



# Protocol for Competence in California Juvenile Justice Proceedings

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# Protocol for Competence in California Juvenile Justice Proceedings

## **I. Why a Juvenile Competence Protocol is Needed**

While California case law has held, since 1978, that children must be competent to stand trial,<sup>1</sup> our Legislature enacted a juvenile competence statute only in 2010.<sup>2</sup> Although the new legislation represents a giant step forward, it does not answer many questions regularly encountered by juvenile courts and practitioners around the state.<sup>3</sup>

While this situation creates challenges, it also creates opportunities to deal with juvenile incompetence in ways that are developmentally appropriate; that recognize the very different resource issues faced by juvenile systems;<sup>4</sup> and that avoid well-known pitfalls of the adult system. Courts have the inherent power to create procedures "...where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function."<sup>5</sup>

This protocol is intended as a tool for the development of such procedures in cases where competence may be an issue. It incorporates Supreme Court and California case law, and existing statutory law. Where no specific provisions exist in current law, the protocol offers suggestions or approaches that may be adapted to local practice, resources and interagency relationships.

The protocol was originally released in March 2010,<sup>6</sup> in response to requests for further guidance from courts, defenders and probation officers after the publication of after the

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<sup>1</sup> *James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 175-177.

<sup>2</sup> California Welfare and Institutions Code section 709, added by Stats. 2010, c. 671 (A.B. 2212) § 1.

<sup>3</sup> In contrast, California's comprehensive statutory scheme for adults governs every aspect of competence proceedings and ample case law helps to clear up any lingering questions. (Pen. Code §§ 1367 through 1376.) While juvenile courts may look to the adult statutory scheme for guidance where juvenile law does not provide for a particular issue, they must be careful not to simply lift adult court procedures and impose them in juvenile court. (See, for example, *In re Christopher F.* (2011) 194 Cal.App.4<sup>th</sup> 462, 522.)

<sup>4</sup> For example, the adult system may commit incompetent defendants to a range of state hospitals or developmental centers. At the present, there are no state hospitals with adolescent mental health programs and beds at developmental centers are scarce. As the juvenile system develops processes to address the needs of potentially incompetent youth, it must come to grips with the fact that the mental health and developmental disabilities systems are well into deinstitutionalization efforts. Collaboration with those systems will be essential in developing community-based services for this population, as well as individual or small group placements for those youth who require a custodial setting.

<sup>5</sup> *James H. v. Superior Court*, *supra* note 1 77 Cal.App.3d at p. 175 (citation omitted).

<sup>6</sup> The 2010 protocol was developed by Sue Burrell and Corene Kendrick with support from the John D. and Catherine T. MacArthur Foundation's Juvenile Indigent Defense Action Network, The California Endowment and the Van Loben Sels Foundation. Preparation of the initial protocol was greatly assisted by the pioneering efforts of the San Diego County Juvenile Court ("Competence Evaluations," revised Jan. 5, 2009), and

publication of *Incompetent Youth in California Juvenile Justice*.<sup>7</sup> This 2012 revision reflects the enactment of A.B. 2212 (Fuentes) and amendments;<sup>8</sup> revisions to California Rules of Court, rule 5.645;<sup>9</sup> protocols developed by several counties;<sup>10</sup> recent case developments, and a recent guide to developing juvenile competence legislation.<sup>11</sup>

The protocol is offered with the humble recognition that it will be revised and adapted as others use it in their work in juvenile court and as the law of juvenile competence develops.

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references to the 2011 revision of that protocol are made throughout. The protocol was also informed through discussions with members of the Judicial Council Task Force for Criminal Justice Collaboration on Mental Health Issues, Subcommittee on Juvenile Issues and Strategies; discussions with Sidney Hollar at the Center for Families, Children and the Courts; interviews with probation staff in 37 counties; and several meetings coordinated by with juvenile defense counsel and mental health advocates. Finally, preparation of the protocol benefited from our consultations with Dr. Thomas Grisso, Kimberly Larson, and Al Grudzinkas of the University of Massachusetts Medical School, Law & Psychiatry Program, whose knowledge about adjudicative competence in juveniles is unparalleled.

<sup>7</sup> *Incompetent Youth in California Juvenile Justice*, 19 Stanford Law & Policy Review 198-250 (Sue Burrell, Corene Kendrick, and Brian Blalock, 2008).

<sup>8</sup> The legislation includes the original enactment of A.B. 2212 (Fuentes) in 2010, fn. 3, as well as later amendments relating to youth with developmental disabilities (Stats, 2011, c. 37 (A.B. 104), § 3; and Stats. 2011, c. 471 (S.B. 368), §4.)

<sup>9</sup> California Rules of Court, rule 5.645, subdivision (d), amended effective Jan. 1, 2012.

<sup>10</sup> This protocol looks for guidance to county protocols including the San Diego County Superior Court, “Protocol for Competence Evaluations” (2011); the Los Angeles County Superior Court, Juvenile Division “Competency to Stand Trial Protocol” (Dec. 21, 2011), and the San Francisco County Department of Public Health, Special Programs for Youth “Policy for Competency Evaluations,” (Mar. 6, 2011).

<sup>11</sup> Larson and Grisso, *Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers, Models for Change* (2012).

## II. Legal Standard for Juvenile Competence

A minor is incompetent to proceed if he or she:

“lacks sufficient present ability to consult with counsel and assist in preparing his or her 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 him or her.”<sup>12</sup>

Incompetence may be the result of a mental disorder, developmental disability,<sup>13</sup> developmental immaturity,<sup>14</sup> or other conditions that result in a failure to meet one or both prongs of the standard above.<sup>15</sup>

Also, because the standard relates to the child’s ability to participate meaningfully in the court proceedings, it calls for present competence; it is not enough that the he or she could become competent in the future.<sup>16</sup>

Upon presentation of substantial evidence that the minor is incompetent, the court shall follow the procedures below. Substantial evidence is that which raises a reasonable doubt as to competence.<sup>17</sup>

## III. Resolution without Formal Proceedings

### A. Consideration of Informal Resolution

This protocol recognizes that pursuing formal competency proceedings may, in some cases, work against efforts to rehabilitate the minor and achieve public safety.<sup>18</sup>

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<sup>12</sup> Welfare and Institutions Code section 709, subdivision (a) [emphasis added]. This standard closely tracks constitutional case law. In *Dusky v. United States* (1960) 362 U.S. 304, the Supreme Court held that, “The test for competence is whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.” *Drope v. Missouri* (1975) 420 U.S. 162, 171, elaborates on the first prong of the test as requiring that the defendant lacks the capacity “...to consult with counsel, and to assist in preparing his defense...”

<sup>13</sup> The California adult standard, set forth in Penal Code section 1367, subdivision (a), defines incompetence as “a result of mental disorder or developmental disability.”

<sup>14</sup> *Timothy J. v. Superior Court* (2007) 150 Cal. App. 4<sup>th</sup> 847, 857.

<sup>15</sup> The California adult statutory scheme for incompetence does not apply to juveniles, although it may be used as a guide. (*James H. v. Superior Court, supra* note 1, 77 Cal.App.3d at pgs. 173-176.)

<sup>16</sup> California Welfare and Institutions Code section 709, subdivision (a); In *re Ricky S.* (2008) 166 Cal. App.4<sup>th</sup> 232, 236.

<sup>17</sup> *People v. Stankewitz* (1982) 32 Cal.3d 80, 92; *People v. Pennington* (1967) 66 Cal.2d 508, 516-517.

<sup>18</sup> Los Angeles Superior Court, “Competency to Stand Trial Protocol,” *supra* note 10, p. 1.

Accordingly, in any case where substantial evidence of incompetence is presented, the court and parties shall first consider whether the case may be appropriately resolved without formal competence proceedings.<sup>19</sup>

In making this determination, consideration shall be given to whether services may be provided outside the juvenile justice system that would obviate the need for jurisdiction,<sup>20</sup> and whether pursuing formal proceedings, including potentially protracted proceedings, is in the interests of justice and the welfare of the minor.<sup>21</sup> In cases where informal resolution is appropriate, the court shall consider dismissing the case in the interests of justice,<sup>22</sup> and/or developing an informal resolution plan that includes supervision by the court with dismissal if the court is later satisfied that justice and the welfare of the minor will be served.

In cases in which informal resolution is appropriate, the court shall work with the parties to establish a voluntary service plan based on the suggested referrals and services in Subsection III.B, and a timeline for the minor and family to obtain any agreed upon evaluations, services and supports. The court and parties shall establish any agreements

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<sup>19</sup> A number of counties already employ informal resolution, and there is almost overwhelming support among probation staff for the notion that some potentially incompetent youth “do not belong” in the juvenile justice system. During the interviews on juvenile competence conducted by Youth Law Center in 2007-2008 almost every one of the 37 probation departments interviewed voiced this opinion. These views are consistent with Congressional findings that many children present at the front doors of California juvenile justice because of difficulty accessing mental health services in the community. United States House of Representatives Committee on Government Reform – Minority Staff, Special Investigations Division, *Incarceration of Youth Who are Waiting for Community Mental Health Services in California* (Prepared for Rep. Henry A. Waxman, January 2005), at pgs. 4-5.

<sup>20</sup> For example, the child may already be a regional center client or eligible for special education or Medi-Cal services that could be harnessed to address the behavior bringing the child to the court’s attention. Moreover, the reality is that, in most cases of incompetence, the court is going to have to fashion services for the child and family many months down the road, so it make sense, at least in some cases, to “cut to the chase” and provide the interventions without months of lost opportunity and expense. Further, services after a formal finding of incompetence must be directed at helping the minor to attain competence, whereas, services prior to that stage can be much broader.

<sup>21</sup> Because formal competence proceedings often take several months to play out, even if an incompetent youth later attains competence, the case may be difficult to prosecute. Witnesses may be lost, and the court may be faced with holding a marginally competent child accountable for alleged events he or she can no longer remember. Moreover, because they often require intensive staffing and mental health services, the presence of potentially incompetent youth in juvenile halls strains precious county resources. (Edward Cohen and Jane Pfeifer, *Costs of Incarcerating Youth with Mental Illness: Final Report* (2008), prepared for the Chief Probation Officers of California and the California Mental Health Directors Association, pgs. iv-vi.) Sadly, too, youth who remain detained pending months of competence proceedings are likely to decompensate further. These factors should be considered in determining whether “the interests of justice” are served by formal proceedings in the case.

<sup>22</sup> Dismissal is suggested in the Los Angeles Superior Court, “Competency to Stand Trial Protocol,” *supra* note 10, pgs. 1-2, in situations where the court believes the voluntary participation of the minor and family in community based programs will serve the needs of the minor and public.

or protections for confidentiality of information needed to accomplish the goals of this section.<sup>23</sup>

The court may consider the following additional options for early resolution. If the minor appears to be impaired but able to comply with the terms and conditions imposed, the court may wish to consider handling under Welfare and Institutions Code section 654.2 informal supervision.<sup>24</sup> If the evidence of incompetence is such that the minor is unlikely ever to attain competence, the court may also consider dismissal in the interests of justice pursuant to Welfare and Institutions Code section 782.<sup>25</sup>

## **B. Suggested Procedures for Resolution without Formal Proceedings**

In weighing the need for formal proceedings, the court may make the following referrals and orders, which may assist in resolution of the case.<sup>26</sup>

1. If the minor is detained, refer the case for evaluation of the mental health of the child under Welfare and Institutions Code section 705 and Penal Code section 4011.6.<sup>27</sup> If the minor is not detained, seek evaluation under the Lanterman-Petris-Short Act through the efforts of the child's parents or guardian.<sup>28</sup>
2. In a county that has adopted a resolution, refer the case for evaluation and services under Welfare and Institutions Code section 710-714.

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<sup>23</sup> Because the court does not have wardship jurisdiction, informal resolution of the case depends on the willingness and capacity of the child and his or her family to engage in voluntary services. Where the child and family are unwilling or unable to so engage, the case will need to go through formal competence proceedings.

<sup>24</sup> This option is one of the suggested avenues for informal resolution in the Los Angeles County protocol. However, the Los Angeles protocol cautions that this mechanism should be employed only if the minor is capable of consenting to the terms of Section 654 supervision. (Los Angeles County Superior Court, "Competency to Stand Trial Protocol," *supra* note 10, p 2.)

<sup>25</sup> Los Angeles County Superior Court, "Competency to Stand Trial Protocol," *supra* note 10, p 2.

<sup>26</sup> These are simply suggestions and some may not work in a particular county or there may be legal impediments that the authors are not aware of. Similarly, there may be additional avenues to obtain services that we have not considered. The idea is to use whatever means are available to get the child and family into services that may address the causes of whatever brought the child to the attention of the system.

<sup>27</sup> These statutes may be employed at any point in the proceedings.

<sup>28</sup> Parents could either apply for involuntary commitment pursuant to Welfare and Institutions Code section 5201, or seek voluntary services.

3. Refer the case to a local interagency team to develop and implement a service plan for the child.<sup>29</sup>
4. Enlist the assistance of probation, defense counsel, a local advocacy organization, or other entity<sup>30</sup> to help the child or his family to enroll in Medi-Cal and/or SSI, and to obtain needed services.
5. Enlist the assistance of probation, defense counsel, a local advocacy organization, or other entity to obtain evaluation and services through the local regional center.<sup>31</sup>
6. Enlist the assistance of probation, defense counsel, a local advocacy organization, or other entity to obtain evaluation and services through the Individuals with Disabilities Education Act or Section 504.
7. Enlist the assistance of probation, defense counsel, a local advocacy organization, or other entity to obtain other publicly funded services, including mental health services through the Mental Health Services Act, or Title IV-E foster care funding.
8. Transfer the case to a juvenile mental health court (in counties that allow pre-adjudication referrals) or other appropriate specialty court. If the child's parent is not available to authorize treatment, order that needed medical or mental health care be provided pursuant to Welfare and Institutions Code section 739.
9. Use the joinder provisions of Welfare and Institutions Code section 727, subdivision (b)(1), to join as a party an agency that has failed to meet a legal obligation to the child, provided that the juvenile court may not impose duties on the agency beyond those mandated by law.<sup>32</sup>

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<sup>29</sup> Some counties already informally refer cases to their interagency teams under Welfare and Institutions Code section 4096, and there may be other interagency teams that could be enlisted to assist in developing service plans and access to services.

<sup>30</sup> Practice varies in different counties as to who may be able to provide this kind of assistance. For example, in some counties public defender offices have social workers to help, and in others, the system has teamed up with local advocacy groups that provide special education advocacy. Thus, the protocol suggests a series of possibilities for assuring assistance in access to services.

<sup>31</sup> Because regional center statutory timelines are quite long compared to juvenile court timelines, the court may want to direct whomever assists to contact the Clients' Rights Advocate stationed at the local regional center. This person can be immensely helpful in helping to cut through bureaucracy and reducing the time needed for eligibility determinations and development of service plans. For a listing of local Clients Rights Advocates, please see Disability Rights California, Office of Clients Rights Advocates, at <http://www.disabilityrightsca.org/about/staff.htm#OCRA> (last visited November 1, 2012).

<sup>32</sup> Welfare and Institutions Code section 727, subdivision (b)(1), has recently been amended to clarify that joinder may take place at any time after a petition has been filed. (Cal. Legis. Serv. Ch.130 (S.B. 1048) (West 2012).) Even without formal joinder, agency officials may be subpoenaed or in some instances requested to

10. Make such orders or create such procedures as are necessary to protect the rights of the child and enable the court to function.<sup>33</sup>

### **C. Resolution of the Case**

The court may, with the consent of the parties, conduct progress review hearings and continue the case until the court is satisfied that the situation that brought the child to the attention of the juvenile court has been addressed, or that the matter cannot be addressed by juvenile court intervention. At that time, the court shall dismiss the petition under Welfare and Institutions Code section 782 on the grounds that “the interests of justice and the welfare of the minor require such dismissal,” or “the minor is not in need of treatment and rehabilitation.”

## **IV. Formal Competence Proceedings**

This section sets forth a process for formal competence proceedings.

### **A. Declaration of Doubt Concerning Competence;**

#### **Stay of the Proceedings; Order for Evaluation**

During the pendency of any juvenile proceedings, the minor’s counsel or the court may express a doubt as to the minor’s competency.<sup>34</sup> There is no statutory requirement that this be done in writing.<sup>35</sup> If the court finds substantial evidence raises a doubt as to the minor’s competency, the proceedings shall be suspended.<sup>36</sup> Evidence is substantial if it raises a reasonable doubt about the minor’s competence to stand trial.<sup>37</sup>

Upon suspension of the proceedings, the court shall order that the question of the minor’s competence be determined at a hearing.<sup>38</sup> The court shall appoint an expert<sup>39</sup> to determine

come to court voluntarily to discuss their obligations to youth. This mechanism would be useful in situations in which the child is a regional center client or has been determined eligible for special education services.

<sup>33</sup> *James H. v. Superior Court*, *supra* note 1, 77 Cal.App.3d at pgs. 175-176.

<sup>34</sup> Welfare and Institutions Code section 709, subdivision (a).

<sup>35</sup> Nor is there a requirement that there be a prior evaluation. See, e.g., *People v. Murdoch* (2011) 194 Cal.App.4th 230, in which the defendant’s assertion that there was no crime because the victim was not a human being (because the victim lacked, shoulder blades, which is indicative angelic beings) sufficed to create substantial evidence. And see, *Tyrone B. v. Superior Court (Sacramento)* (2008) 164 Cal.App.4th 227, 231, in which counsel’s assertion that the minor did not understand the nature of the proceedings, coupled with information that the minor suffered from schizophrenia and bipolar illness was sufficient to raise a doubt.

<sup>36</sup> Welfare and Institutions Code section 709, subdivision (a).

<sup>37</sup> This definition of the substantial evidence requirement is from adult cases, including *People v. Stankewitz*, *supra* note 18, 32 Cal.3d 80, 92; and *People v. Danielson* (1992) 3 Cal.4<sup>th</sup> 691, 726.

<sup>38</sup> Welfare and Institutions Code section 709, subdivision (b).

“whether the minor suffers from a mental disorder, disability, developmental immaturity, or other condition, and if so, whether the condition or conditions impairs the minor’s competency.”<sup>40</sup> The expert shall have expertise in child and adolescent development, and training in the forensic evaluation of juveniles, and shall be familiar with the competency standards and accepted criteria used in evaluating competence.<sup>41</sup> He or she must also meet the criteria set forth in California Rules of Court, rule 5.645, subdivision (d).<sup>42</sup>

If the expert believes the minor is developmentally disabled, the court shall appoint the director of a regional center to evaluate the minor.<sup>43</sup> The director or designee shall determine whether the minor is eligible for services under the Lanterman Developmental

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<sup>39</sup> Courts around the state handle the number and appointment of experts differently. In San Diego, for example, if the District Attorney or the minor’s attorney contest the first evaluation, the court may appoint a second qualified evaluator, and if there is a conflict between the two evaluations, the court may appoint a third evaluator. (San Diego County Superior Court, “Protocol for Competence Evaluations, *supra* note 10, p. 6.)

<sup>40</sup> Welfare and Institutions Code section 709, subdivision (b).

<sup>41</sup> Welfare and Institutions Code section 709, subdivision (b). Some protocols also specify what should be done in the evaluation. For example, San Francisco provides that an adequate evaluation requires a full IQ and learning disability battery, and a measure of adaptive functioning such as the Vineland II. It also approves of Thomas Grisso’s model of evaluation, which is based on relevant developmental and cognitive research. (San Francisco County Department of Public Health, Special Programs for Youth “Policy for Competency Evaluations,” *supra* note 10, p. 1.).

<sup>42</sup> California Rules of Court, rule 5.645, subd. (d)(1)(B) provides that,

“To be appointed as an expert, an individual must be a:

- (i) 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
- (ii) 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.

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

- (i) Possess demonstrable professional experience addressing child and adolescent developmental issues, including the emotional, behavioral, and cognitive impairments of children and adolescents;
- (ii) Have expertise in the cultural and social characteristics of children and adolescents;
- (iii) Possess a curriculum vitae reflecting training and experience in the forensic evaluation of children;
- (iv) Be familiar with juvenile competency standards and accepted criteria used in evaluating juvenile competence;
- (v) Possess a comprehensive understanding of effective interventions as well as treatment, training, and programs for the attainment of competency available to children and adolescents; and
- (vi) 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.”

<sup>43</sup> Welfare and Institutions Code section 709, subdivision (f).

Disabilities Act (Welf. & Inst Code § 4500 et seq.), and this evaluation shall not delay the court proceedings for determination of competency.<sup>44</sup>

Nothing in this section shall prohibit the prosecuting attorney,<sup>45</sup> or the minor from retaining or seeking the appointment of additional expert witnesses to testify at a competency hearing. However, to give an expert opinion on competence, such experts must meet the requirements for “qualified experts” set forth in this protocol.<sup>46</sup>

If the minor is detained pending the evaluation(s), the court shall consider whether the minor may be released or held in non-secure confinement, consistent with the provisions of Welfare and Institutions Code section 636, and shall make appropriate orders regarding custody.<sup>47</sup>

If the minor remains detained, the court shall order that the competence hearing be set within \_\_\_ days,<sup>48</sup> and shall order that the evaluation be delivered by \_\_\_ before the hearing.<sup>49</sup> If the minor is not detained, the court shall order that the competence hearing be set for within \_\_\_ days,<sup>50</sup> and shall order that the evaluation be delivered by \_\_\_ before the

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<sup>44</sup> Welfare and Institutions Code section 709, subdivision (f). Further, an expert determination that the minor has a developmental disability does not supersede the regional center’s independent determination as to eligibility for regional center services. (Welf. & Inst. Code § 709, subd. (g).)

<sup>45</sup> At present, there is little guidance in the general area of prosecution experts in juvenile competence proceedings. The Los Angeles protocol permits the prosecutor to obtain evaluations without court funds. (Los Angeles County Superior Court, Juvenile Division “Competency to Stand Trial Protocol”, *supra* note 10, p. 3 and note 4.) Comments received during the preparation of this protocol differed about whether A.B. 1516 (Lieu 2009) gives prosecutors the right to require the minor to submit to an evaluation by their expert. That legislation amends Penal Code section 1054.3 to require adult and juvenile defendants to submit to evaluation by a prosecution expert if they place a mental state at issue. Although some case law applies adult discovery requirements in juvenile cases, one commenter suggested that not all adult discovery requirements apply (e.g., *In re Thomas F.* (2003) 113 Cal.App.4th 1249, 1254, and juvenile discovery is governed by California Rules of Court, rule 5.546), and that it is not clear that juvenile competence is within the covered mental states. Juvenile discovery is governed by. This issue will surely receive appellate court attention.

<sup>46</sup> California Rules of Court, rule 5.645, subd. (d)(2), provides that, “[n]othing in this rule precludes involvement of clinicians with other qualifications from participation as consultants or witnesses in other capacities relevant to the case.”

<sup>47</sup> Welfare and Institutions Code section 709, subdivision (c)(1) specifically permits the court to rule on detention.

<sup>48</sup> San Diego requires the setting of hearings for detained youth on the next mental competence calendar that is at least 3 court days later, but they use a court forensic unit to do evaluations. Other jurisdictions might need a slightly longer evaluation period. (San Diego County Superior Court, “Protocol for Competence Evaluations, *supra* note 10, p. 2.)

<sup>49</sup> San Diego requires the evaluation to be delivered by 1:00 p.m. on the court day preceding the hearing. (San Diego County Superior Court, “Protocol for Competence Evaluations, *supra* note 10, p. 2.)

<sup>50</sup> San Diego requires the setting of hearings for out of custody youth on the next mental competence calendar that is at least 10 court days later. (San Diego County Superior Court, “Protocol for Competence Evaluations, *supra* note 10, p. 3.)

hearing.<sup>51</sup> In either case, the minor's counsel may move the court for a continuance for additional time necessary to prepare for the competency hearing.

Statements made to the expert by the minor may not be introduced in the adjudication hearing for any purpose, including impeachment of the minor.<sup>52</sup>

## B. Other Pre-Hearing Motions

The court may make orders, at any point in the proceedings in which competence may be an issue, with respect to any matter that is capable of a fair determination without the participation of the minor,<sup>53</sup> including but not limited to the following:

1. A demurrer to the allegations in the petition.<sup>54</sup>
2. A motion to suppress evidence under Welfare and Institutions Code section 700.1.<sup>55</sup>
3. A rehearing on the issue of whether there is a prima facie case that the minor committed a public offense (initially determined at the detention hearing), pursuant to Welfare and Institutions Code section 637.<sup>56</sup>
4. A motion to dismiss the petition under Welfare and Institutions Code section 782 on the grounds that the interests of justice and the welfare of the minor require it, or the minor is not in need of treatment and rehabilitation.

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<sup>51</sup> Los Angeles requires the report to be delivered two days prior to the hearing (Los Angeles County Superior Court, Juvenile Division "Competency to Stand Trial Protocol", *supra* note 10, p. 2); San Diego requires the evaluation to be delivered by 1:00 p.m. on the court day preceding the hearing. (San Diego County Superior Court, "Protocol for Competence Evaluations, *supra* note 10, p. 4.).

<sup>52</sup> *People v. Pokovich* (2006) 39 Cal.4<sup>th</sup> 1240, 1253. This rule is included in the San Diego protocol ((San Diego County Superior Court, "Protocol for Competence Evaluations, *supra* note 10, p. 5., and the Los Angeles protocol. (Los Angeles County Superior Court, Juvenile Division "Competency to Stand Trial Protocol", *supra* note 10, p. 2.)

<sup>53</sup> This section on pre-hearing motions is based on the language in *James H.* that permits courts to fashion procedures needed to accomplish its purposes. (*James H. v. Superior Court*, *supra* note 1, 77 Cal.App.3d 169, 175-177.) Welfare and Institutions Code section 709, subdivision (c), specifically provides for several of these motions to be made *after* a finding of incompetence, and it may be simply a drafting oversight that the statute did not provide for them in pre-hearing status.

<sup>54</sup> Motions to suppress evidence (under the adult equivalent, Penal Code section 1538.5) are specifically permitted in the context of adult competence proceedings pursuant to California Penal Code section 1368.1, subs. (a) and (b).

<sup>55</sup> California Penal Code section 1368.1, subs. (a) and (b).

<sup>56</sup> California Penal Code section 1368.1, subs. (a) and (b) [called the "probable cause determination" in adult court; "prima facie case" in juvenile court].

### C. Expert Report

The expert shall personally interview the minor and review all available records, including but not limited to medical, education, special education, child welfare, mental health, regional center, and court records. The expert shall evaluate the child with respect to the competence abilities set forth in Appendix A of this protocol.<sup>57</sup> The expert shall prepare a written report that identifies any specific matters referred for evaluation; identify the sources of information used by the expert, and describe the procedures, techniques, and tests used in the evaluation and the purposes of each. The expert shall answer each of the following questions "yes" or "no" and then provide the basis for each response:

1. Does the minor have sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding?<sup>58</sup>
2. Does the minor have a rational as well as factual understanding of the proceedings against him or her?
3. Is the minor competent to stand trial and if not, what is the basis for incompetence, including the presence of a developmental disability,<sup>59</sup> mental retardation,<sup>60</sup> mental

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<sup>57</sup> This protocol directs the qualified expert to evaluate competence, the likelihood of remediation, and also to address services to assist the child in attaining competence. This is something that needs to be discussed further, and some of the comments we received suggested the need to keep these functions separate. The San Diego protocol has an initial evaluation directed only at the competence determination, and then has a second evaluation if incompetence is found. In some ways that provides a cleaner way of handling the issues, and it may be that some experts are better at determining the forensic potential and others are better at developing service plans. (San Diego County Superior Court, "Protocol for Competency Evaluations," *supra* note 10, at p. 10.) San Francisco has one evaluator do the evaluation of competence, and then involves other clinicians on developing the remediation plan. (San Francisco County Department of Public Health, Special Programs for Youth "Policy for Competency Evaluations," *supra*, note 10, p. 2.) However, having two separate evaluations is more expensive and more time consuming (though single evaluations should be compensated at a higher rate.) It would also be possible to require the report to be provided in two parts, so that the court only sees the competence portion when ruling on competence. Either way, this protocol also allows the court to order a second evaluation if the first one does not provide sufficient information for the court's orders.

<sup>58</sup> The answers to these questions shall be developed in relation to the competence abilities set forth in Appendix A of this protocol. Appendix A includes two closely intertwined sets of criteria for competence evaluations developed and used by national competence experts to determine competence under the *Dusky* constitutional standard (which is almost identical to the Section 709 standard). The first was specifically developed for use with juveniles, and the second has been used for many years in adult cases. They are fairly similar, but the set designed for juveniles has additional elements relating to decision making abilities.

<sup>59</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 mental retardation, cerebral palsy, epilepsy, autism, and disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation. (Welf. & Inst. Code, § 4512.)

<sup>60</sup> Penal Code section 1376, subdivision (a) defines mental retardation as "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18."

illness, developmental immaturity, or other condition(s), and what is the impact of the condition(s) on the minor's competence to stand trial.

4. Is the minor likely to attain<sup>61</sup> competence in the foreseeable future, and what is the expected time for attaining competence?
5. What specific services, if any, would assist the minor in the attainment of competence? What is the optimum treatment, and what is the potential for success of that treatment; what is the expected length of the services; what other options exist; and what are the relative merits or drawbacks of those services; what is the availability of the service options locally or in another acceptable location; can the minor be safely returned home during the services; and what are the qualified expert's recommendations for services?

In addition, if not covered in responses to the preceding questions, the expert should address any of the following questions that apply to the minor's situation:

6. Does the minor have a disability or condition qualifying him or her for special education, 504, or 3632 services (California Government Code sections 7570 through 7588), and if so, has the minor been found eligible for such services? What is the status of any services the minor should have received pursuant to such eligibility?
7. If the minor has a mental disorder or mental illness, is the minor a danger to himself or herself, to others, or "gravely disabled" (under the standard for children set forth in Welfare and Institutions Code section 5585.25)<sup>62</sup> so as to meet the criteria for involuntary treatment under Welfare and Institutions Code section 705, or Penal Code section 4011.6?<sup>63</sup> Does the minor suffer from mental health problems that have previously been recognized and or treated, and what is the status of any such treatment?

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<sup>61</sup> While discussions of competence often refer to "restoration" services, this protocol refers instead to services to help the child "attain" competence because many incompetent children have never been competent to begin with.

<sup>62</sup> Welfare and Institutions Code section 5585.25 provides that, "Gravely disabled minor" means a minor who, as a result of a mental disorder, is unable to use the elements of life which are essential to health, safety, and development, including food, clothing, and shelter, even though provided to the minor by others. Mental retardation, epilepsy, or other developmental disabilities, alcoholism, other drug abuse, or repeated antisocial behavior do not, by themselves, constitute a mental disorder."

<sup>63</sup> The sections cited are the juvenile court and criminal law statutes referring juveniles into the Lanterman-Petris-Short Act and civil mental health commitment system.

8. Does the minor have a developmental disability? Has the minor been found eligible for regional center services? What is the status of any services the minor should have received pursuant to such eligibility?<sup>64</sup>
9. Would the minor qualify for services through the Mental Health Services Act, Medi-Cal, Title IV-E, or other publicly funded programs? Is the minor currently enrolled in those programs? Does the minor have private health insurance, and if so, through what carrier?
10. What other programs or funding sources are available to assist this minor in the attainment of competence?

#### **D. Court Hearing on Competence**

At the hearing on competence, the juvenile court shall consider all relevant evidence on the issue of the minor's present competence to stand trial. The court shall rely on the court ordered evaluation and such other relevant written or testimonial evidence as may be presented. Upon a showing of good cause, the District Attorney or the minor's attorney may contest the report, request a second opinion, or request an evidentiary hearing.<sup>65</sup> Incompetence must be proved by a preponderance of the evidence<sup>66</sup> under the legal standard set forth in section II of this protocol.

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<sup>64</sup> And again, if the evaluator believes the minor has a developmental disability, Welfare and Institutions Code section 709, subdivision (f), requires the court to refer the case for evaluation of eligibility for regional center services.

<sup>65</sup> This provision appears in the San Diego protocol. (San Diego County Superior Court, "Protocol for Competence Evaluations, *supra* note 10, p. 4.)

<sup>66</sup> Welfare and Institutions Code section 709, subdivision (c); preponderance of the evidence is also the standard for adults in California. (Penal Code section 1369, subdivision (f); *Medina v. California* (1992) 505 U.S. 437, 442–453.)

Unfortunately, Section 709 does not specify who has the burden of proof. In adult court, Penal Code section 1369, subdivision (f) places the burden on the party asserting incompetence of the defendant. However, the court in *In re Christopher F.*, *supra* note 3, 194 Cal.App.4th 462, 472, suggested that the adult standard may not translate to juvenile proceedings because of the general goal of treating the juvenile offender and of punishing the adult offender. Thus, the court reasoned, it might be that the burden rests with the prosecutor to prove competence by a preponderance of the evidence. *Ibid.* However, the court did not reach this issue because it found substantial evidence to support the juvenile court's finding of competence. *Ibid.*

A related issue is how the court should weigh expert opinions. In *Christopher F.*, the court rejected the expert's opinion that the minor was incompetent, even though the prosecutor had not proffered its own expert. (194 Cal.App.4th at pgs. 471-472, citing *People v. Marshall* (1997) 15 Cal.4th 1, 31-32; and *People v. Drew* (1978) 22 Cal.3d 333, 350. Similarly, in *In re Alejandro G.* (2012) 205 Cal.App.4th 472, 481-482, the juvenile court had rejected two expert opinions finding a minor incompetent and found the minor competent based on the court's own interpretation of the minor's characteristics. As in *Christopher F.*, the appellate court acknowledged that the burden of proving incompetence has not yet been decided, but it upheld the juvenile court's finding of competence because there was "little, if any" evidence in the record of incompetence. *Ibid.* This is surely an issue that will receive further appellate attention.

If the court determines that the minor is incompetent to proceed, it shall also determine whether there is a substantial probability that the minor is likely to attain competence in the foreseeable future.<sup>67</sup> “In the foreseeable future” as used in this protocol means within a period not to exceed \_\_\_ months from the date of the incompetence determination.<sup>68</sup>

If the court needs additional information to make its order, or either party requests it, the court may order an additional evaluation by a qualified expert, specify the questions to be answered, require that the evaluation be completed within \_\_\_ days, and set the continued hearing for no more than \_\_\_ days of the initial hearing on incompetence.<sup>69</sup>

#### **V. If the Court Finds that the Minor is Competent**

If the court determines, by a preponderance of the evidence, that the minor is competent, the court shall lift the stay of the proceedings, and the case shall, from this point forward, proceed in accordance the timelines prescribed by statute.

The court may, nonetheless, make any referral or order needed to assure that the minor receives appropriate evaluation and services pending resolution of the petition, and may take any of the actions set forth in section III.B.

#### **VI. If the Court Finds that the Minor is Incompetent But May Attain Competence in the Foreseeable Future**

If the court determines, by a preponderance of the evidence, that the minor is incompetent to proceed, but that there is a substantial probability that the minor will attain competence in the foreseeable future, the proceedings shall remain suspended and the court shall proceed as directed by Welfare and Institutions Code section 709. The court may make orders that it deems appropriate for services to “assist the minor in attaining competency,”<sup>70</sup> based on the expert report or other relevant testimony. Further, the court shall assign a

<sup>67</sup> Welfare and Institutions Code section 709, subdivision (c); *Jackson v. Indiana* (1972) 406 U.S. 715, 738; *In re Davis* (1973) 8 Cal.3d 798, 801.

<sup>68</sup> The outside time limit (and whether to have one) obviously needs discussion. San Diego allows custodial services for 8 weeks, and allows youth to be held longer only “if it is deemed necessary by the court for the safety of the minor and/or community.” (San Diego County Superior Court, “Protocol for Competence Evaluations, *supra* note 10, pgs. 8-9.) California’s adult system allows one year for misdemeanors and three years for felonies, but those time frames and the differentiation between felonies and misdemeanors seem inapposite when we are talking about incompetent children. Preliminary data from Virginia’s remediation program has shown that the majority of juveniles were either restored to competence or found to be incapable of attaining competence within 3 to 4 months. (Larson and Grisso, *Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers*, Models for Change, *supra* note 11, p. 76.)

<sup>69</sup> The San Diego protocol requires the evaluation to be prepared within 10 days and the continued hearing to be held within three weeks of the initial hearing. (San Diego County Superior Court, “Protocol for Competence Evaluations, *supra* note 10, p. 9.)

<sup>70</sup> Welfare and Institutions Code section 709, subdivision (c).

probation officer,<sup>71</sup> interagency committee defense counsel, or other designee to begin immediate coordination of services for the attainment of competence. The court may order the responsible person or entity to do specific things, including but not limited to seeking evaluation for eligibility for particular programs or services, or arranging for those services to be provided.<sup>72</sup>

#### **A. If the Minor has a Developmental Disability**

When the minor suffers from a developmental disability and the court has ordered a regional center evaluation pursuant to Welfare and Institutions Code section 709, subdivision d), the assigned probation officer, interagency committee, defense counsel, or other designee shall take all necessary steps to expedite the completion of the regional center evaluation and, if the minor is eligible, the implementation of a service plan for the minor. If the minor is already a regional center client, the probation officer, interagency committee defense counsel, or other designee shall submit a plan to work collaboratively with regional center staff to promptly obtain appropriate community supports and services from the earliest possible moment.<sup>73</sup>

The court may set 15 day status review hearings (or reviews at other intervals) and, where needed, compel the attendance of agency officials,<sup>74</sup> to assure prompt evaluation, development of a service plan, and provision of services arranged through the regional center.

Pursuant to Welfare and Institutions Code section 709, Subdivision (h)(1), the court may not place an incompetent minor in a developmental center without a determination that the minor has a developmental disability and qualifies for services under the Lanterman Disabilities Services Act. (Welf. & Inst. Code § 4500 et seq.)

#### **B. If the Minor Has a Mental Disorder or Mental Illness**

When the minor has a mental disorder or mental illness, and the minor is detained, the court may order referral for evaluation of eligibility for involuntary treatment under the Lanterman-Petris-Short Act (LPS), pursuant to Welfare and Institutions Code sections 705

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<sup>71</sup> San Diego places the responsibility in the probation officer. We have written the protocol more broadly to reflect differences among the counties in who generally takes on this kind of responsibility. Again, some counties have public defender social workers or placement specialists, and some counties work with non-profit organizations to arrange services and perform case management. The provisions on responsibility for development and coordination of services for incompetent children can be adapted to local conditions, or left broad to permit flexibility in individual cases.

<sup>72</sup> The Los Angeles protocol provides for the case to be transferred to the juvenile mental health court where the home court does not believe it can adequately monitor the case. (Los Angeles County Superior Court, Juvenile Division “Competency to Stand Trial Protocol”, *supra* note 10, p. 4.)

<sup>73</sup> Again, Clients Rights Advocates can be very helpful in this process. See, *supra* note 21 for contact information.

<sup>74</sup> Welfare and Institutions Code section 727, subdivision (b)(1).

and Penal Code section 4011.6.<sup>75</sup> Such a referral should be made only where services under the Lanterman-Petris-Short Act would assist in the attainment of competence.<sup>76</sup>

If the minor does not meet the criteria for involuntary commitment or is not detained, but is willing to accept voluntary services, the assigned probation officer, interagency committee,

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<sup>75</sup> It has long been established that the juvenile court may not directly commit a child to a state mental hospital. Compliance with the LPS Act is required. *In re Michael E.* (1975) 15 Cal.3d 183. The proper procedure is to refer the minor pursuant to Section 705 for evaluation under LPS criteria. (See, e.g., *In re Patrick H.* (1997) 54 Cal.App.4th 1346.)

However, there problems, even with this referral process. Welfare and Institutions Code section 705 allows the court to refer incompetent youth into the LPS statutory provisions at Welfare and Institutions Code section 6550 et seq. This use of section 705 was ratified by the court in *James H. v. Superior Court*, *supra* note 1, 77 Cal.App.3d at pg. 177. This is problematic because Section 6550 which applies *after* wardship. While conceivably a competence issue could come up after wardship is established, it most often surfaces in the pre-adjudication stage. Also, if a child became incompetent later on, the issue would probably be handled through some other process than a competence proceeding – such as a motion under Welfare and Institutions Code sections 778 or 782. However, as a practical matter, any number of county officials could refer a gravely disabled person to be held for involuntary treatment for 72 hours under Welfare and Institutions Code section 5150 of the Lanterman-Petris-Short Act.

A more troubling issue is that LPS is the involuntary treatment system for mental disorders, and LPS treatment has no necessary relationship to competence to stand trial. Since a finding of incompetence suspends the proceedings so that the person may receive services directed at the attainment of competence, this raises the question whether it is legally permissible for the juvenile court to refer children for LPS evaluation in connection with competence proceedings under the authority of section 705 and Penal Code section 4011.6. This question does not arise in the adult system because incompetent adults come within statutory provisions that specifically address the issue of involuntary treatment for competence restoration (e.g., Penal Code sections 1370, subd. (a)(1)(A), and 1370.01, subd. (a)(1)). There is no similar statutory authority that applies to juveniles.

The arguments in favor of such referral are that sections 705 and 4011.6 allow it, and that even though the commitment is not for the purpose of addressing competence, if the child otherwise meets LPS commitment criteria, the treatment may coincidentally help in the attainment of competence. For example, stabilization on psychotropic medications might be directed at treated the underlying mental disorder, but also would have a significant impact on competence. The contrary view, expressed in comments we received during the preparation of the initial protocol, urges that *James H.* and section 705 are unconstitutional in allowing incompetent juveniles to be referred for involuntary evaluation for LPS, based on *Pederson v. Superior Court* (2003) 105 Cal.App.4<sup>th</sup> 931. That case held that requiring adult misdemeanants to submit to involuntary LPS evaluations *prior* to a competence determination was unconstitutional. *Pederson* involved a challenge to Penal Code section 1370.1, which at the time required LPS evaluation at the point a doubt as to competence was declared in misdemeanor cases. That may be a different situation than the more selective use of LPS evaluation being suggested here, but it is fair to say that this is uncharted territory and along with many other juvenile competence issues, referral for LPS evaluation may be tested in the courts.

<sup>76</sup> Another practical issue is that there are currently no state mental hospitals with adolescent inpatient programs, and the community hospitals that serve as treatment centers for youth under LPS tend to be focused on short term stabilization. A number of probation officers interviewed by Youth Law Center for the initial protocol expressed the cynical view that this is one reason so few youth are found to meet LPS criteria for involuntary treatment.

defense counsel, or other designee shall take all necessary steps to arrange and assure that such services are promptly provided.<sup>77</sup>

The court may set 15 day status review hearings (or reviews at other intervals) and, where needed, use the joinder provisions of section 727, subdivision (a) or compel the attendance of agency officials, to assure prompt evaluation, development of a service plan, and provision of services to minors who meet LPS criteria.

### **C. When the Minor's Incompetence Stems from Other Conditions**

When the minor's incompetence results from conditions that do not qualify him or her for services through the regional center or the involuntary commitment system, the assigned probation officer or other designated entity shall take all necessary steps ordered by the court to assure that the minor receives services for the attainment of competence. These may include, but are not limited to services through the special education, Mental Health Services Act, or Medi-Cal systems.

### **D. Least Restrictive Environment**

Any competence attainment services must be provided in the least restrictive appropriate environment. If the minor is in custody, the court shall decide whether the minor may be safely released pursuant to Welfare and Institutions Code section 636. The child may be placed at home, or if a custodial setting is needed, in a mental health facility, a placement for individuals with developmental disabilities, a foster home or other suitable placement.<sup>78</sup>

### **E. Rulings on Other Motions**

Following the determination of incompetence, pursuant to Welfare and Institutions Code section 709, subdivision (c), the court may rule on motions that do not require the participation of the minor in the preparation of the motion, including, but not limited to:

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<sup>77</sup> Whoever is responsible may need to assure access to care through Medi-Cal enrollment and assisting the child and family to set up appointments. In some situations, services through special education, the regional center, or mechanisms suggested in section III.B may also assist in the attainment of competence.

<sup>78</sup> This may require additional discussion. San Diego allows the child to be held in juvenile hall, on home supervision or electronic surveillance. (San Diego County Superior Court, "Protocol for Competence Evaluations," *supra* note 10, p. 10.) The Los Angeles protocol allows the child to be held in juvenile hall for attainment services for no more than 120 days. (Los Angeles County Superior Court, Juvenile Division "Competency to Stand Trial Protocol", *supra* note 10, p. 6.) However, the mental health community and others would object to holding an incompetent child in a juvenile detention center. An incompetent adult would be immediately transferred to a mental health setting or setting for people with developmental disabilities, and there has been litigation around the country on delays in moving adults from jails to mental health facilities. Further, language in earlier cases clarifies that incompetence in and of itself is not a basis for detention; the rules on prima facie showing and need for detention apply. (*In re Mary T.* (1985) 176 Cal.App.3d 38, 44-45.) There will certainly be appellate litigation over the limits of juvenile hall detention of youth found to be incompetent.

1. Motions to dismiss.
2. Motions by the defense regarding a change in placement of the minor.
3. Detention hearings.
4. Demurrers.

## **F. Attainment of Competence Hearing**

### **1. Time for Hearing**

The court shall set the case for a follow up Attainment of Competence Hearing to take place within \_\_\_ days of the date of the court's order for services to assist the minor in attaining attain competence.<sup>79</sup> If the case was continued for a second evaluation and continued Competence Hearing, the follow up Attainment of Competence hearing shall be set within \_\_\_ days of the continued hearing.<sup>80</sup>

### **2. Qualified Expert Report on Attainment of Competence; Probation Report**

At the time the court sets a date for the follow-up Attainment of Competence Hearing it shall appoint an expert to assess the minor's competence at the anticipated conclusion of the services to assist the minor in the attainment of competence. The expert shall meet the criteria of California Rules of Court, rule 5.645, subdivision (d). The expert shall confer with service providers, review any reports or records prepared in conjunction with the treatment, and evaluate the minor's competence using the criteria set forth in Appendix A.<sup>81</sup> The report shall be delivered to the court and made available to the parties at least \_\_\_ days prior to the court hearing.<sup>82</sup>

### **3. Attainment of Competence Hearing**

At the Attainment of Competence Hearing the court will determine whether the minor is competent or remains incompetent. In ruling on competence, the court may rely on the report of the qualified expert, and such other relevant written or testimonial evidence as

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<sup>79</sup> As previously discussed, San Diego limits restoration to 8 weeks with the possibility of extension for the safety of the minor or the community. However, the extension hearing must be set for within five weeks. (San Diego County Superior Court, "Protocol for Competence Evaluations, *supra* note 10, p. 11.)

<sup>80</sup> San Diego requires this hearing to be within 5 weeks to assure that the follow up hearing occurs within 8 weeks of the original finding of incompetence. (San Diego County Superior Court, "Protocol for Competence Evaluations, *supra* note 10, p. 10.)

<sup>81</sup> San Diego has two reports at this point. One is by the team that provided "restoration" services, detailing the treatment and the other is by the expert, evaluating competence. (San Diego County Superior Court, "Protocol for Competence Evaluations, *supra* note 10, pgs 10-11.)

<sup>82</sup> San Diego requires that the evaluator's report be delivered to the probation officer at least three court days before the hearing, and to the minor's attorney and district attorney no later than 1:00 p.m. on the day before the hearing. (San Diego County Superior Court, "Protocol for Competence Evaluations, *supra* note 10, p. 11.)

may be presented. The District Attorney or the minor's attorney may contest the report, request a second opinion, or request an evidentiary hearing.

If the minor is found competent, the court will reinstate the delinquency proceedings and proceed with the case. If the minor is found incompetent, the court may order continued services for the attainment of competence or an alternative plan. The court may also take any of the actions set forth in Section III.B of this protocol.

If, at the end of \_\_\_ months from the initial finding of incompetence, the minor has not attained competence, the court shall find that the minor is not likely to attain competence in the foreseeable future.<sup>83</sup>

### **VII. If the Court Finds that the Minor is Incompetent and Unlikely to Attain Competence in the Foreseeable Future**

If, at any point in the proceedings, the court finds that the minor is incompetent and unlikely to attain competence in the foreseeable future, the court shall dismiss the juvenile court petition and terminate the court's jurisdiction.<sup>84</sup>

Prior to dismissing the case, the court shall encourage the parties to cooperate in obtaining appropriate voluntary services for the minor and the minor's family,<sup>85</sup> and may order the joinder of any agencies with legal obligations to the minor.<sup>86</sup>

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<sup>83</sup> Again, the outside time limits, if drawn, should relate to a realistic time within which youth may be expected to attain competence. In our previous draft protocol the suggested limit was six months, based on discussions with Dr. Grisso and his team. Since that time, preliminary data from Virginia's remediation program has found that most juveniles were either restored to competence or found to be incapable of attaining competence within 3 to 4 months. (Larson and Grisso, *Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers*, Models for Change, *supra* note 12, p. 76.) There will undoubtedly be additional research on this issue and, of course, this is a matter for policy discussion.

<sup>84</sup> Welfare and Institutions Code section 709, subdivision (c), provides that, upon a finding of incompetence, "the 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."

<sup>85</sup> The San Diego protocol also provides for referral for involuntary commitment. (San Diego County Superior Court, "Protocol for Competence Evaluations, *supra* note 10, p. 12.) See also, note 74, *supra*.

<sup>86</sup> Welfare and Institutions Code section 727, subdivision (b)(1), *supra* note 31.

## **Appendix A: Criteria for Competence Evaluation**

The qualified expert shall evaluate the minor's competence with respect to each of the following abilities:<sup>87</sup>

### **The Juvenile Court Trial and Its Consequences**

1. Nature and Seriousness of Offense
2. Nature and Purpose of the Juvenile Court Trial
3. Possible Pleas
4. Guilt and Punishment/Penalties

### **Roles of the Participants**

5. Role of the Prosecutor
6. Role of the Juvenile Defense Lawyer
7. Role of the Probation Officer
8. Role of the Juvenile Court Judge

### **Assisting Counsel and Decision Making**

9. Assisting the Defense Lawyer
10. Plea Bargains/Agreements
11. Reasoning and Decision Making
  - a. Deciding about having a defense lawyer
  - b. Deciding how to assist your lawyer
  - c. Deciding how to plead
  - d. Deciding about a plea bargain

### **Participating at a Juvenile Court Hearing**

12. Participating at a Juvenile Court Hearing
  - a. Ability to Attend (to events in the hearing)
  - b. Ability to Maintain Self-Control (during the hearing)
  - c. Ability to Testify (at a hearing)

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<sup>87</sup> These "Competency Abilities" were designed for use in evaluations of children and adolescents. *Evaluating Juveniles' Adjudicative Competence: A Guide for Clinical Practice* (Thomas Grisso, Professional Resource Press 2005), p. 75. They are used in connection with the "Juvenile Adjudicative Competence Interview" (JACI), in the same publication.

For reference, the preceding set of competence abilities was derived one of the frequently used sets of abilities clinicians use to evaluate competence in relation to the *Dusky* standard, and it may still be useful in conjunction with juvenile specific criteria in evaluating particular competence abilities.<sup>88</sup>

### **Understanding of Charges and Potential Consequence**

1. Ability to understand and appreciate the charges and their seriousness.
2. Ability to understand possible dispositional consequences of guilty, not guilty and not guilty by reason of insanity.
3. Ability to realistically appraise the likely outcomes.

### **Understanding of the trial process**

4. Ability to understand, without significant distortion, the roles of the participants in the trial process (e.g., judge, defense attorney, prosecutor, witnesses, jury).
5. Ability to understand the process and potential consequences of pleading and plea bargaining.
6. Ability to grasp the general sequence of pretrial events.

### **Capacity to Participate with Attorney in a Defense**

7. Ability to adequately trust or work collaboratively with attorney.
8. Ability to disclose to attorney reasonably coherent description of facts pertaining to charges, as perceived by defendant.
9. Ability to reason about available options by weighing their consequences, without significant distortion.
10. Ability to realistically challenge prosecution witnesses and monitor trial events.

### **Potential for Courtroom Participation**

11. Ability to testify coherently, if testimony is needed.
12. Ability to control own behavior during trial proceedings.
13. Ability to manage the stress of trial.

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<sup>88</sup> Thomas Grisso, *Forensic Evaluation of Juveniles* (Professional Resource Press 1998), pgs. 91-92. This set of abilities was originally developed by L. McGarry, *Competency to Stand Trial and Mental Illness* (Publication No. ADM 77-103), Rockville, Md., Department of Health Education and Welfare.