

**SB 295 (2021):
Serving Persons with Mental Illness
in the Right Place
under the Right Legal Jurisdiction**



Oregon
Health
Authority



Disclaimer

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

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



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Major take-away
concepts:

Not everyone w/mental illness is
“incompetent to stand trial”

Not everyone w/mental illness
needs to go to OSH

The law keeps changing; don't
assume that you already know the
statutes

Outline for Today's Presentation

- Context of statutory changes
- Goals of statutory changes
- Statutory changes to definitions
- Statutory changes to aid and assist processes
- “Appropriate actions” must be considered
- Promising practices to implement statutory changes
- Resources
- Questions





The Oregon State Hospital: Salem





The Oregon State Hospital: Junction City

OSH Census by Commitment Type (As of 5/9/2022)

Commitment Type / Legal Status	#	%
Aid & Assist	409	59.4%
Court Order (161.370)	409	59.4%
PSRB	264	38.3%
GEI - T1 (161.327)	104	15.1%
GEI - T2 (161.327)	69	10.0%
Civil Commitment - PSRB (CCP) (426.701)	13	1.9%
Civil Commitment - PSRB (CCP) (426.702)	8	1.2%
Revocation of Conditional Release - T1 (161.336)	49	7.1%
Revocation of Conditional Release - T2 (161.336)	19	2.8%
Juvenile PSRB (419C.530)	1	0.1%
Civil	16	2.3%
Civil Commitment (426.130)	11	1.6%
Voluntary by Guardian (426.220)	5	0.7%
Other	0	0.0%
GEI - M (161.328)	1	0.1%
Total	689	100.0%

The Neuropsychiatric/Geriatric units include a mix of the commitment types listed above.
These units housed 65 patients on 5/9/22.

OSH Median
Length of Stay by
Commitment
Type
(last 12 months,
as of 5/1/2022)

Commitment Type / Legal Status	#	Median LOS
Aid & Assist	792	96.5
Court Order (161.370)	791	97.0
Court Order (161.365)	1	21.0
Psychiatric State Review Board (PSRB)	55	719.0
GEI - T1 (161.327)	13	981.0
GEI - T2 (161.327)	16	553.5
Juvenile PSRB (419C.530)	1	1561.0
Civil Commitment - PSRB (CCP) (426.701)	1	968.0
Revocation of Conditional Release - T1 (161.336)	18	525.0
Revocation of Conditional Release - T2 (161.336)	6	430.0
Civil	8	639.5
Civil Commitment (426.130)	4	254.5
Voluntary by Guardian (426.220)	4	1063.5
Other	0	
Total	855	118.0

The Neuropsychiatric/Geriatric units discharged 87 people with a median LOS of 160 days.
LOS data from 5/1/21 to 4/30/22.

OSH Aid & Assist
Census by
County
(As of 5/9/2022)

ORS 161.370 Patients at OSH on 5/9/22			
County	Count of Patients	Population (2020 Estimate)	Patients per 100,000 Population
Washington	64	620,080	10.32
Multnomah	63	829,560	7.59
Marion	51	349,120	14.61
Lane	44	381,365	11.54
Clackamas	26	426,515	6.10
Douglas	22	112,530	19.55
Jackson	17	223,240	7.62
Linn	13	127,320	10.21
Polk	13	83,805	15.51
Benton	12	94,665	12.68
Clatsop	10	39,455	25.35
Klamath	9	68,075	13.22
Deschutes	7	197,015	3.55
Coos	7	63,315	11.06
Lincoln	7	48,305	14.49
Columbia	5	53,280	9.38
Umatilla	5	81,495	6.14
Yamhill	5	108,605	4.60
Curry	4	23,005	17.39
Malheur	4	32,105	12.46
Josephine	4	86,560	4.62
Wasco	3	27,295	10.99
Union	3	26,840	11.18
Morrow	3	12,825	23.39
Jefferson	3	24,105	12.45
Tillamook	2	26,530	7.54
Baker	2	16,910	11.83
Hood River	1	25,640	3.90
Sherman	0	1,795	0.00
Crook	0	23,440	0.00
Lake	0	8,075	0.00
Grant	0	7,315	0.00
Harney	0	7,280	0.00
Wallowa	0	7,160	0.00
Gilliam	0	1,990	0.00
Wheeler	0	1,440	0.00
Total	409	4,268,055	9.58

Percent Change
in Census
from 1/1/12 to
4/30/22

Aid & Assist (ORS
161.370) +275.5%

- *From 1/1/12 through 4/30/22*
- ***36.3% of all new Aid & Assist admissions were patients charged with crimes no higher than misdemeanors***

Guilty Except for
Insanity -15.8%

2021 Legislative Session

To address the census crisis at OSH and problems with the aid and assist statutes, stakeholders in the Aid & Assist Workgroup collaborated on Legislative Concept 489 (2020), which became SB 295.

The Oregon Judicial Department submitted Legislative Concept 489 representing the consensus of the Aid & Assist Workgroup.

SB 295 reorganizes and amends the aid and assist statutes, ORS 161.365 and ORS 161.370.

SB 295 included an emergency clause, which made it effective when the Governor signed it on June 23, 2021.

Objectives of the 2021 legislation

SB 295 focuses on:

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

Hospitalization: Not Always Better

- Someone with mental illness at OSH who could be better served in the community may lose:
 - Housing
 - Support (family, friends, pets)
 - Financial benefits
 - School enrollment
 - Employment
 - Mental health care and other therapeutic support



Restorative services in community?

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



Potential Restoration Services

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



Fitness To Proceed Statutes (current mental state)

- ORS 161.360
 - Defines fitness to proceed, applies to all criminal fitness evaluations
- ORS 161.365
 - Defines process for **initial** court-ordered evaluations when court has reason to doubt defendant's competency to stand trial (note that a .365 evaluation is not required for a court to make a finding that a defendant is unfit to proceed)
- ORS 161.370
 - Defines process for **subsequent** court-ordered evaluations and how defendants are restored



When Is Someone Unfit to Proceed?

- ORS 161.360: A defendant may be found incapacitated if, as a result of a “qualifying mental disorder,” the defendant is unable to:
 - understand the nature of the proceedings
 - assist and cooperate with their counsel
 - participate in the defense of the defendant

Incompetency is not....

Dangerousness is not a reason for incompetence even if dangerousness is due to a qualifying mental disorder

Severe symptoms do not automatically render a person incompetent to proceed

Lack of factual knowledge does not mean incompetence and must be due to qualifying mental disorder

Hospitalization for incompetency is not the same as Guilty Except for Insanity commitment

What Is Excluded?

- Incompetency must be a result of a “qualifying mental disorder”
- Generally taken to exclude (if solely):
 - antisocial conduct
 - personality disorders
 - substance-induced disorders
 - disorders of sexual behavior



SB 295 Definition Changes

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

The term “dangerousness” has been removed from statute.

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

“Community restoration services” means services and treatment necessary to safely allow a defendant to gain or regain fitness to proceed in the community, which may include **supervision by pretrial services**.

See ORS 161.355

Changes to ORS 161.365

Examination of Defendant

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

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

See ORS 161.365(1)(a)

Determination of Community Restoration Services

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

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

See ORS 161.365(1)(b)

Determination of Community Restoration Services

If the defendant is not charged with any of the offenses on the previous slide, the court must order a county mental health consultation.

The County mental health consultation will determine if community restoration services are present and available.

Determination of Community Restoration Services

If county mental health determines that appropriate community restoration services are **not** present and available in the community, county mental health's report to the court **must**:

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

See ORS 161.362(2)

Changes to ORS 161.365 Examination of Defendant

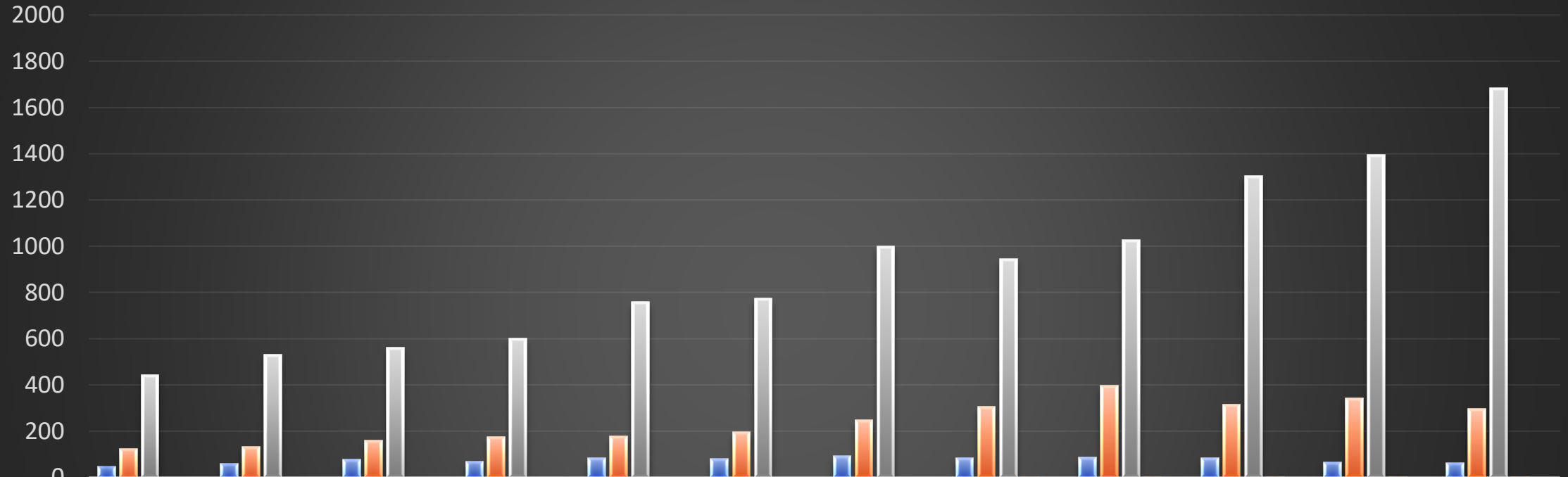
ORS 161.365(7)(a) adds that a **municipal court shall order the city to pay** for a court ordered psychiatric or psychological examination upon motion of the court or a financially eligible defendant.

More
Information
regarding
ORS 161.365

- Note that a “.365” evaluation by a certified evaluator is not required for a court to find that a defendant is unable to aid and assist pursuant to ORS 161.370.
- Note also that, when the court orders OSH’s Forensic Evaluation Service (FES) to conduct a “.365” evaluation after the defense has submitted an evaluation, the FES conclusion is usually the same as the already submitted evaluation.

FES Evaluations by Type (2010-2021)

■ .315 ■ .365 ■ .370 ■ .135



	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
■ .315	46	60	77	70	86	81	92	86	88	86	65	63
■ .365	125	133	160	177	179	197	250	306	398	316	342	297
■ .370	444	530	562	601	759	774	1001	946	1029	1304	1396	1684
■ .135								1	2	2	2	2
Total	615	723	799	848	1024	1052	1343	1339	1517	1708	1805	2046

Changes to ORS 161.370(3)

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

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

If the court does not order commitment, the court shall proceed in accordance with ORS 161.370(2)(c) to determine and order an appropriate action.

Changes to ORS 161.370(4)

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

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

See ORS 161.370(4).

Recommendation of Hospital Level of Care

When the court receives an evaluation from a certified evaluator, it must include a recommendation from the evaluator whether the defendant requires a HLOC, based on:

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

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

See ORS 161.362(1)

The Court Must Order an Appropriate Action

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

- the primary and secondary release criteria,

- the least restrictive option appropriate for the defendant,

- the needs of the defendant and

- the interests of justice.

See ORS 161.370(2)(c)

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

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

See ORS 161.370(2)(c)(A)-(E)

Changes to ORS 161.370(2)

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

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

If Defendant is Committed to OSH

- Treatment **only** until competency restored
- May only keep in hospital for:
 - Reasonable period of time necessary to determine whether there is a substantial probability that defendant/client will gain/regain the capacity in foreseeable future
 - Must discharge as soon as fit or as soon as it is determined that there is not a substantial probability that defendant/client will become fit




How Long is a .370 patient committed?

- Regardless of the number of charges with which the patient is accused, **the patient may only be at OSH for whichever of the following is shorter:**
 - Three years; or
 - A period of time equal to the maximum sentence the court could have imposed if the patient had been convicted

****Note that patients not charged with Measure-11 (the most serious) crimes are given credit for time they spend in jail on the charges.**



A Word About “Timing Out”

- If a defendant is charged with non-Measure-11 charges, the defendant must receive credit for the time they spent in jail
 - OSH may have to discharge shortly after admission with little or no opportunity for treatment and restoration
 - Rapid discharge usually leads to rapid release from the jail, often with little or no mental health services
 - Conditional release and thoughtful stepping down likely results in better outcomes
- 

Restorative services in community?

Essential for attorneys and judges to communicate with community mental health to find out whether a particular client can be restored in the community

If the community can support a particular client, jail time would likely be reduced (note that time in community does not automatically count towards EOJ and clients should be encouraged to work with their attorneys regarding this issue)

Sometimes OSH cannot medicate unfit defendants. Therefore, committing a defendant to OSH will not automatically result in the defendant being medicated.

Community Restoration

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

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

Changes to ORS 161.370(6)

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

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

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

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

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

Changes to ORS 161.370(2)

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

See ORS 161.270(2)(e)

Changes to ORS 161.372 Involuntary Medication

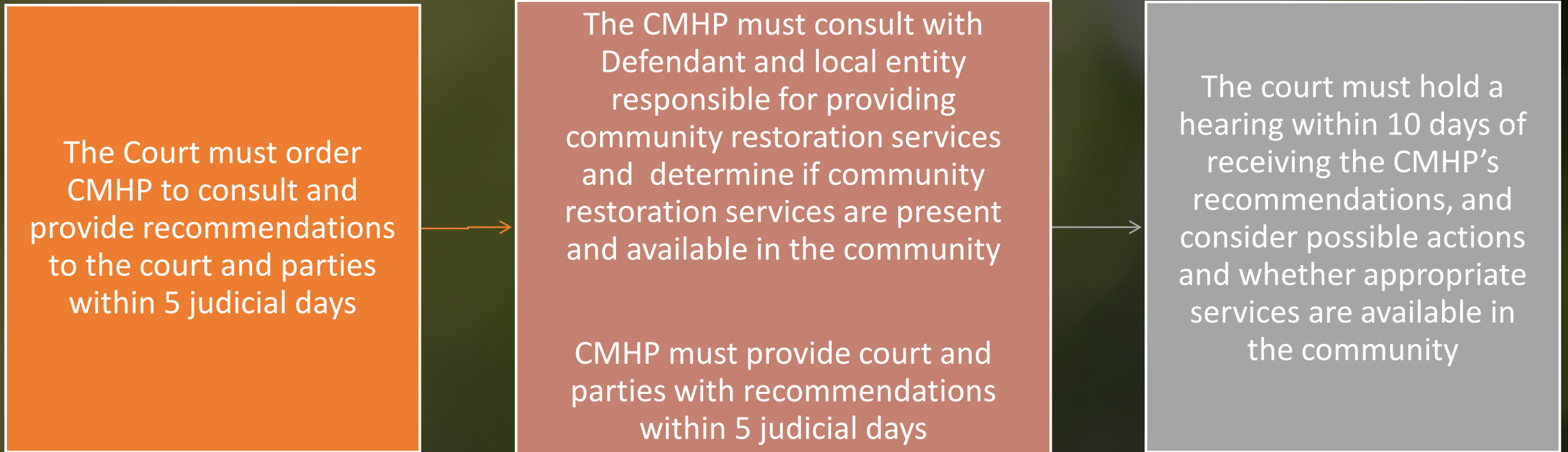
If, while the defendant is at OSH **after commitment** under ORS 161.370, the superintendent determines that medication is the recommended treatment in order to allow the defendant to gain or regain fitness to proceed, the defendant is refusing to take the recommended medication and the defendant cannot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

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

Ready to Place (RTP) Notices from OSH

- if the most serious offense in the charging instrument is a **felony**, and the state hospital determines that a hospital level of care is no longer necessary due to present public safety concerns and the acuity of symptoms of the defendant's qualifying mental disorder, OSH **may** file notice of the determination with the court.
- if the most serious offense in the charging instrument is a **misdemeanor**, and the state hospital determines that the defendant no longer needs a hospital level of care due to the acuity of symptoms of the defendant's qualifying mental disorder or there are not present public safety concerns, OSH **shall** file notice of the determination with the court.
- ORS 161.371(3)&(4)

When the Court receives an RTP Notice from OSH:



The court may not continue commitment to OSH unless the court makes findings required by ORS 161.371(3)(c) or ORS 161.371(4)(c)

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

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

See ORS 161.362(4)

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

Tips regarding things to avoid

- Don't let the defendant bail out (unless the court vacates the commitment order)
- Don't dismiss the charges without ordering the defendant to be transported back to the county
- Don't forget to include county mental health
- Don't forget about the defendant while he/she is at OSH
- Try to avoid duplicative evaluations

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

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

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

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

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

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

Resources: Community Mental Health Programs

- OAR 309-088-0125 requires CMHPs to submit reports within five days of OSH's (9)(b) notice.
- Courts may see a CMHP report even without a court order. (SB 24 requires that courts still order it.)
- Links to the new CMHP consult template and OARs are on the OSH website:
- <https://www.oregon.gov/oha/OSH/LEGAL/Pages/information-mental-health-providers.aspx>

Resources: OSH Website

- Order Templates
- List of Certified Evaluators
- Legal Skills Curriculum
- FAQs about recent legislation

Resources: Administrative Rules

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

Resources

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

Questions

- If you have any questions, please contact:
 - **Oregon State Hospital Legal Affairs**
503-947-2937
 - **Oregon Judicial Department**
Office of the State Court Administrator
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