



Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536



Telephone: (517) 373-5383
Fax: (517) 373-1986

Senate Bill 246 (as enacted)
House Bill 4555 (as enacted)
Sponsor: Senator Tonya Schuitmaker (S.B. 246)
Representative Ellen Cogen Lipton (H.B. 4555)
Senate Committee: Judiciary
House Committee: Families, Children, and Seniors

PUBLIC ACT 541 of 2012
PUBLIC ACT 540 of 2012

Date Completed: 7-12-13

CONTENT

Senate Bill 246 and House Bill 4555 amended the juvenile code and the Mental Health Code, respectively, to do the following regarding juveniles subject to a delinquency petition:

- Establish a presumption of competence to proceed for a juvenile who is 10 years of age or older, and a presumption of incompetence for a juvenile who is under 10.
- Allow a court to order, or a party to request, a competency evaluation to determine whether a juvenile is incompetent to proceed if he or she is charged as a juvenile in court.
- Establish standards for conducting a competency evaluation of a juvenile, including a requirement that an evaluation be conducted by a qualified forensic mental health examiner.
- Allow any party to retain its own qualified forensic mental health examiner to conduct a competency evaluation.
- Require the prosecuting attorney and the juvenile's attorney to give certain information to the qualified examiner.
- Require a qualified examiner to submit a written report to the court within 30 days of receiving a court order requiring evaluation, and specify assessments and information that must be included in the report.
- Require the court to hold a juvenile competency hearing within 30 days after a qualified examiner's competency report is filed.
- Require a court to dismiss charges against the juvenile, with prejudice, if the court finds that a juvenile is incompetent to proceed and that there is a substantial probability that he or she will remain incompetent to proceed for the foreseeable future.
- Specify options for the court if a juvenile is incompetent to proceed but may be restored to competency in the foreseeable future, including issuing a 60-day restoration order.
- Require a qualified restoration provider to report to the court and the qualified forensic mental health examiner every 30 days, or sooner under certain circumstances, after a restoration order is issued.
- Allow the qualified restoration provider to recommend that the court renew the restoration order for another 60 days, if there is a substantial probability that the juvenile will not be incompetent to proceed within that period, but limit the restoration order and any renewal to 120 days.
- Require the court to dismiss charges against the juvenile, and either direct civil commitment proceedings to be initiated under the Mental Health Code or release the juvenile to his parent or guardian, upon receiving a report that the juvenile likely will remain incompetent to proceed for the foreseeable future.

-- **Allow a court to order mental health services to be provided to the juvenile, and retain jurisdiction over the juvenile, upon receiving a report that there is a substantial probability that the juvenile will be unable to be restored due to serious emotional disturbance.**

The bills also specify that protections against self-incrimination apply to all competency evaluations; evidence obtained during a competency evaluation is not admissible to determine the juvenile's responsibility; and the juvenile's statements in a competency hearing are not subject to disclosure.

House Bill 4555 also requires the Department of Community Health (DCH), within 18 months after the bill's effective date, to develop and implement a program to certify individuals as qualified forensic mental health examiners. The DCH must develop and implement the program in conjunction with the Board of Psychology, the Board of Counseling, the Board of Social Work, the Michigan Psychological Association, the Michigan Counseling Association, and the Michigan Chapter of the National Association of Social Workers. The DCH may adopt or adjust the endorsed training program based on research and best practices.

The bills took effect on March 28, 2013.

Presumption of Competency

Under the bills, a juvenile who is at least 10 years of age is presumed competent to proceed, unless the issue of competency is raised by a party. A juvenile who is under 10 is presumed incompetent to proceed.

The bills define "juvenile" as a person who is under 17 years of age who is the subject of a delinquency petition. "Incompetent to proceed" means that a juvenile, based on age-appropriate norms, lacks a reasonable degree of rational and factual understanding of the proceeding or is unable to do one or both of the following:

-- Consult with and assist his or her attorney in preparing his or her defense in a meaningful manner.

-- Sufficiently understand the charges against him or her.

The court, on its own motion, or at the request of a juvenile, the juvenile's attorney, or the prosecuting attorney, may order a competency evaluation to determine whether the juvenile is incompetent to proceed if he or she is the subject of a delinquency petition or if the juvenile is under the court's jurisdiction for a status offense (such as running away or repeated truancy). The issue of the juvenile's competency may be raised by the court or by motion of a party at any time during the proceeding.

When an issue of the juvenile's competency is raised, the delinquency proceeding must cease temporarily until a determination is made on the juvenile's competency, as described below.

Under Senate Bill 246, the court must maintain a record of how many competency evaluations are requested.

Competency Evaluation

Qualified Examiner. A competency evaluation ordered under the bills must be conducted by a qualified forensic mental health examiner. (Senate Bill 246 uses the term "qualified juvenile forensic mental health examiner".) The examiner must provide the court with an opinion as to whether the juvenile is competent to proceed.

Senate Bill 246 defines "qualified juvenile forensic mental health examiner", and House Bill 4555 defines "qualified forensic mental health examiner", as one of the health professionals described below who performs forensic mental health examinations for the purposes of Sections 1062 to 1074 of the Mental Health Code (as enacted by House Bill 4555), but does not exceed the scope of his or her practice as authorized by Michigan law.

The terms include a psychiatrist or psychologist who possesses experience or training in forensic evaluation procedures for juveniles; evaluation, diagnosis, and treatment of children and adolescents with emotional disturbances, mental illness, or developmental disabilities; clinical understanding of child and adolescent

development; and familiarity with competency standards in Michigan.

Beginning 18 months after the effective date of House Bill 4555, the terms also will include a mental health professional, other than a psychiatrist or psychologist, who has completed a DCH-endorsed juvenile competency training program for forensic mental health examiners, and who possesses experience or training in all of the following:

- Forensic evaluation procedures for juveniles.
- Evaluation, diagnosis, and treatment of children and adolescents with emotional disturbance, mental illness, or developmental disabilities.
- Clinical understanding of child and adolescent development.
- Familiarity with competency standards in Michigan.

The court has the final determination of an expert witness serving as a qualified forensic mental health examiner.

The bills do not prohibit any party from retaining its own qualified examiner to conduct additional evaluations, at the party's own expense.

The competency evaluation must be conducted in the least restrictive environment. There is a presumption in favor of conducting a competency evaluation while the juvenile remains in the custody of a parent or legal guardian, unless removal from the home is necessary for the best interests of the juvenile, for reasons of public safety, or because the parent or guardian has refused to cooperate in the competency evaluation process.

"Least restrictive environment" is defined as a supervised community placement, preferably a placement with the juvenile's parent, guardian, relative, or a facility or conditions of treatment that is a residential or institutional placement only used as a last resort based on the best interest of the juvenile or for reasons of public safety.

Provision of Information. The bills require a court to order the prosecuting attorney to give the juvenile's attorney all information related to competency. The court also must order the prosecuting attorney and the

juvenile's attorney to give the qualified examiner any information considered relevant to the competency evaluation, including the names and addresses of all attorneys involved, information about the alleged offense, and any information about the juvenile's background in the prosecuting attorney's possession. Except as prohibited by Federal law, the court must require the juvenile's attorney to provide any available records or other information relevant to the evaluation, including psychiatric records, school records, medical records, and child protective services records.

The requirements to provide records or information do not limit, waive, or abrogate the work product doctrine or the attorney-client privilege, and release of records and information is subject to that doctrine and privilege.

All the required information must be given to the qualified examiner within 10 days after the court issues the order for the competency evaluation. If possible, the required information must be received before the juvenile's competency evaluation or the commencement of the competency evaluation in an outpatient setting.

Written Report. A qualified examiner who conducts a competency evaluation must submit a written report to the court within 30 days after receiving the court order requiring the evaluation. The evaluation must be based on a juvenile adjudicative competence interview (JACI) or another interview method approved by the court. The report must contain a description of the nature, content, and extent of the examination, including a description of the assessment procedures, techniques, and tests used; available medical, educational, and court records; and social, clinical, developmental, and legal history as available.

The report also must contain a clinical assessment that includes all of the following:

- Mental status examination.
- The diagnosis and functional impact of mental illness, developmental disability, or cognitive impairment; and the impact of medication on the juvenile's mental state and behavior, if he or she is taking medication.

- An assessment of the juvenile's intelligence.
- The juvenile's age, maturity level, developmental stage, and decision-making abilities.
- Whether the juvenile has any other factor that affects competence.

In addition, the report must describe abilities and deficits in mental competency functions related to the juvenile's competence to proceed. The mental competency functions include the ability, factually as well as rationally, to understand and appreciate the nature and object of the proceedings, including all of the following:

- An ability to understand the role of the participants in the court process, and to understand its adversarial nature.
- An ability to appreciate the charges and understand their seriousness.
- An ability to understand and realistically appraise the likely outcomes.
- An ability to extend thinking into the future.

The mental competency functions also include the ability to render meaningful assistance to the juvenile's attorney in the preparation of the case, including all of the following:

- An ability to disclose to an attorney a reasonably coherent description of facts and events pertaining to the charge, as perceived by the juvenile.
- An ability to consider the impact of his or her action on others.
- Verbal articulation abilities or the ability to express himself or herself in a reasonable and coherent manner.
- Logical decision-making abilities.
- An ability to reason about available options by weighing the consequences, including weighing pleas, waivers, and strategies.
- An ability to display appropriate courtroom behavior.

The examiner must give the court an opinion about the juvenile's competency to proceed. If he or she determines that the juvenile is incompetent to proceed, the examiner must comment on the nature of any psychiatric or psychological disorder or cognitive impairment, the prognosis, and the services needed to restore the juvenile to

competency, if possible, within a projected time frame.

In its discretion, the court may, for good cause, grant the qualified examiner a 30-day extension in filing the competency evaluation report.

The court must give copies of the written report to the juvenile's attorney, the prosecuting attorney, and any guardian ad litem for the juvenile, within five working days after the court receives the report.

Juvenile Competency Hearing

The bills require the court, within 30 days after a competency report is filed, to hold a hearing to determine if the juvenile is competent to proceed. At the hearing, the parties may introduce other evidence regarding the juvenile's mental condition or may submit the matter by written stipulation based on the filed report.

Upon a finding by the court that a juvenile is incompetent to proceed, and a finding that there is a substantial probability that the juvenile will remain incompetent to proceed for the foreseeable future or within the period of the restoration order, the court must dismiss the charges against the juvenile, with prejudice, and may determine custody of the juvenile.

The qualified examiner appointed by the court to determine the juvenile's mental condition must be allowed reasonable fees for services rendered.

Senate Bill 246 requires the court to report to the State Court Administrator the number of juveniles found to be incompetent to proceed.

"Restoration" means the process by which education or treatment of a juvenile results in that juvenile becoming competent to proceed.

Restoration to Competency

If a juvenile is incompetent to proceed but the court finds that he or she may be restored to competency in the foreseeable future, one of the following applies:

- If the offense is a traffic offense or a misdemeanor other than a serious

misdemeanor, the matter must be dismissed.

- If the offense is a serious misdemeanor (as defined in the Crime Victim's Rights Act), the court may dismiss the matter or suspend the proceedings against the juvenile.
- If the offense is a felony, the proceedings against the juvenile must be further suspended.

If the proceedings are suspended because the juvenile is incompetent to proceed but the court finds that he or she may be restored to competency in the foreseeable future, before issuing a restoration order, the court must hold a hearing to determine the least restrictive alternative setting for completion of the restoration. The court may issue a restoration order that is valid for 60 days from the date of the initial finding of incompetency or until the first of the following occurs:

- The qualified examiner, based on information provided by the qualified restoration provider, reports that the juvenile has regained competency or that there is no substantial probability that the juvenile will regain competency within the period of the order.
- The charges are dismissed.
- The juvenile reaches 18 years of age.

After a restoration order is issued, the qualified restoration provider must submit to the court and the qualified examiner a report that includes the information required for a juvenile's competency evaluation. The report must be submitted to the court and the examiner every 30 days, or sooner if and when the qualified restoration provider determines either of the following:

- The juvenile is no longer incompetent to proceed.
- There is no substantial probability that the juvenile will be competent to proceed within the period of the order.

At least 14 days before the initial 60-day order expires, the qualified restoration provider may recommend to the court and the qualified examiner that the court renew the restoration order for another 60 days, if there is a substantial probability that the juvenile will not be incompetent to proceed within the period of the renewed restoration order. The restoration order and any

renewed restoration order may not exceed 120 days.

"Qualified restoration provider" means an individual whom the court determines, as a result of the opinion provided by the qualified forensic mental health examiner, has the skills and training necessary to provide restoration services. The court must take measures to avoid any conflict of interest among agencies or individuals who may provide evaluation and restoration.

Remaining Incompetent

Except as otherwise provided, upon receiving a report that there is a substantial probability that a juvenile will remain incompetent to proceed for the foreseeable future or within the period of a restoration order, the court must dismiss the charges against the juvenile and determine custody of the juvenile as follows:

- The court may direct that civil commitment proceedings be initiated, as allowed under the Mental Health Code.
- If the court determines that commitment proceedings are inappropriate, it must release the juvenile to his or her parent, legal guardian, or legal custodian under conditions the court considers appropriate.

Upon receiving a report from a qualified examiner that there is a substantial probability that the juvenile will be unable to be restored due to serious emotional disturbance, the court in its discretion and except as provided under the Youth Rehabilitation Services Act, may order that mental health services be provided to the juvenile for a period of up to 60 days by the DCH, subject to the availability of inpatient care; a community mental health services program; the Department of Human Services (DHS); a county DHS; or another appropriate mental health services provider. The court must retain jurisdiction over the juvenile throughout the duration of the order. The entity ordered to provide services must continue to provide services for the duration of the period of treatment ordered by the court.

At least 14 days before an order for treatment expires, the entity providing mental health services must submit a report regarding the juvenile to the court and the

qualified examiner. The court must review the report and either renew the order for another period of treatment not to exceed 60 days or determine custody of the juvenile and dismiss the charges against the juvenile. An order for treatment and any renewed order may not exceed a total of 120 days.

Senate Bill 246 requires the DCH to maintain a record of the number of juveniles for whom the court ordered that mental health services be provided.

Self-Incrimination Protection/Confidentiality

The bills state that constitutional protections against self-incrimination apply to all competency evaluations. Any evidence or statement obtained during a competency evaluation is not admissible in any proceeding to determine the juvenile's responsibility. A statement that a juvenile makes during a competency evaluation or evidence resulting from the statement concerning any other event or transaction is not admissible in any proceeding to determine the juvenile's responsibility for any other charges that are based on those events or transactions.

A statement that the juvenile makes during a competency evaluation may not be used for any purpose other than competency assessment without the written consent of the juvenile or his or her guardian. The juvenile or guardian must have an opportunity to consult with his or her attorney before giving consent.

After the case proceeds to adjudication or the juvenile is found to be unable to regain competence, the court must order all of the reports required to be submitted under the bills to be sealed. The court may order that the reports be opened only as follows:

- For further competency or criminal responsibility evaluations.
- For statistical analysis.
- For data gathering.
- For scientific study or other legitimate research.

The court also may order the records to be open if they are considered to be necessary to assist in mental health treatment ordered according to the Mental Health Code.

If the court orders reports to be open for the purposes of statistical analysis, data gathering, or scientific study, the reports must remain confidential.

Any statement that a juvenile makes during a competency evaluation, or any evidence resulting from that statement, is not subject to disclosure.

MCL 712A.1 et al. (S.B. 246)
330.1498d et al. (H.B. 4555)

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bills may lead to indeterminate cost increases for the Department of Community Health and the Department of Human Services. There also might be a fiscal impact on county governments. The bills allow courts to order that juveniles be provided mental health services by the DCH, the DHS, a county department of human services, or a local community mental health services program (CMHSP). Because CMHSPs are funded by the State and by county governments, any court orders will either increase costs or reduce the availability of services for other CMHSP clients.

The bills will have an indeterminate fiscal impact on local courts. In accordance with the guidelines set forth in the bills, the courts will be tasked with appointing and reasonably compensating a "qualified [juvenile] forensic mental health examiner" as needed in juvenile delinquency cases. This task will not be an entirely new liability for local courts, but by providing uniform guidelines, the bills may result in more competency examinations being requested. Some courts already might have arrangements with experienced examiners, whether they have an examiner on staff or have arrangements with their local community mental health agency. Small jurisdictions, which may see cases involving juvenile competency less frequently, might need to make arrangements on a case-by-case basis.

The criteria for certifying qualified juvenile forensic mental health examiners will have an ambiguous fiscal impact. The need for additional specialization may increase costs; however, by broadening the pool of potential

qualified examiners to include mental health professionals other than psychiatrists or psychologists (such as licensed clinical social workers), the criteria might reduce required fees and/or increase availability.

Fiscal Analyst: Steve Angelotti
Dan O'Connor

S1112\s246es

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.