

STATE OF WEST VIRGINIA

At the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on January 29, 2025, the following order was made and entered:

**RE: REQUEST FOR PUBLIC COMMENT ON AMENDMENTS TO RULE 26
OF THE WEST VIRGINIA RULES OF JUVENILE PROCEDURE, No. 25-
58**

Under Article VIII, §§ 1 and 3 of the West Virginia Constitution, the Court has jurisdiction to promulgate court rules. By that authority, the Court has considered a proposed amendment to Rule 26 of the West Virginia Rules of Juvenile Procedure regarding juvenile competency proceedings for delinquency cases.

Upon consideration and review, the Court is of the opinion that the following proposed amendments to Rule 26 of the West Virginia Rules of Juvenile Procedure should be published for a period of public comment for 30 days. Comments may be filed in writing with the office of the clerk on or before February 28, 2025. Additions are indicated by underscoring, and deletions are indicated by strike-through.

West Virginia Rules of Juvenile Procedure

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Rule 26. ~~Pre-Adjudicatory Competency Evaluations.~~

~~Whenever the circuit court has reasonable cause to believe that a juvenile who is the subject of a pending petition may be incompetent to stand trial, or that the juvenile's diminished mental capacity will be a significant factor in his or her defense, sua sponte or upon a motion filed by the State or on behalf of the juvenile, the court shall order a forensic evaluation of the juvenile in accordance with the procedures set forth in West Virginia Code, Chapter 27, Article 6A, Sections 2 and 4.~~

Juvenile Competency Proceedings for Delinquency Cases

- a. **When Competency Can Be Raised.** Competency may be raised, on a good faith basis, during any stage of a juvenile delinquency proceeding and the Court shall order a competency evaluation. Once properly raised, the Court shall order a competency evaluation consistent with this rule and applicable law. In any event, no juvenile who is

presumed incompetent or found to be incompetent shall be adjudicated on a delinquency petition until determined to be competent. The Court shall appoint a Guardian *ad litem* in any competency proceeding.

b. Juveniles presumed incompetent. The following provisions apply to any juvenile presumed to be incompetent.

1. Definition. Any juvenile under age thirteen at the time of the alleged offense set forth in a verified petition is presumed incompetent. The State shall state the juvenile's date of birth and the date of the offense in the verified delinquency petition.

2. When Department Presence is Required. Where a juvenile presumed incompetent is brought before a circuit judge or any magistrate, the Department of Human Services (hereinafter "DHS" or "Department") shall be notified and a DHS representative shall be present at any detention hearing or first appearance for a juvenile presumed incompetent. The prosecuting attorney shall be responsible for timely notifying the Department.

3. Guardian *ad litem* Appointed. Upon the filing of a petition where a juvenile is presumed incompetent, a Guardian *ad litem* shall be appointed.

4. Type of Custody Permitted. Juveniles presumed incompetent shall not be detained or incarcerated in any Bureau of Juvenile Services (hereinafter "BJS") facility, except as provided for in section (f) of this rule. The Department, upon appropriate findings of the Court, may take physical and legal custody of a juvenile for appropriate community, residential placement, or appropriate placement in a medical or mental health facility where doing so is the least restrictive alternative.

5. Probable Cause. For the purpose of subsection (b) of this Rule only, the Court may find probable cause based on the verified petition and any attached affidavit of the State's delinquency petition if taking jurisdiction is in the best interest of the child.

c. Juveniles Presumed Competent. Juveniles thirteen years or older are presumed competent. If a juvenile is thirteen years of age or older, the juvenile's counsel, Guardian *ad litem*, or the State, or the Court *sua sponte*, may request a competency evaluation for good cause. If the juvenile is found incompetent, the provisions and prohibitions of this Rule shall apply after that determination.

d. Proceedings Prior to Determination of Competency. Because no juvenile can be adjudicated who is found incompetent or presumed incompetent, the Court is permitted to do the following prior to adjudication:

1. If the juvenile's attorney and the State agree it is in the best interest of the juvenile that a competency evaluation be deferred in lieu of a pre-adjudicatory period of community supervision, the Court may place the juvenile on a pre-adjudicatory community supervision period and order any remedial services available under Rule 19, as set forth in paragraph three below, without setting further adjudicatory proceedings.

2. Upon the motion of any party, or the Court upon its own motion, may order any remedial services available under Rule 19 and paragraph three below while the juvenile is awaiting a competency evaluation.

3. For purposes of this section for paragraphs one and two, a period of pre-adjudicatory community supervision may include but is not limited to: probation supervision, community mental health evaluation and treatment, in-home safety services, family inclusion and parenting services, referral to a Youth Reporting Center, GPS monitoring, DHS placement with kinship, fictive kinship, or other community-based placement, or placement in a staff-secured residential treatment facility.

4. A pre-adjudicatory period of community supervision shall not last for more than one year unless the Court finds compelling reasons for an extension of time.

- e. Modification of Pre-adjudicatory Community Supervision Period.** Any party can move the Court to modify the period of community supervision, at any time, to change or intensify services, which may include DHS placement if there is no less restrictive alternative.
- f. Revocation of Pre-adjudicatory Community Supervision Period.** Upon a motion by the State, the Court may revoke any pre-adjudicatory community supervision period under this Rule consistent with requirements of Rule 19(e). If the Court revokes the period of community supervision and all less restrictive alternatives, including DHS placement, have been exhausted **and** if the juvenile presents an immediate threat of serious harm to self or others, the Court may place the juvenile in the custody of the Bureau of Juvenile Services. The Court shall immediately order a competency evaluation to be completed forthwith during the period of detention. At all times, the Department retains a continued duty to explore less restrictive alternatives while the juvenile is detained.
- g. Limitations on Competency Evaluations During Detention.** No juvenile detained pending a competency evaluation shall be detained for more than 30 days. After 30 days has lapsed, the Court shall hold a hearing to review whether BJS and DHS have used reasonable efforts to coordinate the most expeditious competency evaluation available and whether continued detention is appropriate.
- h. Competency Evaluations.**

1. If a competency evaluation is not deferred as set forth in section (d)(1) of this rule, a timely competency evaluation shall be ordered consistent with this rule and applicable law. The competency evaluation must be conducted by a qualified forensic evaluator who has demonstrated the credentials and training requirements described in the code section W.Va. Code § 49-4-530.

2. The competency evaluation shall consist of the following:

(a) Whether or not a juvenile, due to developmental disability, intellectual disability, or mental illness, has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and whether the juvenile has a rational as well as factual understanding of the proceedings against him or her;

(b) A statement of the procedures used, including psychometric tests administered, records reviewed, and the identity of persons interviewed;

(c) Pertinent background information, including a history of educational performance, psychiatric or psychological history, developmental and family history;

(d) Results of the mental status examination;

(e) A diagnosis, if one has been made, which shall address any psychological or psychiatric conditions or cognitive deficiencies determined to exist; and

(f) An opinion as to the juvenile's developmental maturity or developmental immaturity as it would affect his or her ability to proceed.

(g) If so ordered, an opinion as to the juvenile's criminal responsibility or diminished capacity at the time of the offense. If the Court orders both competency and criminal responsibility or diminished capacity evaluations, competency shall be addressed first.

3. If the qualified forensic evaluator determines that the juvenile is incompetent to participate in the proceedings, the competency evaluation report shall address the following questions:

(a) Whether the juvenile has a developmental disability, intellectual disability, or mental illness;

(b) Whether the juvenile can attain competency in the foreseeable future if provided with a course of attainment services along with treatment, therapy, or training.

4. If the qualified forensic evaluator determines that the juvenile is incompetent, but that there is a reasonable probability that he or she can attain competency within the periods set forth in W.Va. Code §49-4-733(c)(3), the report shall include the following recommendations:

(a) A recommendation as to the treatment or therapy to alleviate the youth's barriers to competency; and

(b) The least restrictive setting for juvenile competency attainment services consistent with the juvenile's ability to attain competency and the safety of both the juvenile and the public.

5. If a juvenile is for some appropriate reason detained and the Department, after 45 days, has failed to find residential or community placement for attainment services, attainment services shall be required to take place in a detention facility.

6. If the juvenile refuses or fails to cooperate with the attainment service provider during competency attainment services, the court may modify its order to require a more appropriate setting for further services.

i. Return of Evaluation.

1. The court shall provide a copy of each competency evaluation report it receives to the prosecutor, the juvenile's attorney, and guardian *ad litem* and may provide a copy upon request to the juvenile's parents or legal guardian. No juvenile's statement made in the course of any evaluation conducted under this rule, nor testimony based on that statement, shall be admissible against the juvenile in any proceeding except for competency proceedings.

2. Not more than 15 judicial days after receiving the evaluator's report, the court shall conduct a hearing to determine the juvenile's competency to participate in the proceedings. The court may continue the hearing for good cause shown.

j. **Disposition Alternatives for Incompetent Juveniles or Juveniles Found Not Delinquent by Reason of Mental Health Impairment.**

1. **Incompetent juveniles.** For juveniles found incompetent, and unlikely to attain competency, the Court, as disposition may do the following:

- a. Dismiss the Petition without prejudice;
- b. Refer the matter to DHS and request a determination of whether a child abuse or neglect petition should be filed;
- c. Refer the juvenile and the juvenile's family to the DHS for services, including but not limited to a community mental health evaluation or forensic evaluation; community mental health and behavioral treatment; in-home safety services, family inclusion and parenting services, referral to a Youth Reporting Center, GPS monitoring, DHS placement with kinship, fictive kinship, or other community-based placement, or placement in a residential treatment facility.
- d. Place the juvenile in the custody of their parents or other suitable person, or, if appropriate, place the juvenile in DHS custody for placement, including community-based placement, DHS staff-secured placement, or psychiatric hospitalization.
- e. Upon motion of the prosecuting attorney, stay the proceeding for no more than 20 days to allow the prosecuting attorney to initiate proceedings for civil commitment pursuant to W.Va. Code § 27-5-1 if the juvenile has attained the age of majority.
- f. The Circuit Court may, sua sponte, or upon a motion by any party direct that a dangerousness risk assessment be performed prior to directing the resolutions set forth in this subsection.

2. **Juveniles found not delinquent by reason of mental impairment.**

- a. If a jury or Court finds that a juvenile is not delinquent by reason of mental impairment, the Court shall do the following:
 1. For any person who is either age eighteen or over at the time of verdict or adjudication or has been transferred to adult status, the Court may follow the procedures set forth in W.Va. Code § 27-6A-4 or utilize appropriate dispositional alternatives under subsection (j)(1) of this rule as to disposition.
 2. For any juvenile who is under eighteen at the time of verdict or adjudication and for an offense that is not being prosecuted under adult status, the Court shall revert to the dispositional alternatives in Subsection (j)(1) of this Rule and the Court may retain jurisdiction until the juvenile reaches the age of twenty-one.

k. **Dismissal By Agreement.** The Court may dismiss any petition without ordering a competency evaluation upon agreement of the prosecuting attorney, the juvenile's attorney, and any Guardian *ad litem* that there is compelling evidence that the juvenile is not competent to participate in the proceedings.

l. **Adult Status.** If a juvenile is transferred to adult status under Rule 20 and W. Va. Code § 49-4-710, this Rule and the procedures outlined in W. Va. Code § 49-4-727 through § 49-4-734 govern the process for determining the juvenile's competency and competency attainment services.

- m. **Scope.** This Rule and the specific juvenile competency procedures in W. Va. Code § 49-4-727 through § 49-4-735 supersede W. Va. Code § 27-6A-9 in juvenile delinquency cases. This Rule applies to juvenile delinquency cases only and is not intended to apply in cases involving only status offenses. The provisions of this competency rule and the presumptions contained herein shall not be used to determine whether a child witness is competent to testify pursuant to the West Virginia Rules of Evidence.