experience in child psychology, or psychiatry with forensic specialization.

- Mental health professionals conducting juvenile competency evaluations should have proper training and experience working with children and adolescents, and appropriate training in forensic specialization.
- States should provide continuing education to these professionals, to ensure up-to-date training and knowledge.

Juvenile competency evaluations of youth should be performed in the least restrictive setting appropriate for the youth's psychological needs.

 Youth should not be hospitalized in a psychiatric facility for a competency evaluation unless such psychiatric care is required for a reason separate from the competency evaluation.

Juvenile competency evaluations should be performed within reasonable time limits.

• A juvenile competency evaluation can be appropriately completed by a qualified professional within two to three weeks. States should consider this 14- to 21-day range in relation to the time limits they place on adult competency evaluations, and in light of both the youth's and the state's interest in avoiding unnecessary delay.

Juvenile competency statutes should provide guidance to the court and to examiners on the content that should be included in the competency evaluation report.

• Juvenile competency evaluations should include analysis in five content areas: assessment of the youth's mental disorder and intellectual disability; assessment of the youth's developmental status; assessment of how the youth's mental disorder, intellectual disability, and/or developmental maturity affect his or her abilities associated with competence to stand trial, such as what he or she understands about the trial process, assisting counsel, and making decisions about the proceedings; causes of the youth's deficits, if any, in his or her abilities associated with competence to stand trial; and

- potential for remediation of the youth's abilities associated with competence to stand trial.
- Statutes should offer more direction than merely a list of the content areas to be included in the evaluation report, but should still leave some discretion to courts and evaluators.

Remediation and Legal Disposition of Incompetent Defendants

Juvenile competency statutes should instruct the court to determine the most appropriate placement and/or services for a youth, based on the particular reasons underlying the youth's incompetence.

- While criminal statutes typically refer to "restoration"—the period of time it takes to restore an adult's competence—juvenile competency statutes should refer to this period of time as "remediation." Since some youth will be deemed incompetent to stand trial based purely on their developmental immaturity, remediation is a more appropriate label because it does not imply that the youth were once competent and will over time be restored to that status. Rather, it acknowledges that a youth may have never previously satisfied the competency-to-stand-trial benchmark.
- During the remediation process, youth should be placed in the least restrictive setting available.

Statutes should provide a length of time allowed for remediation and should include provisions for periodic review of remediation progress.

- States should look to their criminal codes for guidance on the length of time that should be permitted for remediation.
- Statutes should require periodic review of the remediation progress. Youth placed in inpatient facilities should be protected by more frequent reviews than youth placed in outpatient programs.

When incompetence cannot be remediated, states must decide what should happen in the legal disposition of the case.

• Juvenile competency statutes should balance the interests of the youth, the state, and the public when determining how these cases should be resolved.

If an incompetent youth cannot be remediated and the state chooses to dismiss the juvenile charges against him or her, juvenile competency statutes should include provisions that allow the court to transfer the case to the state's child welfare system.

• By transferring the case to the child welfare system, courts are able to address public safety concerns, and also order appropriate social or clinical services for the youth. States must determine the appropriate court procedure for such a provision.

CONCLUSION

A competent defendant is a requirement for trial that derives from English common law. Incorporated under the due process clause of the Constitution, competence to stand trial protects defendants who cannot understand the proceedings against them or participate in their own defense. Despite states' acknowledgement that competence is a requirement in juvenile court, most states continue to rely on competence statutes that were developed for adult defendants and fail to consider issues regarding competence that are unique to youth. As competence to stand trial is increasingly raised in juvenile proceedings across the country, the need for statutory guidance is amplified.

Because this document is only intended to provide a brief overview of the issues raised by competency statutes in juvenile court and a summary of the Models for Change recommendations, we urge you to download the full document, <u>Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers</u>, for more information.