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BILL



ANALYSIS

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Senate Bills 246 and 247 (as introduced 3-9-11)  
Sponsor: Senator Tonya Schuitmaker  
Committee: Judiciary

Date Completed: 5-22-12

### **CONTENT**

**Senate Bills 246 and 247 would amend 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 was 10 years of age or older, and a presumption of incompetence for a juvenile who was under 10.
- Allow a court to order, or a party to request, a competency evaluation to determine whether a juvenile was incompetent to proceed if he or she were 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 would have to be included in the report.
- Require the court to hold a juvenile competency hearing within 30 days after a qualified examiner's competency report was filed.
- Require a court to dismiss charges against the juvenile, with prejudice, if the court found a juvenile to be incompetent to proceed and that there was a substantial probability that he or she would remain incompetent to proceed for the foreseeable future.
- Specify options for the court if a juvenile were incompetent to proceed but he or she could be restored to competency in the foreseeable future, including issuing a restoration order that would be valid for 60 days.
- 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 was issued.
- Allow the qualified restoration provider to recommend that the court renew the restoration order for another 60 days, if there were a substantial probability that the juvenile would 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 would 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 was a substantial probability that the juvenile would be unable to be restored due to serious emotional disturbance.**
- **Specify that protections against self-incrimination would apply to all competency evaluations; evidence obtained during a competency evaluation would not be admissible to determine the juvenile's responsibility; and the juvenile's statements in a competency hearing would not be subject to disclosure.**

Senate Bill 247 also would require 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 would have to 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.

Also, under Senate Bill 247, a county could apply for reimbursement from the Child Care Fund for providing mental health services as ordered by a court under the bill.

A more detailed description of the bills follows.

#### Presumption of Competency

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

"Juvenile" would mean a person who is under 17 years of age who is the subject of a delinquency petition. "Incompetent to proceed" would mean 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 could order, or a juvenile, the juvenile's attorney, or the prosecuting attorney could request a competency evaluation to determine whether the juvenile was incompetent to proceed if he or she were being charged as a juvenile in the court. The issue of the juvenile's competency could be raised by the court before which the proceedings were pending or being held, or by motion of a party, at any time during the proceeding.

When an issue of the juvenile's competency was raised, the delinquency proceeding would have to cease temporarily until determination was made on the juvenile's competency, as described below.

#### Competency Evaluation

Qualified Examiner. A competency evaluation ordered under the bills would have to be conducted by a qualified forensic mental health examiner. The examiner would have to provide the court with an opinion as to whether the juvenile was competent to proceed.

"Qualified forensic mental health examiner" would mean one of the following who performs forensic mental health examinations for the purposes of Sections 1062 to 1074 of the Mental Health Code (which Senate Bill 247 would enact):

- A psychiatrist or psychologist who possesses experience or training in forensic evaluation procedures for juveniles; evaluation or 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 Senate Bill 247, a licensed master's social worker or licensed professional counselor or limited license psychologist meeting the certification requirements of the program established by the DCH under that bill.

The court would have the final determination as to who was a qualified forensic mental health examiner.

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

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

"Least restrictive environment" would mean 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 would require a court to order the prosecuting attorney to give the juvenile's attorney all information related to competency. The court also would have to order the prosecuting attorney and juvenile's attorney to give the qualified forensic mental health 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 would have to 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 would not limit, waive, or abrogate the work product doctrine or the attorney-client privilege, and release of records and information would be subject to that doctrine and privilege.

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

Written Report. A qualified forensic mental health examiner who conducted a competency evaluation would have to submit a written report to the court within 30 days after receiving the court order requiring the evaluation. The report would have to 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 would have to contain a clinical assessment that included all of the following:

- Mental status examination.
- The diagnosis and functional impact of mental illness, developmental disability, or cognitive deficiency; and the impact of medication on the juvenile's mental state and behavior, if he or she were taking medication.
- An assessment of the juvenile's intelligence.
- The juvenile's age, maturity level, developmental stage, and decision-making abilities.
- Whether the juvenile had any other factor that affected competence.

In addition, the report would have to describe abilities and deficits in mental competency functions related to the juvenile's competence to proceed. This would have to 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 would 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 would have to give the court an opinion about the juvenile's competency to proceed. If he or she determined that the juvenile was incompetent to proceed, the examiner would have to comment on the nature of mental disease or defect, the prognosis, and the services needed to restore the juvenile to competency, if possible, within a projected time frame. The opinion would have to include an assessment of whether the juvenile was a threat to self or others and whether he or she required emergency intervention.

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

The court would have to 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 received the report.

#### Juvenile Competency Hearing

The bills would require the court, within 30 days after a report was filed, to hold a hearing to determine if the juvenile was competent to proceed. At the hearing, the parties could introduce other evidence regarding the juvenile's mental condition or

could submit the matter by written stipulation based on the filed report.

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

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

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

#### Restoration to Competency

If a juvenile were incompetent to proceed but the court found that he or she could be restored to competency in the foreseeable future, one of the following would apply:

- If the offense were a traffic offense or a misdemeanor other than a serious misdemeanor, the matter would have to be dismissed.
- If the offense were a serious misdemeanor (as defined in the Crime Victim's Rights Act), the court could dismiss the matter or suspend the proceedings against the juvenile.
- If the offense were a felony, the proceedings against the juvenile would have to be further suspended.

If the proceedings were suspended because the juvenile was incompetent to proceed but the court found that he or she could be restored to competency in the foreseeable future, before issuing a restoration order, the court would have to hold a hearing to determine the least restrictive alternative setting for completion of the restoration. The court could issue a restoration order that was valid for 60 days from the date of the initial finding of incompetency or until one of the following occurred, whichever occurred first:

- The qualified restoration provider submitted a report that the juvenile had regained competency or that there was no substantial probability that the juvenile would regain competency within the period of the order.
- The charges were dismissed.
- The juvenile reached 18 years of age.

After a restoration order was issued, the qualified restoration provider would have to submit a report to the court and the qualified forensic mental health examiner a report that included the information required for a juvenile's competency evaluation. The report would have to be submitted to the court and the examiner every 30 days, or sooner if and when either of the following occurred:

- The qualified restoration provider determined that the juvenile was no longer incompetent to proceed.
- The qualified restoration provider determined that there was no substantial probability that the juvenile would be competent to proceed within the period of the order.

At least 14 days before the initial 60-day order expired, the qualified restoration provider could recommend to the court and the qualified forensic mental health examiner that the court renew the restoration order for another 60 days, if there were a substantial probability that the juvenile would not be incompetent to proceed within the period of the renewed restoration order. The restoration order and any renewed restoration order could not exceed 120 days.

"Qualified restoration provider" would mean 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 would have to 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 was a substantial probability that a juvenile would remain incompetent to proceed for the

foreseeable future or within the period of a restoration order, the court would have to dismiss the charges against the juvenile and determine custody of the juvenile as follows:

- The court could direct that civil commitment proceedings be initiated, as allowed under the Mental Health Code.
- If the court determined that commitment proceedings were inappropriate, the court would have to release the juvenile to his or her parent, legal guardian, or legal custodian under conditions the court considered appropriate.

Upon receiving a report that there was a substantial probability that the juvenile would 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, could order that mental health services be provided to the juvenile by the DCH, a community mental health services program, the Department of Human Services (DHS), a county DHS, or another appropriate mental health services provider for a period of up to 60 days. The court would have to retain jurisdiction over the juvenile throughout the duration of the order. The entity ordered to provide services would have to 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 expired, the entity providing mental health services would have to submit a report regarding the juvenile to the court and the qualified forensic mental health examiner. The court would have to 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.

#### Self-Incrimination Protection/Confidentiality

Under the bills, constitutional protections against self-incrimination would apply to all competency evaluations. Any evidence or statement obtained during a competency evaluation would not be admissible in any proceeding to determine the juvenile's responsibility. A statement that a juvenile made during a competency evaluation or evidence resulting from the statement concerning any other event or transaction

would not be admissible in any proceeding to determine the juvenile's responsibility for any other charges that were based on those events or transactions.

A statement that the juvenile made during a competency evaluation could not be used for any purpose without the written consent of the juvenile or the juvenile's guardian. The juvenile or his or her guardian would have to have an opportunity to consult with his or her attorney before giving consent.

After the case proceeded to adjudication or the juvenile was found to be unable to regain competence, the court would have to order all of the reports required to be submitted under the bills to be sealed. The court could order that the reports be opened only as follows:

- For further competency or criminal responsibility evaluations.
- For statistical analysis.
- The records were considered to be necessary to assist in mental health treatment ordered according to the Mental Health Code.
- For data gathering.
- For scientific study or other legitimate research.

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

Any statement that a juvenile made during a competency evaluation, or any evidence resulting from that statement, would not be subject to disclosure.

MCL 712A.1 et al. (S.B. 246)  
330.1498d (S.B. 247)

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### **FISCAL IMPACT**

The bills could lead to indeterminate cost increases for the Department of Community Health and the Department of Human Services. There also would be a potential fiscal impact on county governments. The bills would 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 would either increase costs or reduce the availability of services for other CMHSP clients. In addition, Senate Bill 247 would permit counties to apply for reimbursement from the Child Care Fund (CCF) in the DHS budget. Such reimbursement would help offset county costs, but also would either increase costs in the CCF or reduce the availability of services for CCF clients.

The bills would have an indeterminate fiscal impact on local courts. In accordance with the guidelines set forth in the bills, the courts would be tasked with appointing and reasonably compensating a "qualified forensic mental health examiner" as needed in juvenile delinquency cases. This task would not be an entirely new liability for local courts, but by providing uniform guidelines, the bills could result in more competency examinations being requested. Some courts already may 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, may need to make arrangements on a case-by-case basis.

The proposed criteria for certifying qualified forensic mental health examiners would have an ambiguous fiscal impact. The need for additional specialization could increase costs; however, by broadening the pool of potential qualified examiners to include licensed clinical social workers, the criteria could reduce required fees and/or increase availability.

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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.