I. Introductory Summary

Like an adult criminal defendant, a youth in a delinquency proceeding has a constitutional right to raise the issue of fitness to proceed and to stand trial before he or she can be adjudicated in juvenile court. The Oregon Juvenile Code, however, is silent on the subject of fitness. No procedure is set out in the Code for the determination of fitness, and no options for the court are specified when a youth is found unfit. As a result, courts are left to fashion an outcome for the youth with no guidance in the law. Clear options are needed to help ensure that both the best interests of the youth and the best interests of victims and the community are protected. This draft provides a statutory structure that best fits juvenile court delinquency proceedings when youth may be unfit to proceed.

In order for a criminal defendant to stand trial he or she must be “fit to proceed” (i.e. able to aid and assist in their defense). This means that the defendant must be able to understand the nature of the proceeding and assist and cooperate with his or her counsel. If a defendant is not able to aid and assist the defendant undergoes restorative services until the defendant regains fitness. Restorative services are generally instructional with a focus on educating defendants about the nature of their crimes and the process and results of the trial or proceeding. These services, however, may also include medication or treatment for mental disabilities. Currently, there are statutory provisions codifying fitness to proceed requirements and procedures that govern adult aid and assist proceedings, but there are no similar statutes for juveniles.

Generally, when counsel raises issues regarding fitness to proceed in juvenile court, the courts proceed similarly to how they would proceed in adult court. This, however, is not preferable because in some instances there are specific reasons that juvenile cases
should be handled differently. In addition, with no statutory guidance courts deal with aid and assist proceedings inconsistently. Significantly, some judges have not allowed counsel to raise the issue in juvenile proceedings because it is not provided for in statute. The Aid and Assist Sub Work Group was convened to develop a statutory framework to govern fitness proceedings in order to provide guidance to the courts, ensure consistent application for the litigants, and account for differences between the juvenile and adult system.

II. History of the Project

In December 2003, the Oregon Law Commission’s Juvenile Code Revision Work Group proposed and the Oregon Law Commission approved the juvenile aid and assist project. The project was deferred to the 2007 Legislative Session. The Aid and Assist Sub Work Group first met on April 14, 2006. The members of the Sub Work Group include judges, district attorneys, defense attorneys, and other stakeholders who represent or work with juveniles. The group conducted work in monthly meetings until October, 2006 where it met five times between October 3 and November 9 in order to complete its work and present a final draft to the Juvenile Code Revision Work Group. The Juvenile Code Revision Work Group approved the draft with some minor amendments and forwarded the proposal to the Oregon Law Commission for consideration and approval. The Oregon Law Commission approved the draft for recommendation to the Legislative Assembly during its meeting on December 4, 2006.

III. Statement of Problem Area

Although parties currently raise fitness to proceed issues in juvenile delinquency proceedings, the Oregon statues provide no guidance for courts or parties. This has led to confusion and inconsistency. In fact, one circuit court judge recently denied a fitness to proceed challenge due to lack of statutory authority. In addition, some defense attorneys are reluctant to raise or may be ignorant of the defense because there are no juvenile aid and assist statutes. Not only does this raise issues of fairness, but it implicates constitutional due process rights. It is necessary to establish statutory procedures and guidelines for aid and assist challenges in order to provide direction, ensure consistency, guarantee that constitutional rights are not violated, and develop a procedure to administer restorative services.

1 Juvenile Aid and Assist Sub Work Group members: Julie McFarlane, Juvenile Rights Project (co-chair); Thomas Cleary, Multnomah County District Attorney’s Office (co-chair); Karen Andall, Oregon Youth Authority; Bill Bouska, Office of Mental Health & Addiction Services; Mary Claire Buckley, Psychiatric Security Review Board; Michael Clancy, Clancy & Slininger; Daniel Cross, Law Office of Daniel Cross; Judge Deanne Darling, Clackamas County; Summer Gleason, Clackamas County District Attorney’s Office; Judge Kip Leonard, Lane County; Tim Loewen, Yamhill County Juvenile Department; Bob Joondeph, Oregon Advocacy Center; Patricia O’Sullivan, Department of Human Services; Andrea Poole, Marion County District Attorney’s Office; Mickey Serice, Department of Human Services; Karen Stenard Sabitt, Attorney in private practice; Ingrid Swenson, Office of Public Defense Services; Timothy Travis, State Court Administrator’s Office; Janette Williams, Department of Human Services; Dr. Laura Zorich, Licensed Clinical Psychologist.
IV. Objective of the Proposal

The objective of this proposal is to establish substantive and procedural guidelines for juvenile aid and assist cases. The draft defines when a youth is unfit to proceed and sets out procedures and substantive rules regarding raising the issue of fitness to proceed, obtaining evaluations, challenging evaluations, and administrating restorative services. Setting out statutory standards will protect youths by ensuring that they will not be adjudicated without being able to assist and cooperate with counsel. In addition, it will protect the public by providing the necessary restorative services so that youths who are capable of being restored to fitness will be properly adjudicated. Other states, such as Virginia and Connecticut, have developed juvenile aid and assist statutes. The Aid and Assist Sub Work Group used statutes from these and other states as well as Oregon’s adult aid and assist statutes to develop this draft.

Typically, aid and assist challenges are made by the youth, but the draft provides that any party or the court may raise the issue of fitness. If a party raises the issue the court is required to order an evaluation to determine whether the youth is able to aid and assist. The evaluation is administered by a medical professional and consists of questions and tests to determine whether the youth understands the nature and consequences of the delinquency proceedings and to determine whether the youth suffers from a mental disease or defect. After the evaluation is provided to the parties and the court, the court makes a fitness determination and, if necessary, orders restorative services. The non moving party may object to any part of the evaluation and have another evaluation administered. The delinquency proceedings continue once the youth is restored. If the youth is incapable of restoration – that is, cannot be treated so that the youth is able to aid and assist – the delinquency proceedings are dismissed and, most likely, the district attorney will initiate dependency proceedings.

Under the provisions of this proposal, the Department of Human Services (DHS) is required to administer restorative services to youths who are unfit to proceed. Usually, that will consist of educational type services to teach youths about the nature of the alleged offense and the juvenile process. In some instances, restorative services will include medication or other treatment to address a mental disease or defect. Accordingly, this proposal will have a fiscal impact. The cost to DHS has not yet been determined, but if Oregon is consistent with other states there will be about 35 to 40 youths per year who require restorative services.\(^2\)

The draft is silent on the issue of involuntary medication. In some instances, a youth will be unfit to proceed, but able to achieve fitness with the administration of psychiatric medication. The work group was unable to agree as to whether or under what circumstances a court should order involuntary medication to an unwilling youth. Some work group members proposed a section that would allow courts to order medication upon clear and convincing findings that: 1) the medication would render the youth fit to proceed; 2) there are no less intrusive means; 3) the medication is narrowly tailored to minimize

\(^2\) This prediction is based on the number of youths who are provided restorative services in Virginia and recent records of fitness to proceed cases from Oregon counties.
intrusion on the youth’s liberty and privacy interests; 4) it is not an unnecessary risk to the youth’s health; and 5) the seriousness of the allegations are such that the state’s interests outweigh the youth’s interest in self-determination. Ultimately, the work group voted not to include that section on involuntary medication arguing that it would not sufficiently protect the interests of youths, there are no similar provisions in the adult aid and assist statute, and the section would be unconstitutional. Proponents argued that the section would be constitutional, could provide sufficient safeguards to protect youths, and is necessary because courts currently order involuntary medication so there should be statutory procedure in place.

V. Section Analysis

Section 1
This section sets out the standards for courts to determine whether a youth is fit to proceed. It largely mirrors the adult statute except that it provides that a youth may raise the issue of fitness based on other conditions such as severe immaturity. The adult statute provides that a defendant may be unfit to proceed if as a result of mental disease or defect the defendant is unable to aid and assist in his or her defense. This proposal is broader because it allows a youth to raise the issue of fitness if he or she is unable to assist as a result of a “mental disease or defect or another condition.”

In addition this section provides that a court may not base a finding of unfitness solely on the inability of the youth to remember the acts alleged in the petition, evidence that the youth was under the influence of intoxicants, and the age of the youth (as distinguished from the youth’s maturity level).

Section 2
This section is comprised of six subsections which establish the procedures and guidelines for raising the issue of fitness, obtaining evaluations, challenging evaluations, and administering restorative services.

Subsection 1
This subsection provides that any party or the court can raise the issue of fitness any time after the filing of the petition. It requires the court to stay the delinquency proceedings and order the youth to participate in an evaluation to determine whether the youth is fit to proceed if the court finds: 1) there is reason to doubt the youth’s fitness to proceed; and 2) there is probable cause to believe that the factual allegations contained in the petition are true.

Subsection 2
Subsection 2 provides that only licensed psychiatrists, psychologists, or clinical social workers may conduct evaluations to determine a youth’s fitness to proceed. In addition, this subsection requires the party who requested the evaluation to provide information regarding the evaluation to the other parties and the court. It authorizes any party to submit written information to the evaluator and provides that the evaluation must be paid for by the moving party, unless the court raises the
issue of fitness, in which case Public Defense Services must pay for the evaluation. Finally, this subsection sets out when a court may remove a youth from his or her current placement for an evaluation. The removal for an evaluation cannot be longer than 10 judicial days (two weeks). Removal for evaluations would be rare and happen only in extreme circumstances. Usually, the youth will raise the issue of fitness and willingly participate in an evaluation. Removal may happen if the district attorney or the court raise the issue of fitness – something that is very uncommon – and the youth will not participate in the evaluation.

Subsection 3
Subsection 3 sets out what must be contained in the evaluators report, and includes the information the evaluator reviewed, the evaluator’s opinion regarding the fitness of the child, and whether the child would benefit from restorative services. It provides that statements made by the youth about facts alleged in the petition may not be used against the youth in proceedings related to the petition. Additionally, this subsection provides that the Department of Human Services (DHS) may obtain copies of the evaluation report and petition. In most instances, the parties will submit any evaluations, the petition, and any other information about the proceeding to the DHS. In the case that the parties do not submit that information, DHS would need authority to obtain the information so that they can ascertain why the youth is unable to aid and assist and properly administer restorative services.

Subsection 4
Subsection 4 sets out procedures the court must follow after receiving the evaluator’s report. This subsection was drafted with the purpose of ensuring efficient and timely proceedings without compromising a party’s right to object to and obtain their own evaluation. Accordingly, a party may object to a report within 14 days of receipt of the report. The objecting party obtain its own report and the court is required to hold a hearing within 21 days of the objection.

If there are no objections, the court is not required to hold a hearing and can, depending upon the conclusions in the evaluation, dismiss the petition, vacate the stay, or order restorative services. A court can hold a hearing on its own motion. The moving party is required to show the youth is not fit proceed by a preponderance of the evidence. The court is required to issue a written order outlining the fitness findings.

Subsection 5
This subsection sets out how a court must proceed after it makes fitness findings. If the court finds the youth fit to proceed it is required to vacate the stay and continue the proceedings. If the court finds the youth unfit to proceed and unable to benefit from restorative services the court is required to dismiss the petition without prejudice. Finally, if the court finds the youth unfit to proceed and able to

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3 Without prejudice means that the petition can be filed against the youth at a later time if the youth is restored (fit to proceed). If a case is dismissed with prejudice it cannot be filed again at a later date.
benefit from restorative services the court shall order DHS to provide restorative services.

DHS is required to implement restorative services within 30 days of receipt of the court’s order. No later than 90 days after receipt of the court’s order, DHS must send a report to the court describing the nature and duration of services provided and recommend whether services should be continued. After the court receives the report from DHS, the court is required to make a fitness finding and either vacate the stay, dismiss the petition, or order further restorative services. If services are continued, DHS is required to issue another report no later than 90 days after the receipt of the order from the court. If the youth is cooperative and when possible, restorative services will take place at the youth’s current placement. When necessary, however, the court may remove a youth in order for DHS to administer restorative services.

A youth can only be removed from his or her placement when it is necessary to do so to have restorative services administered. Additionally, the court must find that removal is in the best interest of the child. The maximum amount of time that a child may be removed from his or her current placement or that the DHS may provide restorative service is the lesser of three years or the maximum duration of the youth’s potential commitment. The draft provides for a maximum time for removal and the administration of restorative services so that a youth is not confined in the system indefinitely. This time frame is the same as what is provided in the adult aid and assist statute.

Subsection 6
This subsection directs DHS to develop training and standards for persons providing evaluation services, develop guidelines for conducting evaluations, and provide the court with a list of evaluators. Although the court and parties may use that list to find qualified evaluators, they are not required to do so and may use other evaluators as long as the evaluators meet the requirements set out in Section 2 (2).

Section 3
This section requires DHS to administer a program to provide restorative services, develop qualification standards for persons who provide restorative services, and provide restorative services upon receiving an order from the court. This section was included based on the concerns of some sub work group members that a court may not have authority to order a non party (DHS) to provide restorative services. The sub work group agreed that by specifically providing statutory requirements of DHS would address those concerns.

Section 4
Provides that this proposal applies to petitions filed under ORS 419C.005 on or after January 1, 2008, which is the normal effective date for measure approved during the 2007 session.