

# Secure Detention: The Plight of Juveniles in Florida Who Are Incompetent to Stand Trial

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ASHLEY P. MAYER\*

## ABSTRACT

*Laws in Florida regarding competency to stand trial are divergent between adults and children. While there are sound protections to ensure that adults are never placed in jail as a temporary holding place for more than fifteen days before entering a therapeutic facility for restoration of competency treatment, children do not enjoy such a privilege. This dichotomy, which can allow children to be placed into a secure detention facility in a penal setting for an indefinite period of time, creates an unsound policy choice when it comes to competency to stand trial. This paper argues that Florida law can be easily amended to provide children with the same rights as adults while awaiting placement for restoration of competency services, a change that is further necessitated by the unique needs and vulnerabilities of children.*

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\* Ashley P. Mayer; J.D. expected May 2009, Florida State University College of Law; B.S., 2006, Vanderbilt University. Special thanks to the Florida Bar Foundation for the opportunity it afforded me to work in public service, the child advocates and legal minds who gave me advice and shared their experiences, and my family and friends for their encouragement and support.

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## I. Introduction

“Incompetency to stand trial” is not a construct that only applies to the adult criminal system. When incompetency is suspected in juvenile court proceedings, juveniles are assessed for mental, emotional, and behavioral issues that may hinder their ability to fully appreciate and understand the legal proceedings against them.<sup>1</sup> Florida is one of thirty-four states that have specifically addressed the issue of incompetency in juvenile justice proceedings.<sup>2</sup>

Florida’s youth who are found incompetent are treated with less compassion than adults who are declared incompetent in criminal court.<sup>3</sup> Although Florida’s youth can legally be held in a secure placement, including secure detention, for the pendency of the time period between the finding of incompetency through the commencement of restoration of competency training,<sup>4</sup> adults cannot be held in jail for more than fifteen days.<sup>5</sup> Treating incompetent adults more humanely than incompetent juveniles is unjust, especially in light of the many variables that can affect a finding of incompetency for a juvenile.<sup>6</sup> Florida law can be readily amended to address these concerns, primarily by conforming to the laws regarding a finding of incompetency in adults and the laws regarding restoration of competency services for adults.

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<sup>1</sup> Randy K. Otto, *Considerations in the Assessment of Competent to Proceed in Juvenile Court*, 34 N. KY. L. REV. 323 (2007).

<sup>2</sup> *Id.* at 329.

<sup>3</sup> Fla. Stat. §§ 985.19, (2007) (no time frame for placement of juvenile into treatment) 916.107 (2007) (adults must be placed in an appropriate treatment or training facility in no more than 15 days)

<sup>4</sup> Fla. Stat. § 985.19 (2007).

<sup>5</sup> Fla. Stat. § 916.107 (2007).

<sup>6</sup> Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL’Y & L. (WINTER) 353, 377 (2001).

## II. Florida Law on Juvenile Incompetency

Currently, children who have committed an offense that would qualify as a felony if committed by an adult, and who are subsequently found incompetent to proceed in a delinquency case, must receive restoration of competency services, and can potentially be held in secure detention indefinitely before those services commence.<sup>7</sup> In contrast, adults may only be held in jails in the event of an emergency for up to fifteen days.<sup>8</sup> In fact, Florida law expressly avows a right to quality treatment for incompetent adult defendants, and neglects to do the same for children.<sup>9</sup>

Juveniles are adjudicated incompetent to proceed based upon nearly the same factors that are considered for a finding of adult incompetency.<sup>10</sup> These include failure to appreciate the charges and potential penalties he or she is facing, a lack of understanding of the adversarial nature of trial, and an inability to consult with counsel, to testify relevantly, or to maintain appropriate courtroom behavior.<sup>11</sup> Florida expressly forbids age and immaturity from being included as a factor in a finding of juvenile incompetency.<sup>12</sup> Florida requires that an evaluation must be based on a juvenile's ability to appreciate the charges against him, to appreciate the range and nature of possible penalties, to understand the adversarial nature of the legal process, to disclose to counsel facts pertinent to the proceedings, to display appropriate courtroom behavior, and to testify

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<sup>7</sup> Fla. Stat. § 985.19 (2007).

<sup>8</sup> Fla. Stat. §§ 916.107, 985.19 (2007).

<sup>9</sup> Fla. Stat. § 916.107(1)(a),(4) (2007) (“The policy of the state is that the individual dignity of the client shall be respected at all times...Clients with mental illness, retardation, or autism and who are charged with committing felonies shall receive appropriate treatment or training...Each forensic client shall receive treatment or training suited to the client's needs, which shall be administered skillfully, safely, and humanely with full respect for the client's dignity and personal integrity.”)

<sup>10</sup> Fla. Stat. § 916.12 (2007).

<sup>11</sup> Fla. Stat. § 916.12(3) (2007).

<sup>12</sup> Fla. Stat. § 985.19(2) (2007).

relevantly.<sup>13</sup> More than two experts, but no more than three, must testify to these factors for juveniles.<sup>14</sup>

Before 1996, Florida lacked any law addressing incompetency in juvenile proceedings.<sup>15</sup> In the 1996 legislative session, Representative Elaine Bloom and the House Committee on Juvenile Justice recognized this problem, and created a House bill to address the issue of mentally ill and “mentally deficient” juveniles.<sup>16</sup> The Senate drafted a companion bill, CS/CS/SB 2898, with nearly identical terms,<sup>17</sup> and both the House and Senate bills were eventually rolled into Senate Bill 792, which passed in the 1996 regular session.<sup>18</sup>

At the time the legislation was drafted and amended, Rule 8.095 of the Rules of Juvenile Procedure provided that a child who was found incompetent to proceed should be involuntarily hospitalized as provided by law.<sup>19</sup> However, it was unclear whether that hospitalization should fall within the purview of the Baker Act<sup>20</sup> or under the laws relating to persons with developmental disabilities.<sup>21</sup> In order to articulate a clear process for dealing with the issue of juvenile incompetency, Senate Bill 792 passed in the 1996 regular session and was added to Chapter 39 of the Florida Statutes, before being moved to section 985.223 of the Florida Statutes

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<sup>13</sup> Fla. Stat. § 985.19(1)(f) (2007).

<sup>14</sup> Fla. Stat. § 985.19(1)(b) (2007).

<sup>15</sup> Staff of Fl. House Committee of Juvenile Justice, 1996 Legislature, CS/SB 2579 (1996).

<sup>16</sup> *Id.*

<sup>17</sup> Staff of the Fl. Sen. Committee on Health and Rehabilitative Services, 1996 Legislature, CS/CS/SB 2898 (1996).

<sup>18</sup> 1996 Fla. Laws 398.

<sup>19</sup> *Id.*

<sup>20</sup> Fla. Stat. § 394.451 (also known as the Florida Mental Health Act; statutory provisions governing incapacitated persons and providing involuntary commitment procedures for those incompetent to consent to treatment)

<sup>21</sup> *Id.*

in 1997,<sup>22</sup> and finally to its current home of section 985.19, F.S. in 2006.<sup>23</sup>

The 1996 legislation was substantially similar to the current requirements of section 985.19, F.S. save for a few subsequent changes. When the original legislation was passed, children were to be committed to the Department of Health and Rehabilitative Services,<sup>24</sup> which became the Department of Children and Family Services soon thereafter.<sup>25</sup> Additionally, the original bill required the Department to create a report on the application of the new law after the first year of its effect.<sup>26</sup> A provision was then made which required a motion calling a child's competency into question, and any motion thereafter, to be served on all parties' attorneys.<sup>27</sup> Later, the Legislature required service of the petition, order, and any evaluation reports on the Department of Children and Family Services and the Agency for Persons with Disabilities upon a finding of incompetency, provided that the Department create a treatment plan within thirty days of this service in conjunction with the Agency if necessary, and required the Department to assemble a discharge plan upon a finding that a child will never regain competency.<sup>28</sup>

From its inception, Florida law has never imposed a time limit for secure detention, even as a temporary placement before the commencement of treatment and restoration of competency services.<sup>29</sup> In fact, a substantive legislative staff analysis of the law before the passage of the juvenile incompetency statute demonstrates that children were to be treated at a "hospital or outpatient facility or service," likely due to the version of Rule 8.095 of the Rules of Juvenile

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<sup>22</sup> 1997 Fla. Laws 238.

<sup>23</sup> C.S.S.B. 1748, 48th Leg., Reg. Sess (Fl. 2006).

<sup>24</sup> 1996 Fla. Laws 398.

<sup>25</sup> U.S. Department of Health and Human Services, <http://www.healthfinder.gov/orgs/HR0752.htm>.

<sup>26</sup> 1996 Fla. Laws 398.

<sup>27</sup> 1998 Fla. Laws 207.

<sup>28</sup> *Id.*

<sup>29</sup> Fla. Stat. § 916.107 (2007).

Procedure that was in effect at the time.<sup>30</sup> Nowhere in this analysis is the utilization of secure detention as a holding facility contemplated.<sup>31</sup>

The original fiscal impact of the juvenile incompetency statute was estimated between \$2.1 million and \$13.7 million for the 1996-1997 fiscal year by the professional staff in the House of Representatives.<sup>32</sup> Additional employment positions at the Department of Health and Rehabilitative Services and the Department of Juvenile Justice were anticipated, as was the development of secure residential youth mental health programs.<sup>33</sup> The fiscal estimate included a total of \$7.2 million for fifty new beds, \$8 million for contracted beds and services, \$90,000 for competency evaluations (based on an estimated 144-155 evaluations per year), \$250,000 for court liaisons, \$45,000 for statewide coordination, and \$161,000 for training.<sup>34</sup> The Senate's companion bill to HB 2579 calculated somewhat different numbers, estimating that the secure residential treatment would cost \$1,075,680, non-secure residential treatment would cost \$425,790, nonresidential care would cost \$68,475, and training staff, courts, and attorneys would cost around \$100,000. The Senate Analysis based its figures on estimations from the Department of Juvenile Justice and the Department of Health and Rehabilitative Services that approximated forty-seven juveniles per year would qualify for the program, and that only half would require secure residential treatment.<sup>35</sup>

Although the Florida statute is one of the most specific state laws in the country to address juvenile incompetency,<sup>36</sup> there is a glaring schism in how juvenile mental health and

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<sup>30</sup> Staff of Fl. House Committee of Juvenile Justice, 1996 Legislature, CS/SB 2579 (1996) (Florida Rules of Juvenile Procedure dictate court procedure in juvenile adjudication proceedings)

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Staff of the Fl. Sen. Committee on Health and Rehabilitative Services, 1996 Legislature, CS/CS/SB 2898 (1996).

<sup>36</sup> Kellie M. Johnson, *Juvenile Competency Statutes: A Model for State Legislation*, 81 IND. L.J. 1067, 1087 (Summer 2006).

retardation issues are managed within the state, as compared to the care given to adults.<sup>37</sup> While it can be argued that the codification of juvenile incompetency procedures displays a preference of Florida to refrain from committing juveniles,<sup>38</sup> children still do not benefit from the urgency the state pays to adults who need the same treatment.<sup>39</sup> Children are only placed in secure settings if all other least restrictive alternatives are inappropriate<sup>40</sup> and they are "...incapable of surviving with the help of willing and responsible family or friends...and without treatment or training the child is likely to either suffer from neglect or refuse to care for self, and...poses a real and present threat of substantial harm to the child's well-being."<sup>41</sup> However, the entire statute is subject to specific appropriation,<sup>42</sup> and in the event a child needs to be placed in secure detention due to lack of space, there is no deadline for how long the child can be held.<sup>43</sup>

### III. Realities

#### *Adults*

In Florida, there are five secure facilities for adults with mental illness and one for adults with developmental disabilities, totaling six secure facilities that offer competency training for adult defendants.<sup>44</sup> Adults who are incompetent to proceed at trial are committed to the Department of Children and Families if they have a mental illness, and those who have a developmental disability are committed to the Agency for Persons with Disabilities.<sup>45</sup> Adult defendants who do not

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<sup>37</sup> Fla. Stat. § 916.107 (2007).

<sup>38</sup> Kellie M. Johnson, *Juvenile Competency Statutes: A Model for State Legislation*, 81 IND. L.J. 1067, 1088

<sup>39</sup> Fla. Stat. §§ 985.19, 916.107 (2007).

<sup>40</sup> Fla. Stat. § 985.19(3)(b) (2007).

<sup>41</sup> Fla. Stat. § 985.19(3)(a)(1) (2007).

<sup>42</sup> Fla. Stat. § 918.19(7) (2007) (specific appropriations is a particular allotment of money by the Florida Legislature for a certain stated purpose)

<sup>43</sup> Fla. Stat. § 985.19 (2007).

<sup>44</sup> Staff of the Office of Program Policy Analysis and Government Accountability of the Florida Legislature, *Incompetent to Proceed Adjudications Increasing*, Report No. 08-17 (March 2008), 2.

<sup>45</sup> *Id.*

require a secure environment are conditionally released to receive outpatient competency services in the community.<sup>46</sup>

From 2006-2007, 1,514 adult defendants were committed either to the Department of Children and Family Services or the Agency for Persons with Disabilities for competency restoration.<sup>47</sup> Less than one hundred of those defendants were able to receive these services through outpatient treatment, at a cost of fifty-nine dollars per day, and the average restoration period was between four and six months.<sup>48</sup> The rest of the adult defendants were treated in a secure facility, costing anywhere from \$36,000 per stay for mentally ill defendants to upwards of \$61,000 per stay for defendants with developmental disabilities.<sup>49</sup> The average stay for a mentally ill defendant is around 106 days and the average stay for a developmentally disabled defendant is about 228 days.<sup>50</sup> Although the total cost for developmentally disabled defendants is higher, the state pays about \$266 per day for these defendants, as opposed to \$337 per day for mentally ill defendants.<sup>51</sup> The financial impact to the state of restoring mentally ill and developmentally disabled adult defendants continues to climb, corresponding with the increase in adjudications of incompetency.<sup>52</sup>

### *Children*

Since 2005, 555 children have been committed for competency training, and 344 have been committed for secure residential competency training.<sup>53</sup> In March 2008, there were

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<sup>46</sup> *Id.* at 3.

<sup>47</sup> Staff of the Office of Program Policy Analysis and Government Accountability of the Florida Legislature, *Incompetent to Proceed Adjudications Increasing*, Report No. 08-17 (March 2008), 2.

<sup>48</sup> *Id.* at 2-3.

<sup>49</sup> *Id.* at 3.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 5 (from 5.8 adjudications out of 1,000 felony filings in 2002-2003, to 9.2 adjudications per 1,000 felony filings in 2006-2007)

<sup>53</sup> Email from Michael Sorrell, Juvenile Incompetent to Proceed Coordinator, Florida Department of Children and Family Services and Florida Agency for Persons with Disabilities (March 13, 2008) (on file with author).

four juveniles in Florida currently placed in secure detention awaiting one of the forty-eight spots at the only competency restoration center in the state, Apalachicola Youth Forest Camp (AFYC). At that time, there were also two juveniles committed to secure residential treatment in a state inpatient psychiatric facility who were receiving competency treatment.<sup>54</sup> Additionally, there were twenty-five children on the waiting list for community competency training.<sup>55</sup>

Turning to annual statistics, from June 2004 through June 2005, 161 children were committed to the community competency waiting list, and seventy-four children were on the waiting list for secure residential competency training.<sup>56</sup> The next year, there were 133 committed to community competency and eighty-eight for secure residential.<sup>57</sup> Finally, from June 2006 through June 2007, there were 225 children awaiting community competency training and eight-six awaiting competency training in the secure residential facility.<sup>58</sup> (See Table 1<sup>59</sup>).

**Table 1**

2005-present	555 children committed for restoration of competency services
2005-present	344 of the 555 children were committed for secure residential treatment
March 2008	4 juveniles waiting in secure detention for restoration of competency services
March 2008	2 juveniles committed to secure residential treatment in a state inpatient facility
June 2004- June 2005	161 children committed to community competency training 74 waiting for secure competency training
June 2005-	133 children committed to community

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

June 2006	competency training 88 waiting for secure residential competency training
June 2006- June 2007	225 children committed to community competency training 86 waiting for secure residential competency training
June 2007- June 2008	225 children committed to community competency training 98 committed to secure residential training. No known children waiting in a secure facility in the Department of Juvenile Justice at this time.

Florida has one facility for secure restoration of competency services for juveniles, housing forty boys and eight girls.<sup>60</sup> From 1997 through 2002, 731 juveniles completed competency training in community and secure settings, averaging approximately 122 children per year.<sup>61</sup> From June 2006 through June 2007, there were eighty-six children on the waiting list for competency training at AFYC due to lack of space.<sup>62</sup>

Nationally, the problem of children waiting for mental health services was given attention in a report from the United States House of Representatives Committee on Government

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<sup>60</sup> Emails from Michael Sorrell, Juvenile Incompetent to Proceed Coordinator, Florida Department of Children and Family Services and Florida Agency for Persons with Disabilities (March 13, 2008 and February 16, 2009) (on file with author); Florida Department of Children and Families <http://www.dcf.state.fl.us/mentalhealth/juveniles/about.shtml>.

<sup>61</sup> Staff of Office of Program Policy Analysis and Government Accountability of the Florida Legislature, *Delays Reduced but Persist in the State's Juvenile Competency Program*, Report No. 02-54 (October 2002).

<sup>62</sup> Email from Michael Sorrell, Juvenile Incompetent to Proceed Coordinator, Florida Department of Children and Family Services and Florida Agency for Persons with Disabilities (February 16, 2009) (on file with author).

Reform.<sup>63</sup> The national survey and report called attention to the disturbing trend that detention centers were becoming “holding areas for mental health treatment” for youth. Sixty-six percent of juvenile detention centers across the nation report that youth are being held in detention while waiting for mental health services outside the juvenile justice system.<sup>64</sup> The 2004 report also quoted a Florida juvenile detention administrator as saying, “it appears that detention is used as a dumping ground for youth with mental health problems that no one else can control.”<sup>65</sup>

When the restoration of competency program was created in 1997, competency training provided three to six hours of training per juvenile per week, such as individual and group training, special education, behavioral management, social skills training, and psychiatric services.<sup>66</sup> Of the children served, African American male youth were more likely to be adjudicated incompetent, and almost all of the children adjudicated incompetent had been eligible for special educational services in school.<sup>67</sup> Typically, juveniles were either restored after six months, or it was determined that they would never regain competency.<sup>68</sup> Twenty-nine percent of the children received some services in a secure facility and twenty-two percent received some services in a residential treatment facility.<sup>69</sup> Unfortunately, juveniles often had to wait about six months on average in placements including secure residential facilities, residential treatment facilities, and even at home, before receiving competency restoration services.<sup>70</sup>

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<sup>63</sup> Staff of the H.R. Committee on Government Reform Minority Staff Special Investigations Division, 106<sup>th</sup> Cong., Report on the Incarceration of Youth who are Waiting for Mental Health Services in the United States (2004).

<sup>64</sup> *Id.* at 2.

<sup>65</sup> *Id.* at 12.

<sup>66</sup> Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. (WINTER) 353, 378 (2001).

<sup>67</sup> *Id.* at 379.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 379-80.

Admissions delays persisted at the inception of this program.<sup>71</sup> In fact, forty percent of the children ordered into secure placement waited more than two weeks to be moved, and some even began receiving competency training in juvenile detention centers.<sup>72</sup> Fifteen percent of children waited two months before being placed in training, while sixty-nine percent waited at least a month.<sup>73</sup> Additionally, children were spending, on average, fifty-eight days in the program after being restored to competency because of discharge delays.<sup>74</sup>

In 2002, a review of the state's juvenile competency program was performed by the Florida Monitor, a branch of the Legislature that researches and provides objective analysis of government agencies and programs.<sup>75</sup> The report detailed the transition from the Brown School as the initial contractor of the secure placement facility to AFYC in 2002, under the new leadership of Twin Oaks Juvenile Development, Inc.<sup>76</sup> Fortunately, the delays in discharging children had improved since the first report two years prior,<sup>77</sup> but the average time a child waited for discharge still hovered at around forty-seven days.<sup>78</sup>

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<sup>71</sup> Staff of the Office of Program Policy Analysis and Government Accountability of the Florida Legislature, *72% of Youths Restored to Competency, Able to Move to Delinquency Proceedings*, Report No. 00-27 at 8 (December 2000).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Staff of the Office of Program Policy Analysis and Government Accountability of the Florida Legislature, *Delays Reduced but Persist in the State's Juvenile Competency Program*, Report No. 02-54 (October 2002).

<sup>76</sup> Apalachicola Youth Forest Camp, <http://www.afycamp.com/>.

<sup>77</sup> Staff of the Office of Program Policy Analysis and Government Accountability of the Florida Legislature, *72% of Youths Restored to Competency, Able to Move to Delinquency Proceedings*, Report No. 00-27 at 8 (December 2000).

<sup>78</sup> Staff of the Office of Program Policy Analysis and Government Accountability of the Florida Legislature, *Delays Reduced but Persist in the State's Juvenile Competency Program*, Report No. 02-54 at 3 (October 2002).

Even more troubling are lingering admissions delays, which are often affected by the inefficient discharge process.<sup>79</sup> The Florida Monitor found that fourteen more children could have been served in secure restoration of competency placements if the discharge delays were fixed, saving \$654,240 in the program's budget.<sup>80</sup> In the 2000 report, forty-four percent of children waited more than a month from the time of referral until services began, and twenty-six percent waited longer than two months, with the average wait time being thirty-nine days.<sup>81</sup> In 2002, children were still waiting an average of twenty days for secure placement.<sup>82</sup>

Empirical research in 2001 on Florida's juvenile incompetency program found that almost half of the 463 children it surveyed received at least some of their treatment in a secure residential facility.<sup>83</sup> Seventy-one percent of all children in the restoration of competency program were restored and able to resume delinquency proceedings, and each child spent, on average, five to six months in treatment.<sup>84</sup> A few disturbing trends were identified in the data. First, although about fifty-eight percent of the children were diagnosed as mentally retarded, the court orders of about seventy percent reflected a finding of mental retardation.<sup>85</sup> Additionally, African American children were disproportionately represented in the population of children

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<sup>79</sup> *Id.* (explaining that children often remain in the program longer than necessary and recommending that the discharge delays be minimized)

<sup>80</sup> *Id.* at 4.

<sup>81</sup> Staff of the Office of Program Policy Analysis and Government Accountability of the Florida Legislature, *72% of Youths Restored to Competency, Able to Move to Delinquency Proceedings*, Report No. 00-27 at 8 (December 2000).

<sup>82</sup> Staff of the Office of Program Policy Analysis and Government Accountability of the Florida Legislature, *Delays Reduced but Persist in the State's Juvenile Competency Program*, Report No. 02-54 at 3 (October 2002).

<sup>83</sup> Dr. McGaha, Dr. Otto, Mary Dell McClaren & John Petrila, *Juveniles Adjudicated Incompetent to Proceed: A Descriptive Study of Florida's Competence Restoration Program*, 29 J. AM. ACAD. PSYCH. LAW 427, 431 (2001).

<sup>84</sup> *Id.* at 432.

<sup>85</sup> *Id.* at 434.

adjudicated incompetent to proceed and ordered to receive restoration services, as compared with Florida's total population of youths in the juvenile justice system.<sup>86</sup> Lastly, the overwhelmingly young population, especially in light of evidence demonstrating that age and immaturity are inseparable from a finding of incompetency, sheds light on the unfitness of the adult standard of competence as applied to children, which includes cognition, volition, and a capacity to control one's behavior.<sup>87</sup> Such factors are arguably unattainable for most children of very young ages.<sup>88</sup> Evaluating competence in children using a substantially similar standard by which adults are evaluated is troublesome, especially when children are facing placement not only in therapeutic residential centers, but in secure detention facilities.

#### IV. Case Law

In Florida, children deemed incompetent to face delinquency charges have been warehoused in detention facilities, instead of being placed in a truly less restrictive alternative or given the mental health services they need.<sup>89</sup> After a delinquent juvenile is determined to be incompetent at a hearing by the testimony of experts, the child must be placed in an "appropriate setting."<sup>90</sup> Commitment to a secure placement is only appropriate when the child is "manifestly incapable" of surviving even with the help of family and community resources, if it is very likely that the child will harm himself or others, and when all less restrictive settings

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<sup>86</sup> *Id.* at 436.

<sup>87</sup> *Dusky v. United States*, 295 F.2d 743,749 (8th Cir. Mo. 1961) (*supra*) (the test for competency is whether a person has sufficient present ability to consult with his/her lawyer with a reasonable degree of rational understanding-and whether he/she has a rational as well as factual understanding of the proceedings against him/her)

<sup>88</sup> Dr. McGaha, Dr. Otto, Mary Dell McClaren & John Petrila, *Juveniles Adjudicated Incompetent to Proceed: A Descriptive Study of Florida's Competence Restoration Program*, 29 J AM. ACAD. PSYCH. LAW 427, 436 (2001).

<sup>89</sup> *Dep't of Children & Family Servs. v. M.H.*, 830 So.2d 849,850 (Fla. 2d DCA 2002).

<sup>90</sup> Fla. Stat § 985.19.

are inappropriate.<sup>91</sup> All too often, an appropriate setting is selected not on the basis of the care the incompetent child needs to receive, but on the basis of insufficient space and funding, which severely restricts the ease of placement in the restoration of competency center.<sup>92</sup> Courts are limited as to the remedies that can be fashioned for this problem, since courts cannot direct agencies as to a specific placement for a child.<sup>93</sup> Adding to this problem is the Legislature's escape clause for the Department, allowing the provisions of section 985.19 , F.S. to be followed only to the extent that specific appropriation is available.<sup>94</sup> This provision severely restricts a child's ability to have access to appropriate facilities for restoration of competency treatment.

In *Dusky v. United States*, the Supreme Court laid down the test for competency in a 1960 case involving an adult defendant who was convicted of unlawfully transporting a kidnapped girl across state lines.<sup>95</sup> Mere recognizance of the wrong committed was rejected as a standard of competence, and the Court said the Solicitor General was correct in finding that "the test must be whether he 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."<sup>96</sup>

The Supreme Court also reviewed the case of a sixteen year-old boy who was put on probation at age fourteen for breaking into houses.<sup>97</sup> Two years later, he was accused of rape from evidence in his prior case, and he also became a victim of the antiquated view of the juvenile justice system, *parens patriae*, meaning the capacity of the state to step into

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<sup>91</sup> *Id.*

<sup>92</sup> *Dep't of Children & Family Servs. v. M.H.*, 830 So.2d 849,850 (Fla. 2d DCA 2002).

<sup>93</sup> *State ex rel. Dep't of Health & Rehabilitative Services v. Nourse*, 437 So. 2d 221 (Fla. 4th DCA 1983).

<sup>94</sup> Fla. Stat. § 985.19(7) ("The provisions of this section shall be implemented only subject to specific appropriation").

<sup>95</sup> *Dusky v. United States*, 362 U.S. 402 (1960).

<sup>96</sup> *Id.*

<sup>97</sup> *Kent v. United States*, 383 U.S. 543 (1966).

the role of parent.<sup>98</sup> The most troubling aspect of the case was not the boy's induced self-incrimination or his secure placement into state custody without parental notice, but was the Juvenile Court's exercise of power to remit his case to District Court.<sup>99</sup> The mental condition of the boy was put into issue, and evidence was presented to the Juvenile Court regarding the boy's personality disorder and mental illness.<sup>100</sup> The child's attorney argued that he was unreasonably held without a determination as to probable cause, was interrogated by the police without being reminded of his rights, and that his fingerprints were incorrectly submitted to the District Court.<sup>101</sup> The Supreme Court denounced the practice of using *parens patriae* as a justification for "procedural arbitrariness."<sup>102</sup> The Court also strongly warned against using the theory to "authorize...total disregard of a motion for hearing...and without any hearing or statement or reason to decide...that the child will be...transferred to jail along with adults, and that he will be exposed to the possibility of a death sentence treatment."<sup>103</sup> Finally, the Court held that the child was due a full hearing before the case could be remitted to District Court, and that he also deserved the right to be represented by counsel.<sup>104</sup>

A year later in 1966, due process of the law was extended to children in the *In re Gault* case.<sup>105</sup> A child was accused of making obscene phone calls, taken into custody when his parents were not home, and placed in detention by officials for over two months without having communication with his parents.<sup>106</sup> The Court noted that from the inception of the juvenile justice system, children had been deprived of the

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 546.

<sup>100</sup> *Id.* at 547.

<sup>101</sup> *Id.* at 551.

<sup>102</sup> *Id.* at 554.

<sup>103</sup> *Id.* at 553.

<sup>104</sup> *Id.* at 561.

<sup>105</sup> *In re. Gault et al.*, 387 U.S. 1,5 (1966). Is this the correct citation? Is it 387 U.S. 1, page 5? A little confusing—yes that's the cite

<sup>106</sup> *Id.*

exact due process rights that are granted to adults.<sup>107</sup> When reformers tried to improve the juvenile justice system by making it more rehabilitative, the system assumed the role of *parens patriae*.<sup>108</sup> However, considering the failings of the entire juvenile court system, the removal of procedural and substantive protections did not translate into more rehabilitative treatment.<sup>109</sup> Additionally, in light of the accessibility of juvenile records to agencies such as the FBI, military branches, and even private employers, the argument for the extension of due process to juveniles is made even stronger.<sup>110</sup> The Court turned to an analysis of some of the tenets of due process, and held that it was counterintuitive for adults to enjoy privileges that children do not.<sup>111</sup> The Court held that children should enjoy notice of the charges against them,<sup>112</sup> that the right to counsel is imperative in delinquency proceedings,<sup>113</sup> and that children should enjoy the privilege against self-incrimination from the emphatic language of the Fifth and Fourteenth Amendments.<sup>114</sup>

Courts in Florida have also confronted a variety of juvenile incompetency issues including commitment for misdemeanor type offenses, incorporating age and immaturity into findings of incompetency, specific appropriations restrictions, and immediate placement into the restoration of competency program.<sup>115</sup>

Courts cannot direct immediate placement of juveniles into restoration of competency centers. In *Department of Children & Family Services v. M.H.*, the court considered the case of four delinquent juveniles who had been found incompetent and held in a detention facility for weeks.<sup>116</sup>

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<sup>107</sup> *Id.* at 14.

<sup>108</sup> *Id.* at 16-7.

<sup>109</sup> *Id.* at 19.

<sup>110</sup> *Id.* at 24.

<sup>111</sup> *Id.* at 47.

<sup>112</sup> *Id.* at 33.

<sup>113</sup> *Id.* at 36-7.

<sup>114</sup> *Id.* at 47.

<sup>115</sup> See *infra* notes 116-151.

<sup>116</sup> *Dep't of Children & Family Servs. v. M.H.*, 830 So.2d 849, 850 (Fla. 2d DCA 2002).

While the court expressed its frustration over the prospect of incompetent minors being “warehoused in detention facilities,” it noted the compromising situation of insufficient funding. Though the petitioners claimed that placement in the detention facility violated their right to receive restoration of competency services in the least restrictive setting, the court was constrained by the statute’s last section providing for specific appropriations, which puts the entire statute at the mercy of sufficient resources in the budget.<sup>117</sup> Therefore, the court was powerless to order the children be removed from secure detention and placed in a more appropriate setting.<sup>118</sup>

In contrast, courts can mandate that adults be moved from jail after fifteen days of being held there for emergency purposes. In *Department of Children & Families v. Anderson*, the court was able to either require that the adults be placed in a facility other than a jail, or require that DCF produce evidence to disprove the existence of additional space for incompetent adult defendants.<sup>119</sup> Previously, the court had refused to order DCF to place incompetent adults charged with a crime in a treatment facility.<sup>120</sup> However, the court then withdrew that opinion, realizing that section 916.107, F.S. required DCF to place adults in a facility other than a jail within fifteen days.<sup>121</sup> In the event DCF continued to assert that it cannot comply with that mandate due to insufficient funding, the trial court was to hold an evidentiary hearing in which all interested parties could demonstrate whether or not space was actually available.<sup>122</sup> Similarly, the court in *Hadi v. Cordero*, held that chapter 916, F.S. is mandatory, and that the Legislature intended for DCF to provide appropriate forensic facilities for incompetent people charged with crimes. The court ruled that DCF lacked any kind of discretion over

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<sup>117</sup> Fla. Stat. § 985.19 (2007).

<sup>118</sup> *Dep’t of Children & Family Servs. v. M.H.*, 830 So.2d 849, 850 (Fla. 2d DCA 2002).

<sup>119</sup> *Dep’t of Children & Families v. Anderson*, 840 So. 2d 452 (Fla. 4th DCA 2003).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

whether to comply with the adult statute, that adults had to be removed from jails at the end of fifteen days without regard to the constraints of specific appropriations, and DCF was forced to comply.<sup>123</sup>

Courts have also experienced problems interpreting the number of expert evaluations necessary for a finding of juvenile incompetency.<sup>124</sup> In *Department of Children & Families v. O.C.*, the trial court used only one expert report to find the child incompetent.<sup>125</sup> Because of this error, the trial court's decision to place the child into a community restoration of competency center was in error.<sup>126</sup> The statute is clear that more than two experts, but no more than three, must evaluate a child to determine whether the child is competent to proceed, and that having only one expert evaluation was inconsistent with the statutory language.<sup>127</sup>

Another issue courts have tried to decipher is the separation of age and immaturity out of the analysis of incompetency.<sup>128</sup> In *Department of Children & Families v. C.R.C.*, a child who was charged with shooting a BB gun at a train was committed to a restoration of competency program. However, there was not a finding of mental illness or retardation: rather, the child's examining psychologists found that his age and understanding were the causes of his incompetency.<sup>129</sup> Soon after, the issue arose again when a child's incompetence was found to arise out of his youth and subsequent immaturity.<sup>130</sup> The court held that a child who is incompetent due to age and immaturity is statutorily precluded

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<sup>123</sup> *Hadi v. Cordero*, 2006 Fla. App. LEXIS 20390 (Fla. 3rd DCA 2006).

<sup>124</sup> Fla. Stat. §§ 985.19 (2007), 985.223 (2007), 39....

<sup>125</sup> *Dep't of Children & Families v. O.C.*, 933 So.2d 690, 691 (Fla. 5th DCA 2006).

<sup>126</sup> *Id.*

<sup>127</sup> Fla. Stat. 985.19; *Dep't of Children & Families v. O.C.*, 933 So.2d 690, 691 (Fla. 5th DCA 2006).

<sup>128</sup> See *infra* notes 129-131.

<sup>129</sup> *Dep't of Children & Families v. C.R.C.*, 867 So.2d 592, 593 (Fla. 5th DCA 2004).

<sup>130</sup> *Dep't of Children & Families v. C.C.*, 889 So.2d 965, 966 (Fla. 1st DCA 2004).

from commitment to restoration of competency treatment and is adjudicated as a normal juvenile.<sup>131</sup>

Another disconcerting issue has arisen regarding whether or not a child, who has committed a delinquent act that would qualify only as a misdemeanor if committed by an adult, can be committed for restoration of competency training.<sup>132</sup> In *WG v. State*, a boy was charged with misdemeanor battery, and reports from psychologists found him incompetent to proceed.<sup>133</sup> Although the trial court was aware of the preclusion of qualifying misdemeanor acts to suffice for restoration of competency treatment, the trial court judge ordered such commitment.<sup>134</sup> The decision was subsequently overturned because of the clear and unambiguous statutory preclusion of misdemeanor acts<sup>135</sup>

Courts have faced the most difficult challenge when juveniles have asserted their right to be immediately placed in a restoration of competency center, and when judges have tried to direct immediate placement of children into a restoration of competency program. Both of these have proven to be impossible tasks. In *Department of Children and Families v. MH*, the court articulated its dissatisfaction that children were being held in secure detention while waiting for restoration of competency services.<sup>136</sup> In that case, four children facing delinquency charges had been found incompetent to proceed, and the children spent weeks in a county detention facility waiting for an appropriate

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<sup>131</sup> *Id.* at 966.

<sup>132</sup> *W.G. v. State*, 910 So.2d 330 (Fla. 4th DCA 2005).

<sup>133</sup> *Id.* at 331.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 332-3.

<sup>136</sup> *Dep't of Children & Family Servs. v. M.H.*, 830 So.2d 849, 850 (Fla. 2d DCA 2002) ("We commence our discussion of this troublesome issue by expressing our appreciation of the circuit court's impatience with the state of affairs in which incompetent children are warehoused in detention facilities because insufficient bed space is available to commence the treatment that is designed to restore their competency. That being said, we are also mindful of the dilemma faced by DCF to provide treatment to incompetent juveniles when sufficient funding has not been allocated."). See *infra* notes 116-118.

placement.<sup>137</sup> In April 2008, another district court confronted the same problem.<sup>138</sup> A mentally ill boy, B.N., who was continuously arrested on drug-related charges in the community,<sup>139</sup> was adjudicated incompetent to proceed.<sup>140</sup> All parties, including the public defender, agreed that the child should not be released back into the community and was in need of involuntary placement;<sup>141</sup> therefore the trial court judge ordered the immediate placement of the child into the one restoration of competency center in the state of Florida, AFYC.<sup>142</sup> AFYC was full, the boy was eighth on the waiting list, and he was kept in secure detention for the interim.<sup>143</sup> Two issues were presented on appeal. First, DCF argued that the circuit court judge could not order that the boy immediately begin receiving services at AFYC.<sup>144</sup> The court properly noted that the specific appropriations clause of the statute restricted competency restoration services, and that the lower court judge could not compel DCF to place B.N. in the restoration of competency center.<sup>145</sup> Second, the court reviewed B.N.'s emergency habeas petition. Relief could be granted to B.N. on this ground because he had already been held in detention for twenty-one days.<sup>146</sup> He was released because section 984.24(2)(d), F.S.<sup>147</sup> prevents children from being held in detention for a lack of more appropriate

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<sup>137</sup> *Id.* at 850.

<sup>138</sup> *Dep't of Children & Family Servs. v. B.N.*, 33 Fla. L. Weekly D976 (Fla. 4th DCA 2008).

<sup>139</sup> Telephone Interview with Judge Michael Orlando, Circuit Court Judge, 17th Judicial Circuit of Florida, in Broward County, Fla. (April 10, 2008).

<sup>140</sup> *Dep't of Children & Family Servs. v. B.N.*, 33 Fla. L. Weekly D976 (Fla. 4th DCA 2008).

<sup>141</sup> Telephone Interview with Judge Michael Orlando, Circuit Court Judge, 17th Judicial Circuit of Florida, in Broward County, Fla. (April 10, 2008).

<sup>142</sup> *Dep't of Children & Family Servs. v. B.N.*, 33 Fla. L. Weekly D976 (Fla. 4th DCA 2008).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Fla. Stat. § 984.24(2)(d) (2007) ("A child alleged to have committed a delinquent act or violation of law may not be placed into secure, nonsecure, or home detention care...due to a lack of more appropriate facilities.").

facilities, such as when a child does not require a secure placement because his/her needs do not rise to the level that necessitates a secure environment, and/or the child can be released to a suitable caregiver who can adequately address his/her needs for the time being.<sup>148</sup> Essentially, Florida law requires that detention only be used where the child presents a substantial risk of not appearing before the court: inflicting bodily harm on others; committing a property offense prior to adjudication, disposition, or placement; committing contempt of court; or the child requests protection from imminent bodily harm.<sup>149</sup> Florida law prohibits the use of detention to allow a parent to avoid legal parental responsibility; permit more convenient administrative access to the child; facilitate further interrogation or investigation; or due to a lack of more appropriate facilities.<sup>150</sup> Because B. N. did not meet any of the criteria necessary for placement in detention, the lower court was able to grant his habeas petition.<sup>151</sup> In this respect, the fears of the public defender and circuit court judge regarding the boy's constant recidivism while in the community were actualized, and the boy was released.<sup>152</sup> It is important to note children in Florida who are held in secure detention while waiting for placement into AFYC may likely not be able to be released on habeas grounds, because they often will meet the criteria enumerated in section 985.24, F.S. for the proper use of detention.<sup>153</sup> If B.N. had met any one of the elements necessary for detention, including the risk of not appearing at a subsequent hearing, inflicting bodily harm on others, committing property offenses, or being held in contempt of court, his petition would not have been granted.<sup>154</sup> The *B.N.* case most prominently illuminates the problem of the long

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<sup>148</sup> *Dep't of Children & Family Servs. v. B.N.*, 33 Fla. L. Weekly D976 (Fla. 4th DCA 2008).

<sup>149</sup> Fla. Stat. § 984.24(1) (2007).

<sup>150</sup> Fla. Stat. § 984.24(2) (2007).

<sup>151</sup> *Dep't of Children & Family Servs. v. B.N.*, 33 Fla. L. Weekly D976 (Fla. 4th DCA 2008).

<sup>152</sup> Telephone Interview with Judge Michael Orlando, Circuit Court Judge, 17th Judicial Circuit of Florida, in Broward County, Fla. (April 10, 2008).

<sup>153</sup> Fla. Stat. § 985.24(1) (2007).

<sup>154</sup> *Id.*

waiting list for restoration of competency services, the space limitations that flow from having only one facility for restoration of competency treatment, and the lack of any kind of statutory deadline for the use of detention centers as holding facilities for juveniles who are incompetent to proceed.

Neither secure detention nor release into the community are preferable to commitment into a restoration of competency center; the children who are consistently victimized by the restrictive language of section 985.19, F.S. are the ones who require secure placement in a residential type setting, but who should never be placed into the more penal atmosphere of secure detention. Florida law provides that secure detention is the temporary custody of a child while the child is under the physical restriction of a detention center or facility.<sup>155</sup> Research performed on the state of Florida's secure juvenile detention facilities found that fifty-seven percent of children reported that their detention facility was not clean, and sixty-five percent reported that the facility did not offer enough recreation.<sup>156</sup> Additionally, almost forty percent of children in detention have been held in solitary confinement for up to a day, and at multiple centers across Florida more than fifteen percent of children at each facility fear physical attack by another resident, staff member, or outsider.<sup>157</sup> Seventy-seven percent of youth reported that fights occurred in their detention center, forty percent reported the presence of gangs, and twenty-five percent reported fighting between rival gangs in their facility.<sup>158</sup> These findings provide a realistic glimpse into life inside a secure detention facility, and children who have been found incompetent to proceed due to mental illness or mental retardation are potentially subject to these conditions. The *B.N.* case only underscores the finding

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<sup>155</sup> Fla. Stat. § 985.03(18)(a) (2007).

<sup>156</sup> VANESSA PATINO, & BARRY KRISBERG, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, REFORMING JUVENILE DETENTION IN FLORIDA 8-9 (August 2005) available at [http://www.nccd-crc.org/nccd/pubs/2005\\_fla\\_reform\\_JDet.pdf](http://www.nccd-crc.org/nccd/pubs/2005_fla_reform_JDet.pdf).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 11-12

of the court in *M.H.*, that children are inexcusably being “warehoused” in detention because of the lack of any kind of statutory deadline.<sup>159</sup>

### V. Problems with the Existing Law

Children differ from adults physically, cognitively, socially, and emotionally.<sup>160</sup> These differences do not stop at the courthouse door.<sup>161</sup>

First, the difficulty in truly separating age and immaturity from a diagnosis of mental illness or mental retardation is worth mentioning. The differences between children and adults are stark, but the differences between and amongst children are also noteworthy.

There are many complexities innate in youth that preclude them from attaining competency in young childhood. Children in early to mid-adolescence are neurologically immature, meaning that their intellectual and cognitive capacities are far from fully developed.<sup>162</sup> These children are also less apt to be in control of their impulses, less adept at assessing risks, and have not developed psychosocially, which has a significant affect on their decision-making processes.<sup>163</sup>

In one study by researchers Cowden and McKee, a linear relationship between age and competency was found.<sup>164</sup> The study found that twelve year olds were the least competent to stand trial, and while fifteen to seventeen year-olds had improved understanding, they still had not attained

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<sup>159</sup> *Dep't of Children & Family Servs. v. M.H.*, 830 So.2d 849, 850 (Fla. 2d DCA 2002).

<sup>160</sup> Randy K. Otto, *Considerations in the Assessment of Competent to Proceed in Juvenile Court*, 34 N. KY. L. REV. 323, 330 (2007).

<sup>161</sup> *Id.*

<sup>162</sup> Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C.L. REV. 793, 813 (May 2005).

<sup>163</sup> *Id.* at 813-4.

<sup>164</sup> Dr. Dana Royce Berger, Dr. Eugene Griffin & Ron Simmons, *Competency to Stand Trial in Preadjudicated and Peitioned Juvenile Defendants*, 31 J. AM. ACAD. PSYCH. LAW 314-20, (2003).

the competency level expected from adults.<sup>165</sup> Staff impressions also carried great weight in findings of incompetency, with zero percent of nine and ten year-olds considered competent, only eighteen percent of eleven year-olds found competent, twenty-seven percent of twelve year-olds deemed competent, sixty-four percent of thirteen year-olds found competent, eighty-four percent of fifteen year-olds considered competent, and seventy-two percent of sixteen year-olds found competent.<sup>166</sup> Another study by the MacArthur Foundation compared 800 delinquent youths with 400 jailed adults and found that fifty-five percent of the children under fourteen with low IQ scores had the same competency level as adults who had been found to be incompetent due to mental illness or retardation.<sup>167</sup> These children were considered competent to stand trial, yet overwhelmingly they were only able to function at the level of adults who are incompetent to stand trial because of mental illness or mental retardation.<sup>168</sup> The study interpreted those results to be clear evidence that adolescents are at a higher risk for deficits in understanding the concepts necessary to competently stand trial.<sup>169</sup> At the very least, this is illustrative of the discrepancies in the standards between adults and children.

Juveniles must display an aptitude for a few different concepts in order to appreciate the legal process.<sup>170</sup> First, they must be autonomous, responsible, and independent.<sup>171</sup> They must also be able to comprehend short-term and long-term

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<sup>165</sup> *Id.* at 315.

<sup>166</sup> Dr. McGaha, Dr. Otto, Mary Dell McClaren & John Petrila, *Juveniles Adjudicated Incompetent to Proceed: A Descriptive Study of Florida's Competence Restoration Program*, 29 J. AM. ACAD. PSYCH. LAW 427, 428 (2001).

<sup>167</sup> Thomas Grisso, Ph.D., *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 12 (Winter 2006).

<sup>168</sup> *Id.* at 11.

<sup>169</sup> *Id.* at 12.

<sup>170</sup> Randy K. Otto, *Considerations in the Assessment of Competent to Proceed in Juvenile Court*, 34 N. KY. L. REV. 323, 331 (2007).

<sup>171</sup> *Id.*

decision-making and the consequences thereof, and appreciate the autonomy and personhood of others.<sup>172</sup> Additionally, juveniles need to display appropriate behaviors, and be capable of controlling inappropriate impulses and reactions.<sup>173</sup> Unfortunately, research has shown that children under the age of fourteen, without regard to mental illness, are usually incapable of understanding these concepts, which are some of the most basic elements of meaningful participation at trial.<sup>174</sup>

Given the critical importance that entails a finding of incompetency, it is imperative that experts be duly qualified to assume this role. While it is important to have neutral expert evaluators, the adversarial nature of delinquency proceedings also emphasizes the necessity that each party be able to also have their own expert.<sup>175</sup> Florida allows only the court to appoint experts, and therefore parties forsake some of their ability to advocate for or against a finding of incompetency.<sup>176</sup>

Additionally, children with complex manifestations of mental illness and mental retardation or other issues such as substance abuse risk not receiving any treatment that would truly address those issues. States with laws similar to Florida's, that base findings of incompetency on mental retardation or mental illness, fail to account for developmental concerns, psychotic mental disorders,<sup>177</sup> or underlying substance abuse issues.<sup>178</sup> National research on juvenile offenders reports that fifty percent of committed males had a substance abuse diagnosis.<sup>179</sup> If children who are incompetent to proceed have these issues and are not placed in the most

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCH. PUB. POL. AND L. 3, 10 (March 1997).

<sup>175</sup> Kellie M. Johnson, Note, *Juvenile Competency Statutes: A Model for State Legislation*, 81 IND. L.J. 1067, 1083 (Summer 2006).

<sup>176</sup> Fla. Stat. § 985.19 (2007).

<sup>177</sup> Kellie M. Johnson, Note, *Juvenile Competency Statutes: A Model for State Legislation*, 81 IND. L.J. 1067, 1079 (Summer 2006).

<sup>178</sup> David Katner, *The Mental Health Paradigm and the MacArthur Study: Emerging Issues Challenging the Competence of Juveniles in Delinquency Systems*, 32 AM. J.L. & MED. 503 (2006).

<sup>179</sup> *Id.* at 509.

appropriate setting, or even a setting that has the ability to deal with substance abuse issues, these issues will go untreated.

Finally, whether or not restoration of competency services actually restores children to competency is of great significance. While there is a paucity of information available about the success of restoration of competency programs in truly achieving said competency, studies have shown that simply giving a child information only meagerly improves their comprehension of legal issues.<sup>180</sup> Further, although some defendants can be trained to understand how the legal system could apply to other people, they still often lack the ability to translate that to their lives and appreciate the personal consequences of their own proceedings.<sup>181</sup> In sum, while children appear to be able to understand some ideas and concepts of the legal system, they are unable to apply those as a construct that is personally applicable.

## VI. Other States

There exists a clear differential in Florida regarding the urgency paid to adults and juveniles who are incompetent to stand trial.<sup>182</sup> However, Florida is not the only state that neglects to offer alternatives to detention to children who are found to be incompetent.<sup>183</sup> Institutions and detention centers lacking the resources necessary for rehabilitation will only cause more and more children to either go without the services they need, or prevent the full scope of their clinical mental health or mental retardation issues from being detected.<sup>184</sup> Because of the apparent problems inherent in the Florida statute, it is of particular curiosity how other states are treating some of their most vulnerable children.

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<sup>180</sup> Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCH. PUB. POL. AND L. 3, 10 (March 1997).

<sup>181</sup> *Id.* at 14.

<sup>182</sup> Fla. Stat. §§ 985.19 (2007), 916.107 (2007).

<sup>183</sup> David Katner, *The Mental Health Paradigm and the MacArthur Study: Emerging Issues Challenging the Competence of Juveniles in Delinquency System*, 32 AM. J.L. & MED. 503, 567 (2006).

<sup>184</sup> *Id.*

Arizona allows juveniles who have been ordered to receive inpatient or outpatient competency restoration services to be committed to a state hospital or another facility.<sup>185</sup> The juvenile court must approve any competency restoration program that the child is going to attend, including the type and location of the program, and the court is bound to select the least restrictive alternative.<sup>186</sup> The Arizona statute is not at the mercy of specific appropriation.<sup>187</sup> Additionally, a guardian ad litem is appointed to children who are committed to a competency program to help ensure continuity of care, and the guardian must report to the court with respect to the appropriateness of the program into which the child has been committed.<sup>188</sup>

Virginia requires that incompetent juveniles be committed to either a nonsecure community setting or a secure facility, also known as a detention home.<sup>189</sup> Juveniles who are committed into a secure facility can be placed in a range of possible facilities including local, regional, or state public or private locked residential facilities that have construction fixtures designed to prevent escape and to restrict the movement and activities of children.<sup>190</sup> Time intervals are of the essence in Virginia. However, the court can only order the child into competency treatment for three months.<sup>191</sup> Florida only provides reviews after six months of secure placement, resulting in less opportunity for updates about the child's competency.<sup>192</sup> Virginia law provides that if the juvenile still has not regained competency after three months but is likely to in the future, the court can continue restoration services for another three months, and this procedure can continue for an indefinite period of time.<sup>193</sup>

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<sup>185</sup> Ariz. Rev. Stat. Ann. § 8-291.09 (2007)

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Va. Code Ann. § 16.1-357 (2007).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Fla. Stat. § 985.19(5)(a) (2007).

<sup>193</sup> Va. Code Ann. § 16.1-357 (2007).

In Colorado, an incompetent juvenile who is in need of a secure placement must be placed in the least restrictive environment in light of the needs of the juvenile and the general public.<sup>194</sup> The court is required to perform reviews every ninety days, and the court cannot maintain jurisdiction longer than the maximum possible sentence for the original offense, unless the court finds good cause.<sup>195</sup> There is no restriction on appropriations.<sup>196</sup>

Georgia is one of the few states that provides an explicit restriction on how long secure detention can be used as a placement for juveniles who are incompetent to proceed.<sup>197</sup> If a child is placed in detention or a youth development facility, he or she must be moved to an appropriate treatment setting within five business days.<sup>198</sup> Reviews in Georgia are conducted every six months, and if a child is not likely to be able to regain competence at the end of two years, the delinquency petition is dismissed and a court may institute civil commitment proceedings.<sup>199</sup>

In Kansas, not only are incompetent juveniles protected by ninety day reviews, but if juveniles have not yet attained competency in the first six months from the date of their original commitment, they are then moved out of the competency program to a program for persons in need of care.<sup>200</sup> Florida waits two years before making a final determination, providing scarce opportunities for juveniles to receive adequate assessments.<sup>201</sup> Additionally, in Kansas, incompetent juveniles can be held in an appropriate public or private institution. Although that may appear broad on its face, the statute is not at the mercy of specific appropriations, thus does not restrict what can actually be deemed appropriate.<sup>202</sup>

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<sup>194</sup> Col. Rev. Stat. § 19-2-1303 (2007).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Ga. Code Ann. § 15-11-155 (2007).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> Kan. Stat. Ann. § 38-2349 (2007).

<sup>201</sup> Fla. Stat. § 985.19(5)(a) (2007).

<sup>202</sup> Kansas Stat. Ann. § 38-2349 (2007).

Louisiana, like many of the other states, provides for inpatient and outpatient restoration of competency services.<sup>203</sup> If a child is deemed to be a danger to himself, others, or is gravely disabled due to mental illness, the child is committed to the Department of Health and Hospitals.<sup>204</sup> The child is then placed in either a private mental institution or an institution for the mentally ill under the Department's policies.<sup>205</sup> Reports are done every ninety days,<sup>206</sup> and civil commitment is ordered if the child is not expected to regain competency for the foreseeable future.<sup>207</sup>

Texas allows the Department of Mental Health and Mental Retardation to commit an incompetent child to a facility of its designation.<sup>208</sup> However, the juvenile's parent, guardian, or guardian ad litem may petition the court to place the child in a psychiatric inpatient facility for no more than ninety days, or the court may order the child into an alternative setting to receive outpatient treatment.<sup>209</sup> This section does not contain an express appropriations restriction, which makes it less restrictive than Florida law.<sup>210</sup>

## VII. Model Statute

In order to translate the information and research provided above into a forward-looking recommendation, a model statute that incorporates the most important elements essential to upholding fundamental fairness and the dignity of incompetent juveniles is provided. It must be noted that the Florida statute does quite a few things right. First, it predicates commitment to a secure competency program on a finding of mental illness or mental retardation.<sup>211</sup> Additionally, it provides that at least two experts testify as to the juvenile's

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<sup>203</sup> La. Child. Code Ann. art. 837 (2007).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> La. Child. Code Ann. art. 837.2 (2007).

<sup>207</sup> La. Child. Code Ann. art. 837 (2007).

<sup>208</sup> Tex. Fam. Code Ann. § 55.33 (Vernon 2007).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Fla. Stat. § 985.19 (3) (2007).

capacity, and enumerates factors that must be assessed before a child is committed for secure restoration of competency services.<sup>212</sup> Florida also provides for a meaningful system of periodic reviews.<sup>213</sup> However, inherent in the statute are a few shortcomings. Below is the statute, edited to take into consideration important recommendations and the procurement of the same rights and privileges afforded to adults, while also being mindful of the constraints on agencies and judicial systems. Advocates within the juvenile justice system have provided recommendations for the implementation of this model statute,<sup>214</sup> including the creation of additional facilities, partnerships with other agencies and existing facilities, private partnerships with existing facilities, and the training of Juvenile Probation Officers to enable them to provide more restoration of competency services outside of detention centers and facilities. It is clear that there exists a real need for expanded facilities for secure restoration of competency services. Currently, juveniles only have one such secure facility, while there are six such facilities for adults.<sup>215</sup>

Specifically, incorporations into this model statute address problems with the current statute. First, to take into account the truly adversarial nature of juvenile justice proceedings, a child and his/her representative and/or attorney ad litem must be able to submit evidence from the evaluation of their own expert. Currently, the experts performing the evaluations are only appointed by the court.<sup>216</sup> Second, the professionals performing mental health assessments to detect mental illness or retardation in potentially incompetent juveniles are only required to have completed a training program approved by the Department of Children and Family

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<sup>212</sup> Fla. Stat. § 985.19(1)(b),(3),(4) (2007).

<sup>213</sup> Fla. Stat. § 985.19(4) (2007).

<sup>214</sup> Interview with Judge Janet Ferris, Circuit Court Judge, Florida 2<sup>nd</sup> Circuit, in Tallahassee, FL (Feb. 4, 2008); Interview with Victor Williams, Social Worker Florida 2<sup>nd</sup> Circuit Public Defender's Office, in Tallahassee, FL (Mar. 11, 2008).

<sup>215</sup> Staff of the Office of Program Policy Analysis and Government Accountability of the Florida Legislature, *Incompetent to Proceed Adjudications Increasing*, Report No. 08-17, 2 (March 2008).

<sup>216</sup> Fla. Stat. § 985.19(1)(b) (2007).

Services.<sup>217</sup> Therefore, it is recommended that evaluators be required to be a licensed psychologist or psychiatrist, and not just someone who is certified by the Department of Children and Family Services.

Next, it is recommended that the competency review period be shortened, akin to Kansas<sup>218</sup> and Virginia<sup>219</sup> state laws. Additionally, in response to other state laws<sup>220</sup> with markedly shorter periods for competency treatment, it is recommended that a court only retain jurisdiction for an eighteen-month period, as opposed to a two-year period. This will prevent undue delays in the release of children who are currently receiving competency restoration services, and enable children to be removed from the competency restoration waiting list more quickly.<sup>221</sup> While the proposed review period is not as short as in states such as Virginia, eighteen months is a more reasonable transition than the current two-year period.

Finally, and most importantly, it is recommended that children be entitled to the same dignity and respect that is given to adult clients, by forbidding the use of secure detention as a temporary placement for more than fifteen days, and by removing the shackle of specific appropriation. Justice requires that at a minimum, children be treated as humanely as adults and not placed in detention centers for lack of a more suitable alternative.<sup>222</sup> To truly accomplish this, children cannot be at the mercy of specific appropriations by the Legislature, especially when adults are not.

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<sup>217</sup> Fla. Stat. § 985.19(1)(d) (2007).

<sup>218</sup> Kan. Stat. Ann. § 38-2349 (2007).

<sup>219</sup> Va. Code Ann. § 16.1-357 (2007).

<sup>220</sup> Kan. Stat. Ann. § 38-2349 (2007); Tex. Fam. Code Ann. § 55.33 (Vernon 2007); Va. Code Ann. § 16.1-357 (2007).

<sup>221</sup> See Staff of the Office of Program Policy Analysis and Government Accountability of the Florida Legislature, *Delays Reduced but Persist in the State's Juvenile Competency Program*, Report No. 02-54 at 3 (October 2002).

<sup>222</sup> See *Dep't of Children & Family Servs. v. M.H.*, 830 So.2d 849,850 (Fla. 2d DCA 2002).

### **VIII. Conclusion**

In Florida, children who are incompetent to stand trial in juvenile delinquency proceedings are treated unfairly. Compared to incompetent adults in the criminal justice system who cannot be placed in jail for more than fifteen days, children languish in secure detention waiting for a spot to open up at the only secure restoration of competency facility in the state. At the time this article was written, at least four children in this state were waiting needlessly in detention, and many more were on a waiting list for one of only forty-eight spots. Even though a solution is well within reach for the Florida Legislature, namely, to provide at least the same rights to children as are extended to adults, the law has remained substantially intact since its inception over ten years ago. Children are some of Florida's most valuable resources, and the public policy of Florida should reflect this.

#### § 985.19. Incompetency in juvenile delinquency cases

(1) If, at any time prior to or during a delinquency case, the court has reason to believe that the child named in the petition may be incompetent to proceed with the hearing, the court on its own motion may, or on the motion of the child's attorney or state attorney must, stay all proceedings and order an evaluation of the child's mental condition.

(a) Any motion questioning the child's competency to proceed must be served upon the child's attorney, the state attorney, the attorneys representing the Department of Juvenile Justice, and the attorneys representing the Department of Children and Family Services. Thereafter, any motion, notice of hearing, order, or other legal pleading relating to the child's competency to proceed with the

hearing must be served upon the child's attorney, the state attorney, the attorneys representing the Department of Juvenile Justice, and the attorneys representing the Department of Children and Family Services.

(b) All determinations of competency shall be made at a hearing, with findings of fact based on an evaluation of the child's mental condition made by not less than two nor more than three experts appointed by the court. A party may also make a motion to present findings from one expert for the party, which shall be granted if the court's experts are in conflict, and may also be granted for other reasons within the court's discretion. The party's expert must have the same qualifications required of the court's experts. The basis for the determination of incompetency must be specifically stated in the evaluation. In addition, a recommendation as to whether residential or nonresidential treatment or training is required must be included in the evaluation. Experts appointed by the court to determine the mental condition of a child shall be allowed reasonable fees for services rendered. State employees may be paid expenses pursuant to *s. 112.061*. The fees shall be taxed as costs in the case.

(c) All court orders determining incompetency must include specific written findings by the court as to the nature of the incompetency and whether the child requires secure or nonsecure treatment or training environments.

(d) For incompetency evaluations related to mental illness, the Department of Children and Family Services shall maintain and annually provide the courts with a list of available mental health professionals who have completed a training program approved by the

Department of Children and Family Services to perform the evaluations. All experts must be licensed psychologists or licensed psychiatrists.

(e) For incompetency evaluations related to mental retardation or autism, the court shall order the Agency for Persons with Disabilities to examine the child to determine if the child meets the definition of "retardation" or "autism" in *s. 393.063* and, if so, whether the child is competent to proceed with delinquency proceedings.

(f) A child is competent to proceed if the child has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and the child has a rational and factual understanding of the present proceedings. The report must address the child's capacity to:

1. Appreciate the charges or allegations against the child.
2. Appreciate the range and nature of possible penalties that may be imposed in the proceedings against the child, if applicable.
3. Understand the adversarial nature of the legal process.
4. Disclose to counsel facts pertinent to the proceedings at issue.
5. Display appropriate courtroom behavior.
6. Testify relevantly.

(g) Immediately upon the filing of the court order finding a child incompetent to proceed, the clerk of the court shall notify the Department of Children and Family Services and the Agency for Persons with Disabilities and fax or hand deliver to the department and to the agency a referral packet that includes, at a minimum, the court order, the charging documents, the petition, and the court-appointed evaluator's reports.

(h) After placement of the child in the appropriate setting, the Department of Children and Family Services in consultation with the Agency for Persons with Disabilities, as appropriate, must, within 30 days after placement of the child, prepare and submit to the court a treatment or training plan for the child's restoration of competency. A copy of the plan must be served upon the child's attorney, the state attorney, and the attorneys representing the Department of Juvenile Justice.

(2) A child who is adjudicated incompetent to proceed, and who has committed a delinquent act or violation of law, either of which would be a felony if committed by an adult, must be committed to the Department of Children and Family Services for treatment or training. A child who has been adjudicated incompetent to proceed because of age or immaturity, or for any reason other than for mental illness or retardation or autism, must not be committed to the department or to the Department of Children and Family Services for restoration-of-competency treatment or training services. For purposes of this section, a child who has committed a delinquent act or violation of law, either of which would be a misdemeanor if committed by an adult, may not be committed to the department or to the Department of Children and Family Services for restoration-of-competency treatment or training services.

(3) If the court finds that a child has mental illness, mental retardation, or autism and adjudicates the child incompetent to proceed, the court must also determine whether the child meets the criteria for secure placement. A child may be placed in a secure facility or program if

the court makes a finding by clear and convincing evidence that:

(a) The child has mental illness, mental retardation, or autism and because of the mental illness, mental retardation, or autism:

1. The child is manifestly incapable of surviving with the help of willing and responsible family or friends, including available alternative services, and without treatment or training the child is likely to either suffer from neglect or refuse to care for self, and such neglect or refusal poses a real and present threat of substantial harm to the child's well-being; or

2. There is a substantial likelihood that in the near future the child will inflict serious bodily harm on self or others, as evidenced by recent behavior causing, attempting, or threatening such harm; and

(b) All available less restrictive alternatives, including treatment or training in community residential facilities or community settings which would offer an opportunity for improvement of the child's condition, are inappropriate.

(4) A child who is determined to have mental illness, mental retardation, or autism, who has been adjudicated incompetent to proceed, and who meets the criteria set forth in subsection (3), must be committed to the Department of Children and Family Services and receive treatment or training in a secure facility or program that is the least restrictive alternative consistent with public safety. Any placement of a child to a secure residential program must be separate from adult forensic programs. A detention center or facility may only be used as an emergency facility for up to 15 days following the date the department or agency receives a copy of the order committing

the child to the Department of Children and Family Services. If the child attains competency, then custody, case management, and supervision of the child will be transferred to the department in order to continue delinquency proceedings; however, the court retains authority to order the Department of Children and Family Services to provide continued treatment or training to maintain competency.

(a) A child adjudicated incompetent due to mental retardation or autism may be ordered into a secure program or facility designated by the Department of Children and Family Services for children with mental retardation or autism.

(b) A child adjudicated incompetent due to mental illness may be ordered into a secure program or facility designated by the Department of Children and Family Services for children having mental illnesses.

(c) Whenever a child is placed in a secure residential facility, the department will provide transportation to the secure residential facility for admission and from the secure residential facility upon discharge.

(d) The purpose of the treatment or training is the restoration of the child's competency to proceed.

(e) The service provider must file a written report with the court pursuant to the applicable Florida Rules of Juvenile Procedure not later than 6 3 months after the date of commitment, or at the end of any period of extended treatment or training, and at any time the Department of Children and Family Services, through its service provider determines the child has attained competency or no longer meets the criteria for secure placement, or at such shorter intervals as

ordered by the court. A copy of a written report evaluating the child's competency must be filed by the provider with the court and with the state attorney, the child's attorney, the department, and the Department of Children and Family Services.

(5) (a) If a child is determined to be incompetent to proceed, the court shall retain jurisdiction of the child for up to ~~2 years~~ 18 months after the date of the order of incompetency, with reviews at least every ~~63~~ months to determine competency.

(b) Whenever the provider files a report with the court informing the court that the child will never become competent to proceed, the Department of Children and Family Services will develop a discharge plan for the child prior to any hearing determining whether the child will ever become competent to proceed and send the plan to the court, the state attorney, the child's attorney, and the attorneys representing the Department of Juvenile Justice. The provider will continue to provide services to the child until the court issues the order finding the child will never become competent to proceed.

(c) If the court determines at any time that the child will never become competent to proceed, the court may dismiss the delinquency petition. If, at the end of the ~~2-year~~ 18 month period following the date of the order of incompetency, the child has not attained competency and there is no evidence that the child will attain competency within a year, the court must dismiss the delinquency petition. If appropriate, the court may order that proceedings under chapter 393 or chapter 394 be instituted. Such proceedings must be instituted not less than 60 days prior to the dismissal of the delinquency petition.

(6) (a) If a child is determined to have mental illness, mental retardation, or autism and is found to be incompetent to proceed but does not meet the criteria set forth in subsection (3), the court shall commit the child to the Department of Children and Family Services and shall order the Department of Children and Family Services to provide appropriate treatment and training in the community. The purpose of the treatment or training is the restoration of the child's competency to proceed.

(b) All court-ordered treatment or training must be the least restrictive alternative that is consistent with public safety. Any placement by the Department of Children and Family Services to a residential program must be separate from adult forensic programs.

(c) If a child is ordered to receive competency restoration services, the services shall be provided by the Department of Children and Family Services. The department shall continue to provide case management services to the child and receive notice of the competency status of the child.

(d) The service provider must file a written report with the court pursuant to the applicable Florida Rules of Juvenile Procedure, not later than 6 months after the date of commitment, at the end of any period of extended treatment or training, and at any time the service provider determines the child has attained competency or will never attain competency, or at such shorter intervals as ordered by the court. A copy of a written report evaluating the child's competency must be filed by the provider with the court, the state attorney, the child's attorney, the Department of Children and Family Services, and the department.

~~(7) The provisions of this section shall be implemented only subject to specific appropriation.~~