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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

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**Bill No:** AB 935                      **Hearing Date:** July 11, 2017  
**Author:** Mark Stone  
**Version:** June 26, 2017  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** SJ

**Subject:** *Juvenile Proceedings: Competency*

## HISTORY

**Source:** California Probation Officers of California

**Prior Legislation:** AB 2695 (Oberholte) Held in Assembly Appropriations 2016  
SB 368 (Liu) Ch. 471, Stats. of 2011  
AB 2212 (Fuentes) Ch. 671, Stats. of 2010

**Support:** California Attorneys for Criminal Justice; California Public Defenders Association; Pacific Juvenile Defender Center; Santa Clara County Board of Supervisors

**Opposition:** California District Attorneys Association; San Diego District Attorney's Office

**Assembly Floor Vote:** 68 - 1

## PURPOSE

***The purpose of this bill is to revise the procedure used to determine the mental competence of a juvenile charged with a crime.***

*Existing law* provides that during any juvenile proceeding, the minor's counsel or the court may express a doubt as to the minor's competency. (Welf. & Inst. Code, § 709, subd. (a).)

*Existing law* specifies that 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. If the court finds substantial evidence that raises a doubt as to the minor's competency, the proceedings shall be suspended. (Welf. & Inst. Code, § 709, subd. (a).)

*Existing law* provides that upon suspension of proceedings, the court shall order that the question of the minor's competence be determined at a hearing. (Welf. & Inst. Code, § 709, subd. (b).)

*Existing law* requires the court to appoint an expert to evaluate whether the minor suffers from a mental disorder, developmental disability, developmental immaturity, or other condition and, if so, whether the condition or conditions impair the minor's competency. The expert is required to have expertise in child and adolescent development, and training in the forensic evaluation of

juveniles, and to be familiar with competency standards and accepted criteria used in evaluating competence. The Judicial Council is required to develop and adopt rules for the implementation of these requirements. (Welf. & Inst. Code, § 709, subd. (b).)

*Existing law* requires that if the minor is found to be incompetent by a preponderance of the evidence, all proceedings are to 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. (Welf. & Inst. Code, § 709, subd. (c).)

*Existing law* provides that during the time proceedings are suspended, the court may make orders that it deems appropriate for services that may assist the minor in attaining competency. The court may rule on motions that do not require the participation of the minor in the preparation of specified motions (Welf. & Inst. Code, § 709, subd. (c).)

*Existing law* provides that if the minor is found to be competent, the court may proceed commensurate with the court's jurisdiction. (Welf. & Inst., § 709, subd. (d).)

*Existing law* requires the court to appoint the director of a regional center for developmentally disabled individuals to evaluate the minor if the expert believes the minor is developmentally disabled. The director of the regional center, or his or her designee, is required to determine whether the minor is eligible for services under the Lanterman Developmental Disabilities Services Act, and to provide the court with a written report informing the court of his or her determination. (Welf. & Inst., § 709, subd. (f).)

*Existing law* states that an expert's opinion that a minor is developmentally disabled does not supersede an independent determination by the regional center whether the minor is eligible for services under the Lanterman Developmental Disabilities Services Act. (Welf. & Inst., § 709, subd. (g).)

*This bill* requires the court to suspend all proceedings and make a determination of competence whenever the court has a doubt that a minor who is subject to any juvenile proceedings is mentally competent.

*This bill* specifies that a minor is mentally incompetent if he or she is unable to understand the nature of the proceedings, including his or her role in the proceedings, or unable to assist counsel in conducting a defense in a rational manner, including a lack of a rational and factual understanding of the nature of the charges or proceedings. Incompetency may result from the presence of any condition or conditions, including, but not limited to, mental illness, mental disorder, developmental disability, or developmental immaturity.

*This bill* allows the court to receive information from any source regarding the minor's ability to understand the proceedings. The minor's counsel or the court may express a doubt as to the minor's competency, but the receipt of information or the expression of doubt of the minor's counsel does not automatically require the suspension of proceedings.

*This bill* requires the court to suspend the proceedings if the court has a doubt as to the minor's competency.

*This bill* requires the court to appoint an expert to evaluate the minor to determine if the minor is competent unless the parties stipulate to a finding that the minor lacks competency, or the parties are willing to submit on the issue of the minor's lack of competency.

*This bill* requires the expert to have expertise in child and adolescent development and forensic evaluation of juveniles for purposes of adjudicating competency, to be familiar with competency standards and accepted criteria used in evaluating juvenile competency, and to be familiar with competency remediation for the condition or conditions affecting competency in the particular case.

*This bill* requires the expert to personally interview the minor and review all of the available records provided, as specified. The expert is required to consult with the minor's counsel and any other person who has provided information to the court regarding the minor's lack of competency, to gather a developmental history of the minor, to administer age-appropriate testing specific to the issue of competency, unless the facts of the particular case render testing unnecessary or inappropriate. The expert is required to submit a written report that provides an opinion on whether the minor has the sufficient present ability to consult with his or her counsel with a reasonable degree of rational understanding and whether he or she has a rational and factual understanding of the proceedings against him or her. The expert is required to state the basis for these conclusions.

*This bill* provides that if the expert concludes that the minor lacks competency, the expert is required to give his or her opinion on whether the minor is likely to attain competency in the foreseeable future, and if so, make recommendations regarding the type of services that would be effective in assisting the minor in attaining competency.

*This bill* requires the Judicial Council, in conjunction with specified stakeholders, to adopt a rule of court identifying the training and experience needed for an expert to be competent in forensic evaluations of juveniles. The Judicial Council is also required to develop and adopt rules for the implementation of the other requirements involving the minor's competency.

*This bill* prohibits the use of statements made to the appointed expert during the minor's competency evaluation and statements made by the minor to mental health professionals during the remediation proceedings in any other hearing against the minor in either juvenile or adult court.

*This bill* allows the district attorney or minor's counsel to retain or seek the appointment of additional qualified experts who may testify during the competency hearing. The expert's report and qualifications are required to be disclosed to the opposing party within a reasonable time before, but no later than five court days before, the hearing, or sanctions may be imposed.

*This bill* requires that the question of the minor's competency be determined at an evidentiary hearing unless there is a stipulation or submission by the parties on the findings of the expert. It shall be presumed that the minor is mentally competent, unless it is proven by a preponderance of the evidence that the minor is mentally incompetent. If the minor is under 14 years old at the time of the commission of the alleged offense, the court shall make a determination as to the minor's capacity prior to deciding the issue of competency.

*This bill* provides that if the court finds, by a preponderance of evidence, that the minor is incompetent, all proceedings are to 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 has jurisdiction and the case must be dismissed.

*This bill* provides that if the minor is found to be incompetent and the petition contains only misdemeanor offenses, the petition shall be dismissed.

*This bill* requires the court upon a finding of incompetency, to refer the minor to services designed to help the minor attain competency, including, but not limited to, mental health services, treatment for trauma, medically supervised medication, behavioral counseling, curriculum-based legal education, or training in socialization skills, consistent with any laws requiring consent. Such services are to be provided by the county mental health department and to be provided in the least restrictive environment consistent with public safety.

*This bill* requires that service providers promptly determine the likelihood of the minor attaining competency within the foreseeable future, and to return the minor to court at the earliest possible date if the opinion is that the minor will not attain competency within six months.

*This bill* requires the court to review remediation services at least every 30 calendar days for minors in custody and every 45 calendar days for minors out of custody prior to the maximum period of secure confinement.

*This bill* requires the county mental health department to provide the court with suitable alternatives for the continued delivery of remediation services upon release from custody as part of the court's review of remediation services if the minor is in custody. The court may make any orders necessary to assist with the delivery of remediation services in an alternative setting to secure confinement.

*This bill* requires the court, upon receipt of the recommendation by the designated person or entity, to hold an evidentiary hearing on whether the minor is remediated or is able to be remediated unless the parties stipulate to, or agree to the recommendation of, the remediation program.

*This bill* provides that if the recommendation is that the minor has attained competency, and if the minor disputes that recommendation, the burden is on the minor to prove by a preponderance of evidence that he or she remains incompetent.

*This bill* provides that if the recommendation is that the minor is unable to be remediated and if the prosecutor disputes that recommendation, the burden is on the prosecutor to prove by a preponderance of evidence that the minor is remediable. If the prosecution contests the evaluation of continued incompetence, the minor shall be presumed incompetent and the prosecution shall have the burden to prove by a preponderance of evidence that the minor is competent.

*This bill* provides that if the court finds that the minor has been remediated, the court shall reinstate the proceedings.

*This bill* specifies that if the court finds that the minor has not yet been remediated, but is likely to be remediated within six months, the court shall order the minor to return to the remediation program. The total remediation period shall not exceed one year from the finding of incompetency.

*This bill* states that if the court finds that the minor will not achieve competency within six months, the court shall dismiss the petition. The court is permitted to invite persons and agencies with information about the minor, including, but not limited to, the minor and his or her attorney, the probation department, parents, guardians, or relative caregivers, mental health treatment professionals, the public guardian, educational rights holders, education providers, and social services agencies, to the dismissal hearing to discuss any services that may be available to the minor after jurisdiction is terminated. If appropriate, the court shall refer the minor for evaluation as an imminently dangerous person or person with other mental health disorder.

*This bill* prohibits secure confinement beyond six months from the finding of incompetence.

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

## COMMENTS

### 1. Need for This Bill

According to the author:

While existing Welfare and Institutions Code 709 establishes juvenile competency and sets forth guidelines for these proceedings, there remain some operational ambiguities among practitioners relative to the types of remediation services to be delivered, who is the appropriate entity to deliver them, and where a youth will receive those services and for how long. This bill seeks to provide additional guidance around these questions.

The practical impact is that there are times in which juveniles are remaining in the hall without clear timelines governing the length of remediation services. It is important that not only do these minors receive appropriate services, but that they do so within a reasonable time frame in order to get them out of the hall and in proper placement and care going forward.

### 2. Current Juvenile Competency Standards and Procedures

The Due Process Clause of the U.S. Constitution prohibits the criminal prosecution of a defendant who is not mentally competent to stand trial. An adult is mentally incompetent if “as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational

manner.” (Pen. Code, § 1367, subd. (a).) While those same factors are considered in evaluating the competency of a minor, a minor’s developmental maturity is also considered when determining whether he or she is competent. Unlike an adult, a minor may be found to be incompetent based on developmental immaturity alone. (See *Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847.)

In 2010, California enacted AB 2212 (Fuentes, Chapter 671) which created the existing procedure and standards for handling incompetent minors before the juvenile court. The language of that statute created some procedural gaps regarding how a juvenile should be treated if they are found to be incompetent.

### **3. Differences Between Adults and Juveniles With Respect to Cognitive Abilities**

Researchers in the science of human development generally agree that adolescents differ from adults. “The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable . . . Indeed, age 21 or 22 would be closer to the ‘biological’ age of maturity.” (Adolescent Brain Development and Legal Culpability, American Bar Assn. Criminal Justice Section, Juvenile Justice Center (Winter 2003).)

The difference between juveniles and adults with respect to cognitive ability is at the heart of the *Timothy J.* decision, *supra*. In that case, the Court stated:

As a matter of law and logic, an adult’s incompetence to stand trial must arise from a mental disorder or developmental disability that limits his or her ability to understand the nature of the proceedings and to assist counsel. (internal citation omitted.) The same may not be said of a young child whose developmental immaturity may result in trial incompetence despite the absence of any underlying mental or developmental abnormality.

Dr. Edwards testified that minors are different from adults because their brains are still developing and as myelination occurs during puberty, the minor develops the ability to think logically and abstractly. Both experts concluded that because of his age, [the minor’s] brain has not fully developed and he was unable to think in those ways.

Their conclusions are supported by the literature, which indicates that there is a relationship between age and competency to stand trial and that an adolescent’s cognitive, psychological, social, and moral development has a significant biological basis. (Steinberg, *Juveniles on Trial: MacArthur Foundation Study Calls Competency into Question* (2003) 18 *Crim. Just. supra*, 20, 21.) While many factors affect a minor’s competency to stand trial, “the younger the juvenile defendant, the less likely he or she will be to manifest the type of cognitive understanding sufficient to satisfy the requirements of the *Dusky* standard.” (internal citation omitted.)

### **4. Proposed Amendment**

The author intends to make two amendments. The first is a technical amendment.

709 (e) “If the court finds, by a preponderance of evidence, that the minor is incompetent...or the court no longer retains jurisdiction and the case must be dismissed. ~~During this time~~ Prior to a dismissal, the court may make orders that it deems appropriate for services. Further, the court may rule on motions that do not require the participation of the minor in the preparation of the motions.

The second amendment more clearly reflects the intent of that provision.

709 (g) “... The court shall review remediation services at least every 30 calendar days in custody and every 45 calendar days for minors out of custody ~~prior to the expiration of the maximum period of a secure confinement specified in paragraph (5) of subdivision (h)~~ prior to the expiration of the total remediation period specified in paragraph (3) of subdivision (h)...”

## 5. Related Legislation

AB 689 (Oberholte) is another bill from this legislative session that would have revised the procedures to determine the mental competence of a juvenile charged with a crime. AB 689 differed from AB 935 in that AB 689 did not place any definitive limits on the amount of time a juvenile can be remediated. AB 689 was held in the Assembly Appropriations Committee.

## 6. Argument in Support

The Chief Probation Officers of California, the bill’s sponsor, writes:

The California Legislature enacted juvenile competency proceedings in 2010 by the passage of AB 2212 (Fuentes, Statutes of 2010, Chapter 671). Prior to the passage of this bill, the only guidance for determining legal competency for juveniles was found in California Rules of Court and case law.

Under this new law, minors may be deemed incompetent to participate in their court proceedings as a result of a mental disorder, developmental disability, developmental immaturity, or other conditions that result in the inability to meaningfully understand the proceedings, the charges against them, or work with counsel in their defense. The law also set forth processes for the provision of remediation services upon a determination of incompetency.

Although the prior legislation represented a giant step forward, there are still ambiguities as to the types of remediation services to be delivered, who will deliver them, and where a youth will receive those services and for how long. Absent clear timelines governing the process, vulnerable children will languish in juvenile halls longer than appropriate in an effort to provide remediation services.

AB 935 builds upon existing juvenile competency statute by identifying the types of remediation services provided to juveniles, the delivery system protocols, and establishes a maximum six month timeline for a juvenile to remain in the juvenile hall during the delivery of restoration and remediation services, after which time it would allow for arranging alternative mental health treatment and remediation services administered by County Mental Health Departments. Finally, this

legislation sets forth the dismissal of misdemeanor cases for youth determined to be incompetent.

## 7. Argument in Opposition

The California District Attorneys Association writes:

AB 935, a court would be required to dismiss any petition in which only misdemeanors are alleged, simply upon an initial determination of incompetence. There are already counties within the state that typically do not detain such individuals and, in fact, several counties have established Restoration of Competency programs for out-of-custody minors accused of misdemeanors. Although we understand the desire to release such individuals from custody, we believe that mandatory dismissal of the charges goes too far.

Further, the court is required to dismiss *felony* charges if a service provider opines that a minor is unlikely to be restored within six months. We do not believe that this is in the interest of public safety, as nothing in the bill limits the types of felonies to which this would apply. Thus, an individual who is charged with a violent felony like rape or murder could have his or her charges dropped in a relatively short time. This does not give adequate consideration to victims, the defendant's family, or public safety in general.

If the defense alleges that a minor is incompetent before a Fitness Hearing occurs, the proceedings are stayed and as written, a potentially dangerous minor would be released to the public within six months. AB 935 states that, "in no case will secure confinement extend beyond six months from the finding of incompetence." As written, AB 935 requires that an incompetent minor accused of murder, and who has undergone only one year of treatment, immediately be placed somewhere besides Juvenile Hall. However, there is no Murphy Conservatorship available to juveniles who are pending felony charges and are determined to be dangerous to others, as there are for similarly situated adults. Where and under what authority, once criminal charges are dismissed, will this dangerous juvenile be placed? What happens if a bed is not available (especially a bed in a secure facility for a dangerous and violent minor)? We are unaware of any locked residential facilities in California. Many counties place violent juveniles, who might be restored in the foreseeable future, in secure residential facilities out-of-state.

In addition to these policy concerns, the lack of resources in the bill also raises a red flag. AB 935 provides no funding mechanism for probation, county mental health, or Regional Centers to ensure that treatment and facilities are available to chronically mentally ill minors after their criminal cases are dismissed. Instead, it is probable that some violent and dangerous juveniles would merely be sent home. It is unclear how such a process would enhance public safety.

-- END --