

## PROTOCOL FOR COMPETENCY EVALUATIONS

### I. POLICY:

- A. It is the policy in San Diego County to evaluate a youth's competency as early as possible and, when indicated, to provide services to help the youth attain competency in a timely manner.
- A youth is considered mentally incompetent if, as a result of mental illness, mental disorder, developmental disability, developmental immaturity, or any similar condition, they lack sufficient present ability to consult with counsel and assist in preparing their defense with a reasonable degree of rational understanding, or lack a rational as well as factual understanding of the nature of the charges or proceedings against them. (Welf. & Inst. Code, § 709, subd. (a)(2).)
- B. Optum TERM and Correctional Healthcare Partners (CHP) will assist both the Juvenile Court and the Probation Department when a youth has been referred for a competency evaluation. CHP will be the primary agency to complete a competency evaluation for a youth in custody. Should the court need an additional opinion, CHP will continue to be the primary agency to complete the evaluation by a different CHP evaluator. If CHP does not have an available evaluator, Optum TERM will be contacted to request facilitation of an in-custody evaluation. Optum TERM will facilitate all out-of-custody competency evaluations through a TERM evaluator.
- C. In all cases, if the court or the youth's attorney has some reason to doubt the youth's competency, the issue will be raised at the earliest possible point in the proceedings.

- D. In all cases and at all stages of the proceedings, the court, the youth's attorney, the District Attorney, and the Probation Department will work together to obtain appropriate services for the youth. (See Subdivision VI G, below.)

II. **PROCEDURE:**

- A. When the issue of competency is raised with respect to any youth, the court shall suspend the juvenile justice proceedings and order the appointment of a qualified evaluator to assess the youth's competency if the court finds substantial evidence that raises a doubt as to the youth's competency.
1. To be qualified, an evaluator must have expertise in child and adolescent development and forensic evaluation of juveniles, be familiar with competency standards and accepted criteria used in evaluating juvenile competency, be trained in conducting juvenile competency evaluations, and be familiar with competency remediation services. (Welf. & Inst. Code, § 709, subd. (b)(2).) The evaluator must also meet the requirements listed in rule 5.645(b) of the California Rules of Court. (See Appendix.)
  2. If the youth is not in custody, the court will order the youth to participate in the evaluation through Optum TERM and will order the youth's parent or guardian to cooperate with the Probation Department and the appointed Optum TERM evaluator in arranging for the evaluation and the youth's transportation.
  3. The court will set a 709 Hearing on the next 709 calendar that is at least ten court days later. The court order will advise the evaluator

of the date and time of the 709 Hearing. Upon a showing of good cause, the court may continue the hearing or set it on a later date.

4. The Court Officer will contact the Probation Aide at the conclusion of the court session to coordinate the appointment of an evaluator.
5. The Probation Aide will appoint a qualified evaluator<sup>1</sup> and supply that evaluator with the youth's name and location. If the youth is not in custody, the Probation Aide will also give the Optum TERM evaluator the name of the youth's parent or guardian, and the youth's telephone number. If requested, the Probation Aide will also advise the youth's attorney and the District Attorney of the evaluator's name.
6. If the youth is in custody, the CHP evaluator will contact the Probation Department to make arrangements for the evaluation.
7. If the youth is not in custody, the Optum TERM evaluator will contact the youth's parent or guardian to make arrangements for an appointment and then notify the designated Probation Officer of the appointment time and place.
  - The Probation Officer will inform the youth, the youth's parent or guardian, and the youth's attorney by phone and by mail of the appointment time and place. The Probation Officer may assist in arranging transportation to the appointment (ie: gas card/bus pass).

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<sup>1</sup> The court clerk will not follow the standard referral process of choosing three evaluators and having the youth's attorney rank them. The Probation Aide will appoint the evaluator using the Optum TERM database and established procedures.

- B. The Probation Department, the youth's attorney, and CHP will work together to obtain and provide records to the evaluator.
1. The Probation Department will be responsible for obtaining relevant education, special education, probation, child welfare, and court records and providing them to the evaluator.
  2. The youth's attorney will be responsible for obtaining relevant Regional Center records and providing them to the evaluator.
  3. For referrals to an Optum TERM psychologist, Probation will send a copy of the minute order and psychologist name/contact information to County of San Diego Health Information Management Services (HIMS).
    - a. County of San Diego HIMS will provide the Behavioral Health Services SmartCare Client Face Sheet, if available, to the Optum TERM evaluator.
    - b. If no records are available, County of San Diego HIMS will send, via encrypted email, a notice to the evaluator that no records were found.
  4. CHP will be responsible for releasing relevant mental health records to the Optum TERM evaluator.
  5. If a medical condition may impact the competency of a youth who is not in custody, the youth's attorney will be responsible for obtaining relevant medical records and providing them to the evaluator. If a medical condition may impact the competency of a youth who is in custody, the Probation Department will be responsible for obtaining relevant medical records and providing them to the evaluator.

6. The court will order: “All records, including but not limited to medical, education, special education, probation, child welfare, behavioral health, regional center, and court records regarding the youth, shall be made available upon request to the evaluator assigned to the case. Use of these records is for the sole purpose of preparing the court-ordered evaluation and report. The records shall not be used for any other purpose.”
- C. The evaluator will assess the youth for competency and prepare a report. The assessment must include an in-person interview of the youth, review of all available records provided to the evaluator, consultation with the youth's attorney, a developmental history of the youth, and administration of age-appropriate and linguistically and culturally appropriate testing. The evaluator will select measures that are clinically appropriate to the youth's presentation and specific to the referral concerns. (Welf. & Inst. Code, § 709, subd. (b)(3).)
  - D. The evaluator will deliver the signed, written report to the evaluator's contracting program (Optum TERM or CHP). Optum TERM or CHP will fax the report to the Administration Office of the court no later than 1:00 p.m. on the court day **preceding** the 709 Hearing.
  - E. Upon receipt, the court will scan and email the report to the youth's attorney, the District Attorney, and the designated Probation Officer. The faxed report will be delivered to the judge assigned to conduct the 709 Hearing.

### III. ISSUES FOR THE COURT:

- A. At the 709 Hearing, the court will use the evaluator's report to determine if the youth is mentally competent under California law. The District Attorney or the youth's attorney may contest the report, request a second opinion, or request an evidentiary hearing. (See Section IV, below.)
  
- B. A youth is incompetent to proceed "if the [youth] lacks sufficient present ability to consult with counsel and assist in preparing the [youth]'s defense with a reasonable degree of rational understanding, or lacks a rational as well as factual understanding of the nature of the charges or proceedings against them." A youth may be incompetent as a result of "any condition or conditions, including, but not limited to, mental illness, mental disorder, developmental disability, or developmental immaturity." (Welf. & Inst. Code, § 709, subd. (a)(2).) A youth is presumed to be competent, unless it is proven by a preponderance of the evidence that the youth is incompetent. If a youth was under 14 years of age at the time the offense was allegedly committed, the court must make a determination as to the youth's capacity pursuant to Penal Code section 26 before deciding the issue of competency. (Welf. & Inst. Code, § 709, subd. (c).)
  
- C. Statements by the youth in the course of a competency evaluation or remediation proceedings, and any fruits of such statements, may not be used against the youth in any other hearing in juvenile or adult court. (Welf. & Inst. Code, § 709, subd. (b)(5).)
  
- D. In all competency evaluations, the questions that follow below must be addressed and answered for the court. The evaluator should answer "yes" or "no" and then provide a more detailed response for each question.

1. In the opinion of the evaluator, does the youth have a mental disorder?
2. In the opinion of the evaluator, does the youth have a developmental disability?<sup>2</sup>
3. In the opinion of the evaluator, is the youth developmentally immature?
4. Is the youth able to understand the nature of the proceedings?
5. Is the youth able to assist their attorney in the conduct of a defense in a rational manner?
6. In the opinion of the evaluator, is the youth competent to stand trial? If no, is the youth likely to benefit from attempts at remediation?
7. Does the evaluator have any information to suggest the youth is a danger to self or to others or is gravely disabled?

#### IV. **EVALUATION TO BE USED IF COMPETENCY IS CONTESTED**

- A. If the District Attorney or the youth's attorney contests the report, requests a second opinion, or requests an evidentiary hearing, the court may order the appointment of a qualified Optum TERM evaluator to complete a comprehensive evaluation that addresses competency. If there is a

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<sup>2</sup> "Developmental disability" means a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. The term includes intellectual disability, cerebral palsy, epilepsy, autism, and disabling conditions found to be closely related to intellectual disability or to require treatment similar to that required for individuals with an intellectual disability. (Welf. & Inst. Code, § 4512.)

conflict between the two evaluations, the court may order the appointment of a qualified Optum TERM evaluator to complete a third evaluation.

- B. If requested by the District Attorney or the youth's attorney, the court may set a contested evidentiary hearing to address the youth's competency. The court order will advise the evaluator of the date and time of the hearing.
- C. The procedure in Section II, above, governs timing, completion, and distribution of the report.

V. **IF THE COURT FINDS THE YOUTH TO BE *COMPETENT TO STAND TRIAL*:**

- A. The court will reinstate the juvenile justice proceedings and proceed with the case.
  - 1. If the youth is in custody, the youth will continue to receive the level of care determined to be clinically indicated by CHP.
  - 2. If the youth is not in custody, the Probation Department will make appropriate referrals, if indicated.
- B. Even if the court finds the youth to be competent, the court may order a mental health evaluation if the court suspects that the youth may be a danger to self, a danger to others, or gravely disabled.
- C. If the court suspects that the youth may have a developmental disability, the court will refer the youth to the Regional Center for an evaluation. For a youth who is in custody, Regional Center staff will be allowed to evaluate the youth in the custodial facility. For a youth who is not in custody, the youth's parent or guardian is responsible for arranging the

evaluation with the Regional Center. If the parent or guardian is unable or unwilling to make the arrangements, the court will order the evaluation and designate the youth's attorney to facilitate the arrangements.

VI. **IF THE COURT FINDS THE YOUTH TO BE INCOMPETENT TO STAND TRIAL:**

- A. If the petition contains only misdemeanor offenses, the petition will be dismissed and sealed pursuant to Welfare and Institutions Code section 786. (Welf. & Inst. Code, § 709, subd. (f).)
- B. If the petition contains at least one felony offense and is not dismissed, the court may order a mental health evaluation, if appropriate.
  - 1. If it appears to the court that the youth may require psychiatric hospitalization through the behavioral health system, the youth will be referred to the Emergency Screening Unit (ESU) or to another Lanterman-Petris-Short (LPS) facility for an evaluation pursuant to Welfare and Institutions Code sections 705 and 6550 for wards, or pursuant to Welfare and Institutions Code section 705 and Penal Code section 4011.6 for non-wards.
  - 2. In all other cases the youth may be referred to an Optum TERM evaluator for a psychological or psychiatric evaluation, if deemed appropriate by the court. If ordered, the evaluation must be completed within 10 court days. The court will authorize county treasurer funds for the evaluation at the standard rate for a psychological or psychiatric evaluation, depending upon the type of evaluation deemed necessary by the court. If the court orders a psychological evaluation, it should include all of the elements of the psychological evaluation identified in the Optum TERM Provider

Handbook. In addition, the evaluation should include, but not be limited to: recommended treatment; potential for success of that treatment; any cited risks if treatment is not provided; anticipated length of treatment; other treatment options to be considered; availability of the recommended treatment in San Diego County or elsewhere; whether the youth can be safely returned home; whether the youth can be safely released from custody; and whether there is a need for a psychiatric evaluation.

- C. A Probation Officer will be designated to begin immediate coordination of a remediation and services plan for the youth. The Probation Officer will communicate with the youth's attorney about the plan.<sup>3</sup> All services will be provided in the least restrictive environment consistent with public safety, as ordered by the court.
1. The Court Officer will contact the assigned Probation Officer at the conclusion of the court session to coordinate the initiation of the remediation program.
  2. For a youth who is in custody, CHP will provide a competency remediation program. The youth may be released from custody at any time it is deemed appropriate by the court. Behavioral Health Services Next Move program will provide the competency remediation program for a youth released from custody, unless otherwise ordered by the court. For an offense not listed in section 707(b) of the Welfare and Institutions Code, secure confinement shall not exceed six months from the finding of incompetency. For an offense listed in section 707(b), secure confinement shall not

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<sup>3</sup> The court, the youth's attorney, the District Attorney, and the Probation Department will work together to obtain appropriate services for the youth.

exceed eighteen months from the finding of incompetency. (Welf. & Inst. Code, § 709, subd. (h)(5).)

3. For a youth who is not in custody, Behavioral Health Services Next Move program will provide a competency remediation program. Probation will provide, with each referral, minute orders with hearing schedule, case reports and charges, PCMS face sheets (demographics for scheduling remediation appointments), pertinent Probation case plan information, all mental health records (listed in Section II B) including information about any accommodations that are part of a youth's IEP, and copies of psychological assessments and all prior mental competency evaluations.
4. Remediation sessions are to be done in person and will be done no less than twice a week for a youth who is in custody or once a week for a youth who is not in custody. The competency remediation program will include services that are clinically appropriate to the youth's presentation and specific to the referral concerns.
5. A person who provides remediation services shall adhere to the standards stated in Welfare and Institutions Code section 709 and rule 5.645 of the California Rules of Court. (Welf. & Inst. Code, § 709, subd. (g)(1).) (See Appendix.) The person who provides remediation services does not need to meet the qualification requirements listed in CRC 5.645(b)(1). However, a person who does meet the qualification requirements must supervise the person who provides remediation services, must meet the youth in person, and must review and sign any report submitted to the court.

#### D. Initial Competency Review Hearing

1. An initial Competency Review Hearing will be set to review any mental health evaluation, the information provided by the Probation Officer, and the status of the remediation process. The hearing will take place within 30 days after the 709 Hearing. The date may be advanced if the mental health evaluation and report are completed earlier.
  - a. The Optum TERM evaluator assigned to do a mental health evaluation will submit the completed evaluation to Optum TERM within 10 court days after the 709 Hearing. Optum TERM will review the evaluation and submit it to the court. Optum TERM will also provide the evaluation to the designated Probation Officer, the youth's attorney, and the District Attorney via the Juvenile Electronic Library System Exchange (JELS).
  - b. The Probation Department will submit a summary report of the status of the remediation process to the court, the youth's attorney, and the District Attorney no later than 1:00 p.m. on the court day **preceding** the Competency Review Hearing.
2. At the initial Competency Review Hearing the court will review the status of the remediation process and determine detention and treatment of the youth.
  - a. The court will decide whether "it is a matter of immediate and urgent necessity for the protection of the [youth] or reasonably necessary for the protection of the person or

property of another that he or she be detained or that the [youth] is likely to flee to avoid the jurisdiction of the court, and that continuance in the home is contrary to the child's welfare." (Welf. & Inst. Code, § 636.)

- b. If necessary, the youth may be detained in a custodial setting. If secure detention is not necessary, the youth may be placed on home supervision or global positioning system. The court may make any further orders necessary for the protection of the youth and the community.
- c. If the court determines that the youth may benefit from further efforts at remediation, the court will set a subsequent Competency Review Hearing.

#### E. Subsequent Competency Review Hearings

1. The court will review the youth's progress at least every 15 calendar days if the youth is detained or every 30 to 45 calendar days if the youth is not detained. One court day before each Competency Review Hearing, the Probation Officer will submit an update to the court, the youth's attorney, and the District Attorney.
2. At the conclusion of the remediation program, the person or team that provided the remediation program ("remediation team") will submit a report that includes a summary of services offered, a summary of the youth's participation in the remediation program, whether or not the remediation program has been completed, an opinion as to whether or not the youth has been restored to competency, and recommendations for any further services. The

remediation team will deliver the report to the designated Probation Officer at least three court days before the next scheduled hearing.

3. The Probation Department will submit the report from the remediation team to the court, the youth's attorney, and the District Attorney no later than 1:00 p.m. on the court day **preceding** the Competency Review Hearing.
4. The District Attorney or the youth's attorney can request the appointment of an independent Optum TERM evaluator to assess the youth's competency. The procedure in Section II, above, governs the timing, completion, and distribution of the report.
5. The parties may stipulate to whether the youth is competent or remains incompetent. If there is no stipulation, the court will hold an evidentiary hearing to determine if the youth is competent or remains incompetent. If the opinion of the independent Optum TERM evaluator is that the youth has attained competency, and if the youth disputes that opinion, the burden is on the youth to prove by a preponderance of evidence that they remain incompetent. If the opinion of the independent Optum TERM evaluator is that the youth is unable to be remediated and if the prosecutor disputes that opinion, the burden is on the prosecutor to prove by a preponderance of evidence that the youth is remediable. If the prosecution contests the evaluation of continued incompetency, the youth shall be presumed incompetent and the prosecution shall have the burden to prove by a preponderance of evidence that the youth is competent. (Welf. & Inst. Code, § 709, subd. (h)(1).)
  - a. If the youth is found competent, the court will reinstate the juvenile justice proceedings and proceed with the case.

- b. If the youth is found incompetent and the court finds that the youth is likely to be remediated within six months, the court will order the youth to return to the remediation program and will set the next Competency Review Hearing. The total remediation period shall not exceed one year from the finding of incompetency and secure confinement shall not exceed the limit specified in subdivision C. (Welf. & Inst. Code, § 709, subd. (h)(3).)
  
- F. If the court finds, by a preponderance of evidence, that the youth is incompetent, all proceedings shall remain suspended for a period of time that is no longer than reasonably necessary to determine whether there is a substantial probability that the youth will attain competency in the foreseeable future, or the court no longer retains jurisdiction and the case must be dismissed. If the court finds that the youth will not achieve competency within six months, the court shall dismiss the petition. Prior to a dismissal, the court may make orders that it deems appropriate for services. (Welf. & Inst. Code, § 709, subd. (e).)
  
- G. At all stages of the proceedings, the court, the youth's attorney, the District Attorney, and the Probation Department will work together to obtain appropriate services for the youth.
  - 1. When the youth suffers from a developmental disability, the court will refer the youth to the Regional Center for an evaluation. The youth's attorney will take all necessary steps to obtain Regional Center services for the youth.
    - a. If the youth is already a Regional Center client, the youth's attorney and the Probation Department will submit a plan to

work collaboratively with Regional Center staff to obtain appropriate community supports and services.

- b. If the youth is not already a Regional Center client, the youth's attorney will work with the youth's family to facilitate the completion of a Regional Center evaluation within the 120 days allowed. If the youth's parent or guardian is unable or unwilling to make the arrangements, the court will order the evaluation and designate the youth's attorney to facilitate the arrangements. The Regional Center will give priority to evaluations for youths in custody.
  - c. The court may continue competency review hearings until completion of the Regional Center evaluation and submission of a plan for placement and treatment by the Probation Department. The Regional Center will submit an update for each status review hearing regarding the status of the evaluation.
2. When the youth is alleged to have committed an offense involving physical violence or danger to others, the court may direct the filing in any other court of a petition for the commitment of a developmentally disabled individual to the State Department of Developmental Services. (Welf. & Inst. Code, §§ 6500 et seq., 6512, 6551; Cal. Rules of Court, rule 5.645.)
  3. The court may direct that a team meeting be convened to determine whether a referral to the Office of the Public Conservator would be appropriate for the youth. (See Protocol for Conservatorship of a Child Who is the Subject of Proceedings in the Juvenile Court.)

4. The youth and family will be referred to programs in the community that will address the behavior that led to the petition, including programs available through Behavioral Health Services and the youth's school.
  
- H. Where appropriate, the youth may be offered any other relevant information, counseling, and/or services to assist them in understanding the proceedings and assisting counsel.
  
- I. At the conclusion of the appropriate course of treatment, the youth will be reassessed for competency, per the procedures delineated above.
  
- J. In all cases, the youth will continue to receive the level of care determined appropriate by the treating/evaluating behavioral health provider and permitted by law, including medications and outpatient treatment.
  
- K. During the time the youth is not competent, the court may rule on motions that do not require the participation of the youth. These motions include, but are not limited to: motions to dismiss, motions by the defense regarding a change in the placement of the youth, detention hearings, demurrers, motions to continue, and time waivers. (Welf. & Inst. Code, § 709, subd. (e).)

VII. **CONTINUED SERVICES:**

- A. The Probation Department will monitor the youth and all services provided to them.
  
- B. The Probation Department will attempt to obtain the consent of the youth's parent or guardian for all necessary treatment and will assist the treating

psychiatrist in obtaining consent for medications. If the Probation Officer is not able to obtain such consent, the Probation Officer will seek the assistance of the youth's attorney. If the family still fails to cooperate, the Probation Officer will apply ex parte for a court order allowing the treatment and medications.

VIII. **JURISDICTION:**

- A. The Juvenile Court will maintain jurisdiction while the youth is being evaluated for competency and while the youth is attempting to attain competency, subject to the time limits specified in Welfare and Institutions Code section 709.
  
- B. The Juvenile Court may dismiss the petition and seal pursuant to Welfare and Institutions Code section 786 when it finds that there is not a substantial probability that the youth will attain competency in the foreseeable future and that the interests of justice and the welfare of the youth require that dismissal. (Welf. & Inst. Code, §§ 709, 782.)

## APPENDIX

### **Welfare and Institutions Code section 709:**

(a)(1) If the court has a doubt that a minor who is subject to any juvenile proceedings is competent, the court shall suspend all proceedings and proceed pursuant to this section.

(2) A minor is incompetent for purposes of this section if the minor lacks sufficient present ability to consult with counsel and assist in preparing the minor's defense with a reasonable degree of rational understanding, or lacks a rational as well as factual understanding of the nature of the charges or proceedings against them. Incompetency may result from the presence of any condition or conditions, including, but not limited to, mental illness, mental disorder, developmental disability, or developmental immaturity. Except as specifically provided otherwise, this section applies to a minor who is alleged to come within the jurisdiction of the court pursuant to Section 601 or 602.

(3) Notwithstanding paragraph (1), during the pendency of any juvenile proceeding, the court may receive information from any source regarding the minor's ability to understand the proceedings. The minor's counsel or the court may express a doubt as to the minor's competency. If the court finds substantial evidence that raises a doubt as to the minor's competency, the proceedings shall be suspended.

(b)(1) Unless the parties stipulate to a finding that the minor lacks competency, or the parties are willing to submit on the issue of the minor's lack of competency, the court shall appoint an expert to evaluate the minor and determine whether the minor suffers from a mental illness, mental disorder, developmental disability, developmental immaturity, or other condition affecting competency and, if so, whether the minor is incompetent as defined in paragraph (2) of subdivision (a).

(2) The expert shall have expertise in child and adolescent development and forensic evaluation of juveniles for purposes of adjudicating competency, shall be familiar with competency standards and accepted criteria used in evaluating juvenile competency, shall have received training in conducting juvenile competency evaluations, and shall be familiar with competency remediation for the condition or conditions affecting competence in the particular case.

(3) The expert shall personally interview the minor and review all of the available records provided, including, but not limited to, medical, education, special education, probation, child welfare, mental health, regional center, and court records, and any other relevant information that is available. The expert shall consult with the minor's counsel and any other person who has provided information to the court regarding the minor's lack of competency. The expert shall gather a developmental history of the minor. If any information is unavailable to the expert, the expert shall note in the report the efforts to obtain that information. The expert shall administer age-appropriate testing specific to the issue of competency unless the facts of the particular case render testing unnecessary or inappropriate. The expert shall be proficient in the language preferred by the minor, or, if that is not feasible, the expert shall employ the services of a certified interpreter and use assessment tools that are linguistically and culturally appropriate for the minor. In a written report, the expert shall opine whether the minor has the sufficient present ability to consult with the minor's counsel with a reasonable degree of rational understanding and whether the minor has a rational and factual understanding of the proceedings against them. The expert shall also state the basis for these conclusions. If the expert concludes that the minor lacks competency, the expert shall give their opinion on whether the minor is likely to attain competency in the foreseeable future, and, if so, make recommendations regarding the type of remediation services that would be effective in assisting the minor in attaining competency.

(4) The Judicial Council, in conjunction with groups or individuals representing judges, defense counsel, district attorneys, chief probation officers, counties, advocates for people with developmental and mental disabilities, experts in special education testing, psychologists and psychiatrists specializing in adolescents, professional associations and accredited bodies for psychologists and psychiatrists, and other interested stakeholders, shall adopt a rule of court identifying the training and experience needed for an expert to be competent in forensic evaluations of juveniles. The Judicial Council shall develop and adopt rules for the implementation of the other requirements in this subdivision.

(5) Statements made to the appointed expert during the minor's competency evaluation and statements made by the minor to mental health professionals during the remediation proceedings, and any fruits of these statements, shall not be used in any other hearing against the minor in either juvenile or adult court.

(6) The district attorney or minor's counsel may retain or seek the appointment of additional qualified experts who may testify during the competency hearing. The expert's report and qualifications shall be

disclosed to the opposing party within a reasonable time before, but no later than five court days before, the hearing. If disclosure is not made in accordance with this paragraph, the court may make any order necessary to enforce the provisions of this paragraph, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of the expert or consideration of the expert's report upon a showing of good cause, or any other lawful order. If, after disclosure of the report, the opposing party requests a continuance in order to further prepare for the hearing and shows good cause for the continuance, the court shall grant a continuance for a reasonable period of time. This paragraph does not allow a qualified expert retained or appointed by the district attorney to perform a competency evaluation on a minor without an order from the juvenile court after petitioning the court for an order pursuant to the Civil Discovery Act (Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure).

(7) If the expert believes the minor is developmentally disabled, the court shall appoint the director of a regional center for developmentally disabled individuals described in Article 1 (commencing with Section 4620) of Chapter 5 of Division 4.5, or the director's designee, to evaluate the minor. The director of the regional center, or the director's designee, shall determine whether the minor is eligible for services under the Lanterman Developmental Disabilities Services Act (Division 4.5 (commencing with Section 4500)), and shall provide the court with a written report informing the court of his or her determination. The court's appointment of the director of the regional center for determination of eligibility for services shall not delay the court's proceedings for determination of competency.

(8) An expert's opinion that a minor is developmentally disabled does not supersede an independent determination by the regional center whether the minor is eligible for services under the Lanterman Developmental Disabilities Services Act (Division 4.5 (commencing with Section 4500)).

(9) This section does not authorize or require determinations regarding the competency of a minor by the director of the regional center or the director's designee.

(c) The question of the minor's competency shall be determined at an evidentiary hearing unless there is a stipulation or submission by the parties on the findings of the expert that the minor is incompetent. It shall be presumed that the minor is mentally competent, unless it is proven by a preponderance of the evidence that the minor is mentally incompetent. With respect to a minor under 14 years of age at the time of the commission of the alleged offense, the court shall make a determination as to the minor's capacity pursuant to Section 26 of the Penal Code prior to deciding the issue of competency.

(d) If the court finds the minor to be competent, the court shall reinstate proceedings and proceed commensurate with the court's jurisdiction.

(e) If the court finds, by a preponderance of evidence, that the minor is incompetent, all proceedings shall remain suspended for a period of time that is no longer than reasonably necessary to determine whether there is a substantial probability that the minor will attain competency in the foreseeable future, or the court no longer retains jurisdiction and the case must be dismissed. Prior to a dismissal, the court may make orders that it deems appropriate for services. Further, the court may rule on motions that do not require the participation of the minor in the preparation of the motions. These motions include, but are not limited to, all of the following:

(1) Motions to dismiss.

(2) Motions regarding a change in the placement of the minor.

(3) Detention hearings.

(4) Demurrers.

(f) If the minor is found to be incompetent and the petition contains only misdemeanor offenses, the petition shall be dismissed.

(g)(1) Upon a finding of incompetency, the court shall refer the minor to services designed to help the minor attain competency, unless the court finds that competency cannot be achieved within the foreseeable future. The court may also refer the minor to treatment services to assist in remediation that may include, but are not limited to, mental health services, treatment for trauma, medically supervised medication, behavioral counseling, curriculum-based legal education, or training in socialization skills, consistent with any laws requiring consent. Service providers and evaluators shall adhere to the standards stated in this section and the California Rules of Court. Services shall be provided in the least restrictive environment consistent with public safety, as determined by the court. A finding of incompetency alone shall not be the basis for secure confinement. The minor shall be returned to court at the earliest possible date. The court shall review remediation services at least every 30 calendar days for minors in custody and every 45 calendar days for minors out of custody prior to the expiration of the total remediation period specified in paragraph (3) of subdivision (h). If the minor is in custody, the county

mental health department shall provide the court with suitable alternatives for the continued delivery of remediation services upon release from custody as part of the court's review of remediation services. The court shall consider appropriate alternatives to juvenile hall confinement, including, but not limited to, all of the following:

- (A) Placement through regional centers.
- (B) Short-term residential therapeutic programs.
- (C) Crisis residential programs.
- (D) Civil commitment.
- (E) Foster care, relative placement, or other nonsecure placement.
- (F) Other residential treatment programs.

(2) The court may make any orders necessary to assist with the delivery of remediation services in an alternative setting to secure confinement.

(h)(1) Within six months of the initial receipt of a recommendation by the designated person or entity, the court shall hold an evidentiary hearing on whether the minor is remediated or is able to be remediated unless the parties stipulate to, or agree to the recommendation of, the remediation program. If the recommendation is that the minor has attained competency, and if the minor disputes that recommendation, the burden is on the minor to prove by a preponderance of evidence that he or she remains incompetent. If the recommendation is that the minor is unable to be remediated and if the prosecutor disputes that recommendation, the burden is on the prosecutor to prove by a preponderance of evidence that the minor is remediable. If the prosecution contests the evaluation of continued incompetence, the minor shall be presumed incompetent and the prosecution shall have the burden to prove by a preponderance of evidence that the minor is competent. The provisions of subdivision (c) shall apply at this stage of the proceedings.

(2) If the court finds that the minor has been remediated, the court shall reinstate the proceedings.

(3) If the court finds that the minor has not yet been remediated, but is likely to be remediated within six months, the court shall order the minor to return to the remediation program. However, the total remediation period shall not exceed one year from the finding of incompetence and secure confinement shall not exceed the limit specified in subparagraph (A) of paragraph (5).

(4) If the court finds that the minor will not achieve competency within six months, the court shall dismiss the petition. The court may invite persons and agencies with information about the minor, including, but not limited to, the minor and the minor's attorney, the probation department, parents, guardians, or relative caregivers, mental health treatment professionals, the public guardian, educational rights holders, education providers, and social services agencies, to the dismissal hearing to discuss any services that may be available to the minor after jurisdiction is terminated. If appropriate, the court shall refer the minor for evaluation pursuant to Article 6 (commencing with Section 5300) of Chapter 2 of Part 1 of Division 5 or Article 3 (commencing with Section 6550) of Chapter 2 of Part 2 of Division 6.

(5)(A) Secure confinement shall not extend beyond six months from the finding of incompetence, except as provided in this section. In making that determination, the court shall consider all of the following:

- (i) Where the minor will have the best chance of obtaining competence.
- (ii) Whether the placement is the least restrictive setting appropriate for the minor.
- (iii) Whether alternatives to secure confinement have been identified and pursued and why alternatives are not available or appropriate.
- (iv) Whether the placement is necessary for the safety of the minor or others.

(B) If the court determines, upon consideration of these factors, that it is in the best interests of the minor and the public's safety for the minor to remain in secure confinement, the court shall state the reasons on the record.

(C) Only in cases where the petition involves an offense listed in subdivision (b) of Section 707 may the court consider whether it is necessary and in the best interests of the minor and the public's safety to order secure confinement of a minor for up to an additional year, not to exceed 18 months from the finding of incompetence.

(i) The presiding judge of the juvenile court, the probation department, the county mental health department, the public defender and any other entity that provides representation for minors, the district attorney, the regional center, if appropriate, and any other participants that the presiding judge shall designate, shall develop a written protocol describing the competency process and a program to ensure that minors who are found incompetent receive appropriate remediation services.

(Added by Stats.2018, c. 991 (A.B.1214), § 2, eff. Jan. 1, 2019. Amended by Stats.2019, c. 161 (A.B.439), § 1, eff. July 31, 2019.)

**Rule 5.645 of the California Rules of Court:**

(a) Doubt as to child's competency (§§ 601, 602, 709)

(1) If the court finds that there is substantial evidence regarding a child who is the subject of a petition filed under section 601 or 602 that raises a doubt as to the child's competency as defined in section 709, the court must suspend the proceedings and conduct a hearing regarding the child's competency.

(2) Unless the parties have stipulated to a finding of incompetency, the court must appoint an expert to evaluate the child and determine whether the child suffers from a mental illness, mental disorder, developmental disability, developmental immaturity, or other condition affecting competency and, if so, whether the child is incompetent as defined in section 709(a)(2).

(3) Following the hearing on competency, the court must proceed as directed in section 709.

(b) Expert qualifications

(1) To be appointed as an expert, an individual must be a:

(A) Licensed psychiatrist who has successfully completed four years of medical school and either four years of general psychiatry residency, including one year of internship and two years of child and adolescent fellowship training, or three years of general psychiatry residency, including one year of internship and one year of residency that focus on children and adolescents and one year of child and adolescent fellowship training; or

(B) Clinical, counseling, or school psychologist who has received a doctoral degree in psychology from an educational institution accredited by an organization recognized by the Council for Higher Education Accreditation and who is licensed as a psychologist.

(2) The expert, whether a licensed psychiatrist or psychologist, must:

(A) Possess demonstrable professional experience addressing child and adolescent developmental issues, including the emotional, behavioral, and cognitive impairments of children and adolescents;

(B) Have expertise in the cultural and social characteristics of children and adolescents;

(C) Possess a curriculum vitae reflecting training and experience in the forensic evaluation of children and adolescents;

(D) Be familiar with juvenile competency standards and accepted criteria used in evaluating juvenile competence;

(E) Be familiar with effective interventions, as well as treatment, training, and programs for the attainment of competency available to children and adolescents;

(F) Be proficient in the language preferred by the child, or if that is not feasible, employ the services of a certified interpreter and use assessment tools that are linguistically and culturally appropriate for the child; and

(G) Be familiar with juvenile competency remediation services available to the child.

(3) Nothing in this rule precludes involvement of clinicians with other professional qualifications from participation as consultants or witnesses or in other capacities relevant to the case.

(c) Interview of child

The expert must attempt to interview the child face-to-face. If an in-person interview is not possible because the child refuses an interview, the expert must try to observe and make direct contact with the child to attempt to gain clinical observations that may inform the expert's opinion regarding the child's competency.

(d) Review of records

(1) The expert must review all the records provided as required by section 709.

(2) The written protocol required under section 709(i) must include a description of the process for obtaining and providing the records to the expert to review, including who will obtain and provide the records to the expert.

(e) Consult with the child's counsel

(1) The expert must consult with the child's counsel as required by section 709. This consultation must include, but is not limited to, asking the child's counsel the following:

(A) If the child's counsel raised the question of competency, why the child's counsel doubts that the child is competent;

(B) What has the child's counsel observed regarding the child's behavior; and

(C) A description of how the child interacts with the child's counsel.

(2) No waiver of the attorney-client privilege will be deemed to have occurred from the child's counsel report of the child's statements to the expert, and all such statements are subject to the protections in (g)(2) of this rule.

(f) Developmental history

The expert must gather a developmental history of the child as required by section 709. This history must be documented in the report and must include the following:

- (1) Whether there were complications or drug use during pregnancy that could have caused medical issues for the child;
- (2) When the child achieved developmental milestones such as talking, walking, and reading;
- (3) Psychosocial factors such as abuse, neglect, or drug exposure;
- (4) Adverse childhood experiences, including early disruption in the parent-child relationship;
- (5) Mental health services received during childhood and adolescence;
- (6) School performance, including an Individualized Education Plan, testing, achievement scores, and retention;
- (7) Acculturation issues;
- (8) Biological and neurological factors such as neurological deficits and head trauma; and
- (9) Medical history including significant diagnoses, hospitalizations, or head trauma.

(g) Written report

(1) Any court-appointed expert must examine the child and advise the court on the child's competency to stand trial. The expert's report must be submitted to the court, to the counsel for the child, to the probation department, and to the prosecution. The report must include the following:

(A) A statement identifying the court referring the case, the purpose of the evaluation, and the definition of competency in the state of California.

(B) A brief statement of the expert's training and previous experience as it relates to evaluating the competence of a child to stand trial.

(C) A statement of the procedure used by the expert, including:

(i) A list of all sources of information considered by the expert including those required by section 709(b)(3);

(ii) A list of all sources of information the expert tried or wanted to obtain but, for reasons described in the report, could not be obtained;

(iii) A detailed summary of the attempts made to meet the child face-to-face and a detailed account of any accommodations made to make direct contact with the child; and

(iv) All diagnostic and psychological tests administered, if any.

(D) A summary of the developmental history of the child as required by this rule.

(E) A summary of the evaluation conducted by the expert on the child, including the current diagnosis or diagnoses that meet criteria under the most recent version of the Diagnostic and Statistical Manual of Mental Disorders, when applicable, and a summary of the child's mental or developmental status.

(F) A detailed analysis of the competence of the child to stand trial under section 709, including the child's ability or inability to understand the nature of the proceedings or assist counsel in the conduct of a defense in a rational manner as a result of a mental or developmental impairment.

(G) An analysis of whether and how the child's mental or developmental status is related to any deficits in abilities related to competency.

(H) If the child has significant deficits in abilities related to competency, an opinion with explanation as to whether treatment is needed to restore or attain competency, the nature of that treatment, its availability, and whether restoration is likely to be accomplished within the statutory time limit.

(I) A recommendation, as appropriate, for a placement or type of placement, services, and treatment that would be most appropriate for the child to attain or restore competence. The recommendation must be guided by the principle of section 709 that services must be provided in the least restrictive environment consistent with public safety.

(J) If the expert is of the opinion that a referral to a psychiatrist is appropriate, the expert must inform the court of this opinion and recommend that a psychiatrist examine the child.

(2) Statements made to the appointed expert during the child's competency evaluation and statements made by the child to mental health professionals during the remediation proceedings, and any fruits of these statements, must not be used in any other hearing against the child in either juvenile or adult court.

(Adopted, eff. Jan. 1, 2020.)