

# Juvenile Justice Court

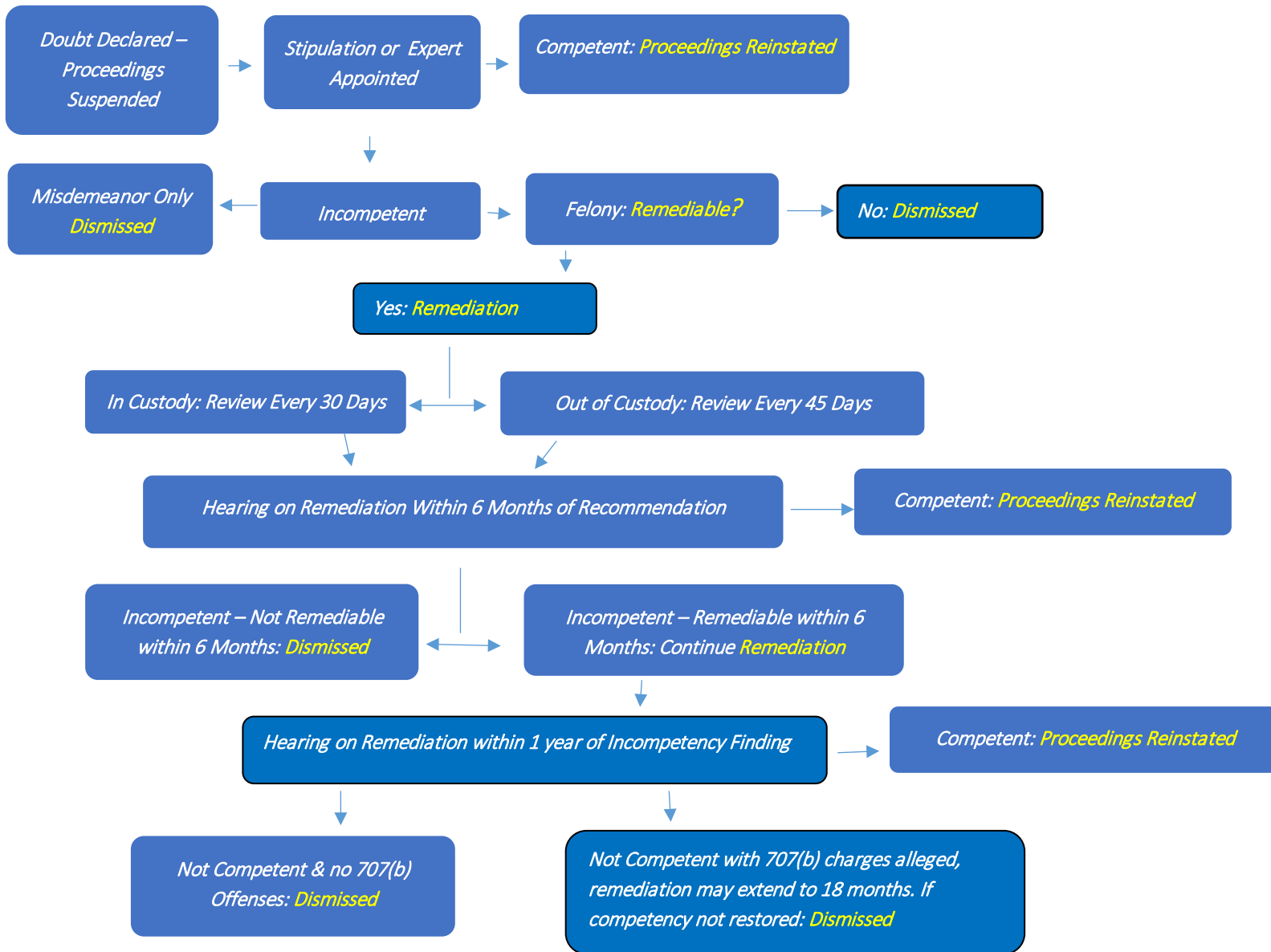
## **JUVENILE COMPETENCY PROTOCOL**

Effective July 1, 2019

\*This protocol supersedes all prior protocols. This protocol implements WIC §709 as amended by AB 1214 for the Santa Clara County Juvenile Justice Court.

## COMPETENCY PROCESS OVERVIEW

1. Doubt declared by court or defense counsel
2. Court finds substantial evidence of doubt or proceedings reinstated
3. Competency evaluator appointed
4. Competency readiness
  - a. 30 calendar days after doubt declared if minor detained
  - b. 45 calendar days after doubt if minor out of custody
  - c. Parties stipulate to evaluator's findings or set formal hearing
5. Competency hearing
  - a. Presumption of competence
  - b. Minor has burden of proving incompetence by preponderance of the evidence
  - c. If minor is under 14 years of age at the time of the alleged offense, court must determine capacity (PC 26) prior to competency
  - d. Petition alleges only misdemeanors:
    - i. Minor competent – proceedings reinstated
    - ii. Minor not competent – case dismissed
  - e. Petition contains felony charges:
    - i. Minor competent – proceedings reinstated
    - ii. Minor not competent - set for remediation planning
6. Remediation planning
  - a. Evaluator provides remediation plan WIC 709(b)(3)  
Evaluator shall make recommendations regarding remediation services; behavioral health to implement
  - b. Court sets remediation review and remediation hearing
  - c. Services shall be delivered in least restrictive environment consistent with public safety; court must consider appropriate alternatives to juvenile hall
7. Remediation reviews
  - a. Earliest possible date, but at least:
    - i. Every 30 calendar days if minor is in custody
    - ii. Every 45 calendar days if minor is out of custody
  - b. Prior to remediation hearing, order new competency evaluation
8. Remediation hearing
  - a. 6 months after finding of incompetence
  - b. Burden on party contesting evaluator's findings (preponderance of the evidence)
  - c. Minor competent – proceedings reinstated
  - d. Minor not competent – can minor attain competence within 6 months
    - i. If no, case dismissed
    - ii. If yes, set for remediation reviews (see section 7) and 12-month remediation hearing
9. 12-month remediation hearing
  - a. Burden on party contesting evaluator's findings (preponderance of the evidence)
  - b. Minor competent – proceedings reinstated
  - c. Minor not competent - is a WIC §707(b) charge alleged
    - i. If no, case dismissed
    - ii. If yes, set for remediation reviews (see section 7) and 18-month remediation hearing
10. 18-month remediation hearing
  - a. Burden on party contesting evaluator's findings (preponderance of the evidence)
  - b. Minor competent – proceedings reinstated
  - c. Minor not competent - case dismissed



**Additional Issues: Secure Confinement shall not extend beyond 6 months from finding of incompetence absent special findings.**

## **I. Introduction**

- A. This protocol shall apply when it appears that there is a doubt as to a minor's competency to stand trial or to participate in Juvenile Justice proceedings. The protocol is designed to provide an overview of the following: procedures for determining a minor's competency; the evaluation process; the competency hearing process; and the remediation process.
- B. This protocol is intended to supplement the provisions of Welfare & Institutions Code (WIC) §709, CA Rule of Court 5.645, as well as relevant case law. If a conflict arises between this protocol and statutory or case law, the law controls.

## **II. Consideration of Informal Resolution**

- A. Formal competency proceedings in some cases may be contrary either to the goals of protecting public safety or rehabilitating the minor. Where substantial evidence exists that a minor may be incompetent to stand trial, the parties may consider resolving the matter without initiating formal competency proceedings.
- B. The court may consider dismissal of the action pursuant to WIC §782 in cases where the court believes the voluntary participation of the minor and family in Community Based Organizations (CBOs) serves the needs of the minor and public safety, and where the court believes the minor is unlikely to attain competence in the foreseeable future.

## **III. Legal Standard for Juvenile Competence**

- A. A minor is incompetent to participate in Juvenile Justice proceedings if the minor "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." WIC §709(a)(2); *Dusky v. United States* (1960) 362 US 402.
- B. 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. WIC §709(a)(2).

## **IV. Initiation of Competency Proceedings**

### **A. Expression of Doubt**

During the pendency of any juvenile proceeding, counsel for the minor or the court may express a doubt as to the minor's competency. WIC §709(a)(3).

Prior to commencing competency proceedings, the court must first find "substantial evidence" that "raises a doubt as to the minor's competency." WIC §709(a)(3). The court should conduct an initial inquiry to determine if substantial evidence exists to suspend the underlying juvenile proceedings. The court may receive information from any source. Evidence is substantial if it

raises a reasonable doubt concerning the minor's ability to understand the nature of the juvenile proceedings or to assist in the defense. *People v. Rogers* (2006) 39 Cal.4<sup>th</sup> 826, 847; *People v. Hayes* (1999) 21 Cal.4<sup>th</sup> 1211, 1281-1282.

The court may allow defense counsel to present their opinion regarding the minor's competence *in camera* if the court finds there is reason to believe that attorney-client privileged information would be inappropriately revealed in open court. CA Rule of Court 4.130(b)(2).

A retroactive determination is not required. The court must only determine the minor's current competency. WIC §709(a).

## **B. Suspension of the Proceedings**

If the court finds substantial evidence raises a doubt as to the minor's competency, proceedings shall be suspended. WIC §709(a)(3).

During the period when proceedings are suspended, the court shall refer the minor to services designed to help the minor attain competency, unless the court finds that competency cannot be achieved within the foreseeable future. WIC §709(g)(1).

During the suspension of proceedings, the court may rule on motions that do not require the participation of the minor in their preparation. These motions include, but are not limited to:

1. Motions to dismiss;
2. Motions regarding a change in the placement of the minor;
3. Detention hearings;
4. Demurrers;
5. Motions to join agencies in the Juvenile Justice Court proceedings that may have failed to meet a legal obligation to provide services to the minor. WIC §727(b)(1).

## **C. Appointment of Evaluator**

Unless the parties stipulate to, or submit on the issue of, the minor's lack of competency, the court shall appoint an expert to evaluate the minor and determine whether the minor is incompetent as defined by WIC §709.

### **1. Appointment Process**

Upon suspension of the proceedings, the court shall appoint an expert from the Juvenile Competency Panel to perform a juvenile competency evaluation. Evidence Code §730.

The Juvenile Competency Panel shall consist of experts in child and adolescent development, who have training in forensic evaluation of juveniles and are familiar with the competency standards and accepted criteria used in evaluating competence and in the remediation of

incompetency.<sup>1</sup> The reports of the Juvenile Competency Panel shall be reviewed periodically by court administration for quality assurance and data collection purposes only. The Juvenile Justice Court shall maintain a list of approved Juvenile Competency Panel evaluators. Appointments will be made from the Juvenile Competency Panel on a rotating basis. Juvenile Competency Panel evaluators will be paid at the current rates adopted by the Santa Clara County Superior Court.

When the court orders a juvenile competency evaluation, the clerk shall assign the next available Juvenile Competency Panel evaluator in the rotation. The court may deviate from following the rotation upon a showing of good cause. The minor's counsel shall immediately notify the evaluator of the appointment. The minor's counsel shall send any relevant information, including special education records and recent psychological testing reports, that they believe will be of assistance in making a juvenile competency determination. Minor's counsel shall make every attempt to get any relevant documentation to the evaluator as quickly as possible.

## 2. Scope of Work

The juvenile competency evaluator shall conduct the evaluation using tests that are designed to evaluate the minor's functional competency. The Juvenile Adjudicative Competence Interview (JACI) may be used unless the evaluator believes it is inappropriate. If the evaluator determines that more extensive testing is required, the report shall state the reasons for additional testing and whether the evaluator is qualified to administer the additional tests.

## 3. Language Proficiency

The evaluator must be proficient in the language preferred by the minor, or, if that is not feasible, the evaluator shall employ the services of a certified interpreter and use assessment tools that are linguistically and culturally appropriate for the minor.

The order appointing the evaluator should specify whether the minor and/or the minor's parents require the services of an interpreter and, if so, in which language.

## 4. Separately Retained Experts

Defense counsel or the district attorney may retain or seek appointment of their own qualified expert(s) to evaluate the minor and testify at the competency trial. WIC §709(b)(6). Such retained experts should meet the requirements of qualified experts set forth in this protocol.

A qualified expert retained or appointed by the district attorney may not perform a competency evaluation on a minor without an order from the Juvenile Court pursuant to Code of Civil Procedure §2016.010, et seq. WIC §709(b)(6).

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<sup>1</sup> The Juvenile Competency Panel shall also comply with any rules promulgated by the Judicial Council under WIC §709(b)(4).

If the minor desires to present testimony of a psychiatrist or psychologist of his or her own choosing, the court may not place conditions on the admission of the testimony, such as the minor's cooperation with the court-appointed psychologist. *People v. Mayes* (1988) 202 Cal.App.3d 908.

The expert's reports and qualifications must be disclosed to the opposing party within a reasonable time, but no later than 5 court days prior to the hearing. If disclosure is not made as required, the court may make any order necessary including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of the expert or consideration of the expert's report upon a showing of good cause. If, after disclosure of the report, the opposing party requests a continuance, the court shall grant a reasonable continuance.

The court does not pay for separately retained defense or prosecution experts.

## **V. Method of Evaluation**

### **A. Standards of Practice and Ethical Issues**

As with all evaluations done for the court, competency evaluations should be consistent with best clinical and ethical practices.

### **B. Independent Experts**

The evaluators on the Juvenile Competency Panel are appointed by the judges as "at will" independent experts. The policies discussed herein describe the contents and processes involved in generating evaluations only. The opinion rendered in each evaluation is at the discretion of the individual psychologist.

### **C. Criteria for Competency Evaluations**

The juvenile competency evaluator shall:

1. Interview the minor. If the minor is detained, the interview will take place at juvenile hall or the ranch. If the minor is not detained, the evaluator will schedule an appointment with the minor or the minor's parent or guardian.
2. Review all material and conduct all interviews and testing as set forth in the Checklist for Juvenile Competency Evaluations attached hereto as Appendix 1.
3. Opine, in a written report, whether the minor has an understanding and a rational and factual understanding of the proceedings. The evaluator shall state the basis for these conclusions.

#### **D. Inclusion of Remediation Plan**

If the evaluator concludes that the minor lacks competency, the evaluator shall give an opinion on whether the minor is likely to attain competence in the foreseeable future, and, if so, make recommendations regarding the type of remediation services that would be effective in assisting the minor attain competence. WIC §709(b)(4). The recommendations should address what specific aspects of the minor's functioning can realistically be remediated and the timeframe therefor. The evaluator should provide a specific, detailed plan for remediation, including available resources, strategies, interventions, and time lines, and an estimation of the likelihood of success. A Supplemental Report or letter from the evaluator may be required to clarify any issues.

#### **VI. Receipt of Competency Evaluation**

The juvenile competency evaluator shall submit their report to the court and counsel at least 5 calendar days prior to the date set for the Juvenile Competency Readiness Hearing. If the minor is detained, the Juvenile Competency Readiness Hearing will be scheduled within 30 calendar days of the suspension of proceedings. If the minor is not detained, the hearing will be held within 45 days.

#### **VII. Juvenile Competency Readiness Hearing**

At the Juvenile Competency Readiness Hearing, the court shall receive the juvenile competency evaluator's report. The parties may stipulate to the results of the competency evaluation, but the court must base its determination of competency, or lack thereof, on reliable evidence. If the parties do not stipulate on the issue of competency, the matter shall be set for a Juvenile Competency Hearing.

#### **VIII. Juvenile Competency Hearing (JCH)**

The question of the minor's competence shall be determined at an evidentiary hearing unless there is a stipulation or submission by the parties on the findings of the evaluator.

##### **A. Timing of JCH**

If the minor is in custody, the JCH should be set within 15 court days of the receipt of the competency evaluation, unless there is good cause to extend the time for a short period to accommodate the availability of expert witnesses or to allow for completion of additional evaluations. If the minor is out of custody, a JCH shall be set within 45 calendar days.

*De facto* good cause exists for a reasonable continuance if an attorney needs further time to prepare for trial or to obtain a second opinion.



## **B. Judicial Officer**

The JCH need not be held before the same judge who declared a doubt as to the minor's competence to stand trial. *People v. Hill* (1967) 62 Cal.2d 105, 113, fn. 2; *People v. Lawley* (2002) 27 Cal.4th 102, 133-134.

## **C. Burden of Proof**

There is a rebuttable presumption that the minor is competent. WIC §709(c). The party asserting the minor's incompetence bears the burden of proof by a preponderance of the evidence. WIC §709; *In Re R.V.* (2015) 61 Cal.4th 181; *Bryan E. v. Superior Court* (2014) 231 Cal.App.4th 385.

## **D. Capacity**

Prior to the determination of competency, the court shall determine, for any minor under age 14 at the time of the alleged offense, whether the minor had the capacity to commit a crime pursuant to Penal Code §26. The district attorney bears the burden of rebutting the presumption that a minor under the age of 14 is presumed to be incapable of committing a crime by clear and convincing evidence. *In re Joseph H.* (2015) 237 Cal.App.4th 517, 538.

## **E. Trial Procedure**

1. Either counsel may offer an opening statement
2. Defense counsel shall present evidence of the minor's incompetence
3. District attorney shall present evidence of the minor's competence
4. Each party may offer rebuttal testimony
5. Defense counsel makes closing argument, followed by the district attorney

## **F. Findings**

1. If the minor is found competent, the court shall reinstate the Juvenile Justice proceedings.
2. If the minor is found incompetent and the petition contains only misdemeanor offenses, the court shall dismiss the petition. WIC §709(f).
3. If the minor is found to be incompetent and the petition includes felony offenses, proceedings shall remain suspended and the court shall set a Competency Planning Hearing within 15 calendar days for detained minors or within 30 calendar days for minors who are out of custody.

## **G. Re-Hearings**

When a competency hearing has been held, the court is not required to hold a second competency hearing unless it is presented with a substantial change of circumstances, or with new evidence, casting a serious doubt on the validity of the initial competency finding. *People v. Lawley* (2002) 27 Cal.4th 102,136; *People v. Kaplan* (2007) 149 Cal.App.4th 372,383-387. The court may take its personal observations of the minor into account in determining whether there has been a substantial change in the minor's mental state. *People v. Jones* (1991) 53 Cal.3d 1115, 1153.

## **IX. Competency Planning Hearing**

At the Competency Planning Hearing, the court shall order appropriate remediation services for the minor. The court shall set a Competency Remediation Hearing within six (6) months of the referral for remediation services. The court shall review the minor's progress every 30 calendar days if the minor is detained and every 45 calendar days if the minor is out of custody. The need for detention shall remain at issue throughout the remediation process and alternatives to detention shall be explored. The first period of remediation should not exceed six (6) months from the finding of incompetence. If further remediation services are ordered after the initial six (6) months and the petition does not include a WIC §707(b) offense, the total period of remediation shall not exceed one (1) year from the finding of incompetence. If the petition contains a WIC §707(b) offense, the total remediation period shall not exceed 18 months from the finding of incompetence.

The assigned probation officer will be responsible for coordinating appropriate treatment services with behavioral health and submitting reports to the court.

## **X. Placement of Minor**

Services must be provided in the least restrictive environment consistent with public safety. A finding of incompetency alone shall not be the basis for secure confinement. WIC §709(g)(1). Many minors can successfully participate in remediation services while living in their homes, attending their regular schools, and participating in their normal activities.

The court has the discretion to place a minor in an out of home placement or in custody. The court should take into consideration the following factors:

- Where the minor will have the best chance of obtaining competence
- Needs of the minor
- Seriousness of the underlying offense(s)
- Public safety
- Minor's past performance while out of custody
- Whether the minor will actively engage in remediation services while out of custody.

## **XI. Remediation Review Hearings**

The court shall review remediation services at least every 30 calendar days for in-custody minors and every 45 calendar days for minors not in custody. WIC §709(g).

The assigned probation officer and behavioral health shall submit written reports for the review hearings.

The assigned probation officer shall gather collateral information (such as school, mental health treatment and electronic monitoring updates), and write and distribute reports in advance of each Remediation Review Hearing. If the minor is in custody, the probation officer's report shall include information about the minor's behavior and well-being in custody.

Behavioral health shall provide a report as it relates to participation and progress in the competency remediation program for each Remediation Review Hearing. The report should indicate the degree of progress (no progress, some progress, or ready to be re-evaluated) before each court date. The report shall be provided 2 court days prior to each Remediation Review Hearing. The assigned probation officer shall notify behavioral health of court dates.

If the minor does not participate in remediation services, behavioral health shall immediately notify the assigned probation officer. Probation shall request that the court calendar the case for the next available court date to reevaluate the most effective means of providing remediation services.

Behavioral health shall also provide the court with suitable alternatives for the continued delivery of remediation services upon release from custody. The court must consider appropriate alternatives to juvenile hall confinement, including but not limited to developmental centers, placement through regional centers, short-term residential therapeutic programs, crisis residential programs, civil commitment, foster care, relative placement, other nonsecure placement, or other residential treatment programs. WIC §709(g)(1).

At any time during the remediation process, if behavioral health believes the minor's competence has been obtained or restored, this information shall be included in their progress report to the court. The assigned probation officer shall recommend a re-evaluation of competency.

If the court finds that the minor has attained competence, the Juvenile Justice proceedings shall be reinstated and the case shall resume at the stage at which it was suspended.

## **XII. Six Month Remediation Hearing**

Within six months of the finding of incompetence, the court shall hold an evidentiary hearing on whether the minor has been remediated or can be remediated in the foreseeable future unless the parties stipulate, or agree, to the recommendation of behavioral health. WIC §709(h)(1).

If the minor disputes the opinion that the minor has attained competency, the minor has the burden of proving that they remain incompetent. The burden of proof is by a preponderance of the evidence.

If the district attorney disputes the recommendation that the minor is unable to be remediated, the district attorney has the burden of proving, by a preponderance of the evidence, that the minor is remediable.

At the 6-Month Remediation Hearing, the court has the following options:

1. Find that the minor has been remediated and reinstate the proceedings.
2. Find that the minor has not yet been remediated but is likely to be remediated within the foreseeable future. The court shall order the minor to return to the remediation program. However, the total remediation period shall not exceed one year from the finding of incompetence, unless the petition contains a WIC §707(b) offense. Remediation services

may be extended to a maximum of 18-months if the petition contains a WIC §707(b) offense.

3. If the court finds that the minor will not achieve competency in the foreseeable future, the court shall dismiss the petition.

If remediation services are continued past the 6-Month Remediation Hearing, the court shall set a 12-Month Remediation Hearing and continue to hold Remediation Review Hearings as discussed in Section XI. If the court finds that the minor has not been remediated at the 12-Month Remediation Hearing, the petition shall be dismissed, unless the petition contains a WIC §707(b) offense. If the petition contains a WIC §707(b) offense and the court finds, at the 12-Month Remediation Hearing, that the minor is likely to be remediated in the foreseeable future, the court shall set an 18-Month Review Hearing and continue to hold Remediation Review Hearings. If the court finds that the minor has not been remediated after 18-months of remediation efforts, the petition shall be dismissed.

### **XIII. Secure Confinement During Competency Proceedings**

The court shall not continue a minor's detention beyond six (6) months from the finding of incompetence unless it makes findings, on the record, that it is in the best interests of the minor and public safety that the minor remains detained. In making this determination, the court shall consider whether:

- it is the location the minor will have the best chance of obtaining competence
- the placement is the least restrictive setting appropriate
- alternatives have been identified and pursued and, if not, why not
- the placement is necessary for the safety of the minor or others

In any case in which a detained minor is charged with a WIC §707(b) offense, after consideration of the criteria listed above, the court may continue the minor's detention for an additional year, but not to exceed eighteen (18) months from the finding of incompetence.

### **XIV. Developmentally Disabled Minors**

If the juvenile competency evaluator believes the minor is developmentally disabled and the minor is not a San Andreas Regional Center (SARC) consumer, the court shall appoint SARC to evaluate the minor. SARC shall determine whether the minor is eligible for SARC services and shall provide the court with a written report informing the court of its determination. The court's appointment of SARC for determination of eligibility for services shall not delay the court's competency determination.

The attorney for the minor shall request that the court include a referral to SARC on the minute order. The assigned probation officer shall serve the court order forthwith on SARC and file a proof of service with the court clerk. The minor's attorney may provide SARC with any

information from the minor's file that is necessary for the purposes of obtaining or continuing services through SARC.<sup>2</sup>

For purposes of a SARC referral, developmental disability shall be defined based on the description contained in WIC §4512(a).

An evaluator's opinion that a minor is developmentally disabled does not supersede an independent determination by SARC as to the minor's eligibility for services under the Lanterman-Petris-Short Act (LPS Act). To qualify for these services, SARC must examine and accept the minor.

**XV. Minor's Statements in Subsequent Proceedings**

Statements made to any competency evaluator or to mental health professionals during the remediation process, and any evidence derived from these statements, shall not be used in any hearing, not related to competency, against the minor in either juvenile or adult court. WIC §709(b)(5).

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<sup>2</sup> See [Santa Clara County Juvenile Standing Order](#) dated 7/29/09 signed by Judge Tondreau.

## **APPENDIX 1 – CHECKLIST FOR JUVENILE COMPETENCY EVALUATIONS**

The Juvenile Justice Court requests that the following checklist be used in evaluating a minor for competence and for uniformity in Juvenile Competency Evaluations.

- Minor’s Identifying Information: A description of the youth's age, gender identification, grade, living arrangement, and any other relevant information.
- Interview the minor
- Review all available records provided, including, but not limited to, medical, education, special education, probation, child welfare, mental health, regional center, court records, and any other available relevant information.<sup>3</sup>
- Consult with minor’s counsel
- Consult with probation officer
- Consult with others who provided information to the court regarding the minor’s competence or lack thereof
- Gather a developmental history of the minor.
- Administer age-appropriate testing specific to the issue of competence unless facts of the case render such testing inappropriate or unnecessary.
- Assess the minor for level of cooperation with the assessment. If the evaluator finds that cooperation is inadequate or significantly uncertain, the evaluator should consider halting the evaluation and forwarding this information to the parties. Issues such as a marked discrepancy between previous academic or intellectual testing and present effort, lack of effort, or refusal may be indicators of inadequate cooperation.
- Answer the following questions “yes” or “no” where possible and provide the rationale for the opinion:
  - a. Does the minor have a mental illness?
  - b. Does the minor have a mental disorder?
  - c. Does the minor have a developmental disability?
  - d. Is the minor developmentally immature?
  - e. Is the minor able to assist his/her attorney in the conduct of a defense in a rational manner?
  - f. Does the minor have a rational as well as factual understanding of the nature of the charges or proceedings against him or her?
  - g. Is the minor competent to stand trial?
- Summary: A concise summary of competency findings should be provided.

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<sup>3</sup> If any information is unavailable to the juvenile competency evaluator, the evaluator shall note in the reports what efforts were made to obtain the information.

If the minor is deemed “not competent”, please also include the following information:

- Is the minor likely to attain competence in the foreseeable future if provided remediation services. Explain the basis for your opinion.
- If the minor is likely to attain competence, what remediation services will be effective given the minor’s current functioning?
- What specific aspects of the minor’s functioning can realistically be remediated?
- Provide a specific, detailed plan for remediation, including:
  - a. Available resources
  - b. Strategies
  - c. Interventions
  - d. Time lines
  - e. Estimation of likelihood of success