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Juvenile Records

Work Group Report

For SB 622 (2013)

(With the -2 Amendments)

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I. Introduction

Today, the Oregon Revised Statutes (ORS) contain three chapters of law dedicated to juvenile law—ORS 419A, 419B, and 419C. However, up until 1993, Oregon law had one chapter that was known as the Juvenile Code—Chapter 419. The splitting of the chapter was done to address the diverging approaches to delinquency and dependency cases. That is, the state guiding principle for both of these types of cases was no longer "best interests of the child." Instead, delinquency cases are now based on the principles of "personal responsibility, accountability and reformation within the context of public safety and restitution to the victims and to the community." ORS 419C.001. Oregon's juvenile delinquency law is now placed primarily in ORS Chapter 419C. Dependency cases remain centered on "best interests of the child" with a focus on the family, promoting each child's right to "safety, stability, and well-being." ORS 419B.090(2). Oregon's juvenile dependency law is now primarily found in ORS Chapter 419B. The third chapter of Oregon law that is focused on juvenile law is ORS Chapter 419A—this chapter is known as the administrative chapter and applies to both dependency and delinquency cases.

Four key terms are used throughout the three chapters of Oregon juvenile law to refer to juveniles involved in these two types of cases. The terms are child, ward, youth, and youth offender. In summary fashion, "child" simply means an unmarried person who is under age 18; "ward" means a person within the jurisdiction of the court under the dependency chapter; "youth" means a person under age 18 who is alleged to have committed a violation or a violation of a law or ordinance; and "youth offender" means a person who was found to have committed a violation or a violation of a law or ordinance and is within the jurisdiction of the court under the delinquency chapter. See ORS 419A.010. In both types of juvenile cases, key other participants in the case include the juvenile's parents, the Department of Human Services (DHS), the Oregon Youth Authority (OYA), the county juvenile department, the district attorney, the attorney general, the Citizen Review Board (CRB), and defense attorneys.

Juvenile courts in Oregon generally have jurisdiction over all juvenile dependency and delinquency matters. Juvenile court records are to be kept separate from the other records and proceedings of the circuit courts. ORS 7.230. The clerk of the court is responsible for maintaining a court record for each case. ORS 419A.255. The courts typically hold a "legal file" for pleadings, etc., and a separate "social file" for reports and other material relating to history and prognosis. ORS 419A.255. Like most states, Oregon has long had law and policies that generally make juvenile court records confidential, and access to them is highly restricted[1]. Oregon statute specifically prohibits public access to juvenile court records. See ORS 419A.255.

[1] All jurisdictions have confidentiality provisions to protect abuse and neglect records from public scrutiny. Federal statutes that fund education, social, health, drug abuse, alcohol abuse, and mental health services require the state to maintain juvenile court record confidentiality provisions as well. Examples include CAPTA (Child Abuse Prevention and Treatment Act), HIPAA (Health Insurance Portability and Accountability Act), FERPA (Family Educational Rights and Privacy Act) and 42 U.S.C./42 C.F.R. Part 2 (consolidated alcohol and drug abuse confidentiality protections).

The work group intended to make no changes to public access rights. That is, the bill neither is intended to expand nor increase public access. Rather, the focus of the work group's work was clarifying access rights of parties in juvenile cases. Permitted access to identified individuals and entities is enumerated in statute. The primary juvenile court record access rules and exceptions are provided in the administrative chapter of the juvenile law at ORS 419A.253 to 419A.257 and thus apply to both juvenile dependency and delinquency cases. Other access rules, however, are scattered throughout the ORS. Most juvenile court records are indeed also exempt from public records laws under ORS 192.502(9). ORS 192.502(9) provides that public records are exempt if disclosure of information or records is prohibited or restricted or otherwise made confidential or privileged under Oregon law. It is primarily the restrictions in ORS Chapter 419A that make the records exempt from public records laws.[2] ORS 192.496 also generally exempts from public records mental and physical health records, records of persons held in custody or lawful supervision of a state agency or a court, and student records.

Note, however, that while access to juvenile court records is restricted, Oregon juvenile court proceedings themselves are open. See State ex rel. Oregonian Pub. Co. v. Deiz, 289 Or. 277 (1980). In that case, the Oregon Supreme Court issued a writ of mandamus requiring the juvenile court judge to permit the Oregonian to attend hearings in a juvenile delinquency proceeding. The Court held that the trial judge's application of state statute to bar the press' presence violated The Oregon state Constitution's open courts clause found in Art. 1, sec. 10).

It is important for Oregon's law to precisely provide rules regarding who is entitled to inspect and/or copy juvenile court records for both juvenile dependency and delinquency cases. The laws presently are imprecise, and practice is inconsistent in Oregon's counties.

II. History of the Project and Statement of the Problem:

In July 2010, the Oregon Judicial Department (OJD) referred review of Oregon's statutes relating to juvenile court records and files to the Oregon Law Commission. Specifically, OJD and the State Court Administrator requested review and improvement of ORS 419A.255. The request noted the "(n)eed for clarification regarding party access to full legal file contents in both delinquency and dependency cases" as well clarification of public access rules. In addition, the request noted circuit courts' inconsistent interpretations of the phrase "other filings with court" used in ORS 419A.255(1); some courts place records in the legal file rather than the social file based on this ambiguous phrase. The request noted that "[s]tatutory clarification regarding the contents of each file ["social and legal file"] would assist the courts in protecting case information." OJD requested particular clarity on the proper handling of "social file" materials (e.g. processing, attachment to orders/judgments, disclosure responsibilities, etc.). Lastly, OJD requested that statutes that require that records be "returned" or permit "inspection" of records but not copies of records be reviewed in light of the impending transition to electronic court records.

[2] See Attorney General's Public Records and Meetings Manual 2010, footnote 124, available online at http://www.doj.state.or.us/public_records/manual/pages/public_records.aspx#_ftnref124

OJD's referral came from recommendations of a Law and Policy Work Group created as part of OJD's eCourt Program. That Work Group had several smaller groups focusing on various substantive law areas; the Juvenile Group and a separate Juvenile Social File Group identified the juvenile court file issues. In order for eCourt to function well, access rules must be clear regarding court records.

The Oregon Law Commission approved the formation of a work group to review and make recommendation regarding juvenile case court files and records laws at its meeting on November 29, 2010. A work group[3] was formed in 2012 with Commissioner Julie McFarlane serving as Chair. The work group began meeting in November 2012 and met five times to complete the recommended bill.

III. Objectives of the Proposal

The Work Group recommends SB 622 to the 2013 Legislative Assembly. The objective of the bill is to provide more clear rules for access to juvenile court records. Specifically, the goal was to define the two types of files containing juvenile court records that are maintained by the juvenile court and detail who is entitled to inspection rights of the two types of files and who is entitled to copy rights of the two types of files. To accomplish this objective, a new definitions section is created (See Section 1) and the present juvenile court records laws, found in ORS 419A.253, ORS 419A.255 and ORS 419A.256, are significantly revised (Sections 2-4). In addition, existing ORS 419A.257 is moved and instead the substance is improved and incorporated into ORS 419A.255.

IV. Review of Legal Solutions Existing or Proposed Elsewhere

The Work Group reviewed existing Oregon statutes and discussed practice in Oregon, with a goal of clarifying Oregon law and to codifying best practices. Staff did research other state's juvenile records laws on specific issues throughout the project, but no one state or uniform act was relied upon. Oregon's juvenile code is unique and really required state-specific solutions to address the current problems, ambiguities, and omissions.

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[3] Voting work group members included Julie McFarlane, OLC Commissioner and Chair; Susan Amesbury, Oregon Dept. of Justice; Brad Berry, Yamhill Co. DA's Office; Tom Cleary, Multnomah Co. DA's Office; Nancy Cozine, Office of Public Defense Services; Linda Guss, Oregon Dept. of Justice; Prof. Leslie Harris, Dorothy Kliks Fones Professor at the University of Oregon School of Law; Cherie Lingelbach, Oregon Youth Authority; Michael Livingston, Oregon Judicial Dept.; Tim Loewen, Yamhill Juvenile Dept.; Judge Maureen McKnight, Mulnomah Co. Circuit Court; Sarah Morris, Dept. of Justice; Rem Nivens, Oregon Youth Authority; Lisa Norris-Lampe, Oregon Supreme Court; Becky Osborne, Oregon Judicial Dept.; Wendy Peterson, Washington Co. Juvenile Dept.; Mickey Serice, Oregon Dept. of Human Services; Tahra Sinks, Attorney at Law; Shannon Storey, Office of Public Defense Services. Work Group advisors included Caroline Burnell, Oregon Dept. of Human Services; Presiding Judge John Collins, Yamhill County Circuit Court; Richard Condon, Attorney at Law; Maurita Johnson, Oregon Dept. of Human Services; Tom Vlahos, Oregon Dept. of Human Services.

V. The Proposal

The Work Group's recommendations are reflected in SB 622 and session amendments. A section-by section explanation of the bill and recommendations follows:

Section 1

This section codifies new definitions to be used in ORS 419A.253, 419A.255 and 419A.256 (Sections 2-4 of the bill).

The definition of "person" in subsection (1) was added as that term is used several times in the records provisions and presently "person" may be mistakenly read so as to only cover individuals. The bill's new definition, which expressly covers individuals and also covers public bodies, makes it clear that "person" includes state and local government entities , e.g. the juvenile department, OYA, DHS, and the court.

Subsection (2) defines "prospective appellate attorney"; this new term is needed to address the court-appointed attorney realities and practice for juvenile court appellate work. If a child, ward, youth, youth offender, parent, or guardian has a retained attorney, then that attorney has access to court records as provided by ORS 419A.255 because that attorney is officially an attorney of record. However, when a person needs court-appointed counsel on appeal, the practice of Oregon Public Defense Services (OPDS) is to have prospective appellate counsel preliminarily examine a case before becoming the official attorney of record. Prospective attorneys, authorized by OPDS, will review the register and portions of the lower court record to determine if an appealable judgment exists, whether any conflicts exist, etc.. While this review is being done, the attorney is a prospective attorney and not the attorney of record. It is important for such "prospective attorneys" to have access to portions of the juvenile court case file and essentially be treated like attorneys of records for access purposes; this term thus is used in the newly revised access rules in section 3 of the bill when attorneys are referenced. In short, the group agreed that the statutes should clearly provide that the attorneys for parties should automatically have access to all case-specific information provided to the juvenile court.

Subsection (3) defines "record of the case," and subsection (4) defines "supplemental confidential file." These are the two new terms that will define what have commonly been referred to by the bench and the bar as the "legal file" and the "social file" of a court file in a juvenile case. Providing statutory definitions has been long overdue—inconsistency and confusion with respect to what shall be maintained in each file has been the norm. The new definitions provide needed detail and direction to courts, parties, state and local government and attorneys.

Specifically, subsection (3), of the bill lists in more detail the filings, records, and papers that are to be maintained as comprising the record of the case. The list provided in present ORS 419A.255(1) served as the starting point for this definition, but the list in the bill is expanded to provide further direction and specificity.

Answers, affidavits, and judgments were specifically added to the list; these three types of documents are very commonly filed and they simply were missing from the old list.

The work group also decided to require that both local citizen review board (CRB) findings and recommendations as wells as guardianship report summaries be maintained in the record of the case. See Section 1(3)(a)(D) and (E). Present law requires both of these materials be filed with the court but it has been unclear as to which file to maintain them. The CRB is an arm of the juvenile court and is a part of the judicial department; as such, OJD and the CRB supported placement of CRB reports in the record of the case. Such practice also seems to be the practice in most counties. See Section 6 discussion below for more explanation of guardianship reports and the new summary sheet.

ORS 419A.256(1)(a) already has provided that transcripts of a juvenile court proceeding are to be maintained in the record of the case. The addition of transcripts to the list in Section 1(3)(a)(G) thus is simply a cross reference addition to promote consistency and clarity.

Section 1(3)(a)(H) specifies that "exhibits and materials offered as exhibits but not received" are now also included in the "record of each case." This is an important new provision recommended by the work group after long discussions. Exhibits are physical or documentary evidence and should be consistently treated as such and made a part of the official record of the case. Exhibits that are offered but not received also need to become a part of the record of the case so that the court's ruling can be challenged on appeal if necessary. Juvenile court practitioners need to be more consistent in this area. Nothing in this bill is intended to change the court's exhibit maintenance practice or authority provided in ORS 7.120(2). ORS 7.120(2) permits courts to destroy or return to parties exhibits offered or received after the case becomes final and not subject to further appeal. Courts would experience a storage problem if courts were required to maintain all exhibits indefinitely.

Note that the bill provides that record of the case covers "supporting documentation." See Section 1(3)(a)(C) (covering supporting documents filed with the court) and Section 1(3)(a)(F) (covering supporting documents filed by the court itself). The group struggled with the wording here, but it is meant to be a catch-all that covers a variety of supporting documents-- but most specifically it is meant to cover attachments to motions, orders, and judgments as those are common practice. It may also cover correspondence. Note that attached supporting documentation becomes part of the record of the case by virtue of the filing, even if it does not become evidence.

Section 1(3)(a)(I) is the record of the case definition's catch-all provision. It is meant to cover other documents that are to be a part of the record of the case as provided elsewhere by statute or caselaw. An example is the list provided for in ORS 419A.253. .

Section 1 (4) defines "supplemental confidential file" which has for decades has been commonly referred to as the "social file." Note, however, that the phrase "social file" is found nowhere in Oregon statute. The bill will finally codify a name for this file, albeit not the social file. A new name was deemed necessary because the file does not contain only "social" information and it is not socially available as that term is now understood with social networking today. This file is really a holding place for records and materials that do not qualify as part of the record of the case, are not admitted into evidence, and are not part of the case on appeal. It has traditionally

been used to hold materials relating to "history and prognosis" of the child, ward, youth or youth offender. The Oregon appellate courts have held that "history and prognosis" refers to records regarding the medical, psychological, and social (personal and family) background of juveniles as well as predicted future status or condition of the juvenile.[4] Records include such materials as OYA education and treatment reports, school records, DHS reports, medical reports, and mental health reports. Many "history and prognosis" reports are required to be periodically sent to the court and practice has been to put them in this file. This practice of keeping two files is unique to juvenile court and perhaps one day it should be phased out, but that would require significant time and require a new law reform work group. The bill provides specifically that reports filed with the court under ORS 419B.440 shall be maintained in the supplemental confidential file. These are reports that are required when a public or private agency (generally DHS) has guardianship or legal custody of a child or ward. ORS 419B.440. Reports are required every six months or more frequently if the court so orders. The report contents are provided for in ORS 419B.443, but include descriptions of problems or offenses necessitating placement with the agency, descriptions of the care and treatment provided for the child or ward, school placements and credits earned, etc. The Group recommends that these routine reports, though required to be filed with the court (see ORS 419B.446), should not be maintained in the record of the case due to their contents. Practice today has varied on where these reports are maintained. The bill also specifies in (4)(a)(A) and (B) that this file shall contain reports and materials that are not part of the record of the case that are not offered or received as evidence in the case. This provision parallels with the record of the case definition, which includes evidence offered and received as well as evidence offered but not received.

Section 1 of the bill also provides explicitly that both the "record of the case" and the "supplemental confidential file" include traditional paper records as well as electronic records. See Section 1(3)(b) and (4)(b). These references clarify that electronic court processes extend to juvenile case records. Further Oregon eCourt details are not needed in the chapter but instead will be handled by court rule, etc. OJD will evaluate any system configuration and court rule needs following the passage of this bill.

Section 2

This section amends ORS 419A.253. This provision is a relatively new section of the juvenile code that provides a procedure for a judge in juvenile court to rely upon information in a report, document or other material that a party has not asked the court to take judicial notice of nor has any party offered the actual report, document or material containing the information as an exhibit. At times there are materials in the court file that have not been made part of the record of the case because there is not an attorney present to offer the evidence. This happens most often when a state agency appears without counsel. Other common instances prompting this procedure occur when letters are written to the court and when records are forwarded to the court from other states. This statute allows the judge to act whether requested or not; indeed, it is a judge's responsibility to act. To do so, the statute requires the judge to identify the report, material or

[4] See e.g, Kahn v. Pony Express Courier Corp., 173 Or App 127, 141-42 (2001).

document on the record and allow an opportunity for objections by the parties before taking judicially notice of information or marking and receiving into evidence a report, material, or document as an exhibit. Work Group member, Judge Maureen McKnight, reminded the Work Group that "there is no juvenile court slide for the way things get in to evidence. They get in by judicial notice, stipulation, evidence, or testimony. There are only four doors." Judges and practitioners need to conform to approved practice in this area if the parties want the court to rely on certain information or the court wants to rely on a record or information – it needs to be properly in evidence.

This statute provides a useful evidentiary procedural tool but it needs to be followed correctly. Thus, the bill revises this section for readability and to clarify misunderstandings that continue to occur in juvenile court practice, particularly with respect to judicial notice of information. In short, a judge can take judicial notice of a fact or law but a judge cannot take judicial notice of a particular document, report or other material. Rather, the judge can take judicial notice of a fact or law in a document, report or other material. Revised subsection (2) now emphasizes more and specifies more clearly that if the court takes judicial notice of a fact or law under this section, it must specify both the source of the fact or law and the fact or law that is judicially noticed. The court shall make this identification by causing a list to be made; the list may be either included in the court's order or judgment or set out in a separate document attached to the order or judgment. See Section 2(2). The provision is consistent with the series in ORS 40.060 to 40.090 which governs judicial notice generally. The provision also uses "fact or law" throughout to emphasize what is judicially noticeable. Note that a judge will more commonly judicially notice facts in these cases, but tribal regulations are an example of a law that may be judicially noticed.

This section adds a new subsection (3) to the statute to specify that both exhibits marked and received by a judge under this statute and any list of information judicially noticed by a judge under this section are to be maintained as part of the record of the case. Note however that a list alone is insufficient to properly judicially notice information. The judge must identify the source and what is judicially noticed. The list provided by this section is really an organizational tool to help introduce the information into evidence. Subsection (4) goes on to provide that if an appeal is taken, the exhibits, lists, and "(a)ny report, material or other document containing judicially noticed facts or law as identified on the list" shall all be made of the record of the case on appeal.

ORS 419A.253(3) in present law is moved over to 419A.255(9). The subsection ensures appellate court access to juvenile court records when reviewing juvenile court orders or judgments. See also ORS 419A.200(10)(d) (protecting juvenile court records on appeal). This issue is better addressed in ORS 419A.255 by providing clear inspection and copy rights to the appellate courts there.

Section 3

This section amends ORS 419A.255. This section provides that both the record of the case for each juvenile case and the supplemental confidential file shall be withheld from public inspection. That is, this bill continues the longstanding state policy that juvenile case records are to be treated different from other civil and criminal case records--that is, juvenile records are generally

confidential.[5] To be entitled to inspection or copy rights, a person must be listed in the statute's exceptions that provide access.

Subsection (1)(a) provides that the clerk of the court shall maintain the record of the case and the supplemental confidential file.

INSPECTION—RECORD OF THE CASE

Subsection (1)(b) of the bill provides a new list of who shall be given access to inspect the record of the case (formerly known as the legal file). Present ORS 419A.255(1) is broken up more with semicolons and new paragraph letters to make the section more readable. The following already have access to the record of the case under ORS 419A.255(1) and will continue to in the bill's Section 3(1)(b): child; ward; youth; youth offender; parent or guardian of the child, ward, youth or youth offender; surrogate; person allowed to intervene in a proceeding involving the child, ward, youth or youth offender; court appointed special advocate; and attorneys for persons listed.

The work group recommends adding some persons who presently do not have explicit access to the record of the case.

The four additions provided for in the bill include:

1. <u>The judge of the juvenile court and those acting under the judge's discretion</u> (Section 3(1)(b)(A))

   ORS 419A.255(1), presently is silent as to juvenile court access to the legal file but 419A.255(2) does specifically provide juvenile court access to the social file. The bill specifies juvenile court inspection authority as well as copy authority for both the full record of the case and the supplemental confidential file to provide consistency. Most would interpret court record provisions to permit court access axiomatically but because only present ORS 419A.255(2) specifically mentions the juvenile court, it has created an interpretation problem.

2. <u>Guardian ad litem for the parent</u> (Section 3(1)(b)(G))

   A guardian ad litem is not a party but is a representative of the parent. ORS 419B.234(2). Still, the court may appoint a guardian ad litem only if a parent lacks substantial capacity either to understand the nature and consequences of the court proceeding or give direction and assistance to the parent's attorney due to the parent's mental or physical disability or impairment. ORS 419B.231(2). Thus, the work group concluded that a guardian ad litem should be afforded the same access rights to juvenile court records that a parent is provided. Note that guardian ad litems must be lawyers or mental health professionals. See ORS 419B.234(1)(a). Practice in most counties has been for guardian ad litems to have access.

[5] Mental commitment (ORS 426.160 and 427.293) and adoption case (ORS 7.211) records are also generally confidential and withheld from public inspection in Oregon.

3. Service providers in the case (Section 3(1)(b)(J))

Service providers (counselors, therapists, doctors, etc.) have long been provided both inspection and copy rights to the "social file" but were omitted from access to the "legal file." The bill thus adds service providers to the list of persons allowed to inspect and copy the record of the case. Presently they are getting copies of the record but it sometimes is problematic because they must get the record from a different source rather than the court. For treatment and service these records are often needed by the service providers. The Work Group considered defining service providers but concluded that it was not unnecessary and would be difficult as services needed vary a great deal by case.

4. Prospective appellate attorneys (Section 3(1)(b)(L))

As explained above in the definition section provided in Section 1, prospective appellate attorneys need access to the record of the case. They need to run conflict checks, etc. before it is determined whether they will represent a person in the case. The statute has long provided attorney access but the bill will now cover prospective attorneys as well.

Note that Section 3(1)(b)(M), (N), (O), and (P) are all listed in bold in this section. These paragraphs provide inspection rights to the district attorney, assistant attorney general, juvenile department, DHS, and OYA. This is not a change to the law; however, because these persons were provided the same access to the record of the case by reference in ORS 419A.257(1). Existing ORS 419A.257 has been folded into ORS 419A.255.

5. Any other person allowed by the court (Section 3(1)(b)(Q))

Note that at the end of the list of persons entitled to inspect the record of the case there is a catch-all provision that allows the court to permit other persons to inspect the record of the case. See Section 3(1)(b)(Q). This is an explicit provision granting the court authority and discretion. Many maintain, however, that the court already has this authority, but this provision certainly clears up any ambiguity.

COPIES—RECORD OF THE CASE

Subsection (1)(c) of Section 3 provides a list of who is entitled to copies of the record of the case. Presently, ORS 419A.255(1) provides explicit copy rights to the record of the case (i.e. the legal file) only to the attorneys. In addition, present law, in ORS 419A.257, provides copy rights to the district attorney, assistant attorney general, juvenile department, DHS, and OYA.

The work group recommends adding some new persons explicit copy rights to the record of the case in this provision.

The additions provided for in the bill include:

1. The judge of the juvenile court and those acting under the judge's discretion (Section 3(1)(c)(A))

This addition seems axiomatic—of course juvenile court and appellate judges and their staff need to be able to work with copies of records to do their jobs.

2. Service providers in the case (Section 3(1)(c)(D))

Service providers are listed in paragraph (b)(J) and thus the bill includes them in the list of persons entitled to copies of the record of the case under the series provided in paragraph (c)(D). As explained above, service providers have long been provided both inspection and copy rights to the "social file" but were omitted from access to the "legal file." The bill thus adds service providers to the list of persons allowed to both inspect and copy the record of the case. Presently they get the record but it sometimes is problematic because they must get the record from a different source rather than the court. For treatment and service these records are often needed by the service providers.

3. Court Appointed Special Advocates (CASA) (Section 3(1)(c)(D))

Court Appointed Special Advocates are listed in paragraph (b)(K) and thus the bill includes them in the list of persons entitled to copies of the record of the case under the series provided in paragraph (c)(D). CASAs are deemed a party in ORS chapter 419B juvenile dependency proceedings. ORS 419A.170(1). CASAs are to investigate all relevant information in a case and monitor all court orders. ORS 419A.170(2). And specifically, ORS 419A.170(7) provides that upon presentation of the order of appointment of the CASA, "any agency, hospital, school organization, division, officer or department of the state, doctor, nurse or other health care provider, psychologist, psychiatrist, police department or mental health clinic shall permit the court appointed special advocate to inspect and copy. . . any records relating to the child or ward involved in the case. . ." Thus, due to the nature of a CASA's duties and the explicit broad record access provided in 419A.170, the work group concluded that CASAs should be included within the list of persons entitled to copies of the record of the case in this section of the bill. The present omission from ORS 419A.255 seems to be a mistake.

4. Prospective appellate attorneys (Section 3(1)(c)(D))

Prospective appellate attorneys are listed in paragraph (b)(L) and thus the bill includes them in the list of persons entitled to copies of the record of the case under the series provided in paragraph (c)(D). As explained above in Section 1, prospective appellate attorneys need to inspect and have copy rights to the record of the case. They need to run conflict checks, etc. before it is determined whether they will represent a person in the case. The statute has long provided attorney access but the statute needs to cover prospective attorneys as well.

Again, note that the district attorney, assistant attorney general, juvenile department, DHS, and OYA are listed in bold in paragraphs (b)(M) to (b)(P) and thus the bill includes them in the list of persons entitled to copies of the record of the case under the series provided in paragraph (c)(D). This is not a change to the law; however, because these persons were entitled to inspect and copy the record of the case by reference in present ORS 419A.257(1). ORS 419A.257 is incorporated into ORS 419A.255.

5. Any other person allowed by the court (Section 3(1)(c)(E)

Also note that at the end of the list of persons entitled to copies of the record of the case there is a catch-all provision that allows the court to permit other persons to receive copies. See Section 3(1)(c)(E). This provision is an explicit new provision that gives the court authority and discretion. Such a provision was advocated by several in the Work Group to clearly allow the court flexibility to permit parents, guardians, and guardian ad litems to obtain copies of the record of the case in cases when the court finds it appropriate. Others maintain that the court already had this authority but the provision clears up any ambiguity. The Commission agreed that the court was in the best position to rule on such issues and wanted to provide clear authority.

SPECIAL NOTE ON COPIES—RECORD OF THE CASE—PARTIES IN THE CASE

Finally, the bill provides new language in subsection (1) of ORS 419A.255 that provides an entitlement to copies of the record of the case to both "a party to the extent permitted under ORS 419B.875(2) or 419C.285(2)" and "a guardian ad litem for a parent to the same extent the parent is permitted copies under ORS 419B.875(2) or ORS 419C.285(2)." See Section 3(1)(c)(B) and (C). This language is admittedly awkward. It essentially maintains the status quo of Oregon law by referring to existing law in Chapter 419B and 419C that provides parties[6] in the case with the right to copies of certain records of the case. ORS 419A, on the other hand, presently provides for no explicit copy rights to parties in the records provisions and this bill at least fixes that conflict by recognizing the related "copy" provisions and listing them in this section of the bill.

Note that both the parties and the copy rights are different in dependency and delinquency cases. Many of the parties have access and copy rights already under another enumerated subsection. Thus, it really is the parent or guardian that is a party to the case to which this paragraph primarily applies (it does also cover certain intervenors, including tribes). Again, the bill maintains status quo by referring to both the rights provided in ORS 419C.285(2) and ORS 419B.875(2) to parties. ORS 419C.285(2) provides that the rights of parties in a delinquency proceeding include the right to notice of the proceeding and copies of the pleadings." ORS 419B.875(2) appears more expansive and provides that parties' rights in dependency proceedings include the "right to notice of the proceeding and copies of the petitions, answers, motions, and other papers." The phrase "other papers" is ambiguous in present law. Some argue the phrase includes a number of records in a file while others contend it is quite limited. The main disagreement is whether parties are entitled to copies of psychological reports of parents and children filed with the court under this provision. Many of Oregon's judges and judicial officers are very protective of these reports and maintain that the law does not presently permit the provision of copies of psych reports nor as a matter of policy should Oregon law be changed to

[6] ORS 419C.285(1) lists the parties to a delinquency proceeding. The parties are different at the adjudication and dispositional stages of the proceeding. ORS 419B.875(1)(a)lists the parties in the juvenile court for dependency

provide copies to parties.[7] They reason that such reports contain highly personal information--often concerning sexual abuse and behavior details, medical and mental health information--that if disclosed to others or placed on the Internet would be highly humiliating and damaging to children. Such material would detrimentally effect their future. Others, primarily defense attorneys for parents, however, maintain that parties need such records and especially psych reports to effectively parent, obtain adequate services and treatment for their child or themselves, and to effectively defend themselves in the case. They argue it is a due process issue—and when they are denied copies of such key records their constitutional rights are violated. They also maintain that ORS 419B.875(2) coupled with the U.S. Constitution indeed require access and copies.

Some Work Group members were particularly concerned with denying copies of certain aspects of the record of the case to parties who are unrepresented. Indeed, unrepresented parties may have a stronger due process claim. Present law makes no distinction for the unrepresented—although anecdotally there are not many who are unrepresented. The bill continues to allow attorneys for the parties to have copies of the record. Many in the Work Group argued that to not also expressly permit unrepresented parties to have copies puts them at an unfair and significant disadvantage. Still, others countered that providing an opportunity to inspect the record, which would include the ability to take personal notes from the records, etc. is sufficient to comply with due process requirements. See above discussion regarding revised ORS 419A.255(1)(b) which provides inspection rights to listed persons, including parents. All agreed that to also deny inspection rights would certainly deny parents due process. Practice in some counties is for parents to review records in court chambers or the attorney's office; they return the copies before leaving. The Work Group considered amending the statute to allow copies to unrepresented parties if coupled with protective orders restricting re-disclosure and use.

In the end, the Work Group could not reach consensus on this policy issue of what specific record of the case copy rights parties in juvenile court should be entitled to under Oregon law. Thus, no changes were made relating to current party copy rights in the bill. The choices essentially discussed were to allow parties explicit full copy access, allow parties copy access but with restrictions on certain records (e.g. psych evaluations), allow only unrepresented parties copy access, and/or allow unrepresented parties copy access with restrictions and/or protective orders. The issue will likely be litigated if the legislature does not address the policy issue. Note that the group did agree that whatever the statutory and constitutional copy rights are of parents (ambiguous though it remains), a guardian ad litem should have the same rights. Thus, the bill does add Section 3(1)(c)(C) to include guardian ad litems for a parent to the same extent the parent is permitted copies under the listed statutes. For some counties, this could act to cut back on copy access as guardian ad litems often do receive copies in practice.

[7] See e.g., Standing Order 1201.00000, dated November 28, 2012, signed by Chief Family Court Judge, Maureen McKnight and Presiding Judge, Nan Waller of Oregon's Fourth Judicial District. (4)(a)

SUPPLEMENTAL CONFIDENTAL FILE

Section 3, subsection (2), of the bill addresses inspection and copy rights rules with respect to the supplemental confidential file. See discussion above of Section 1(4) for explanation of this file which contains "history and prognosis" reports and material. Subsection (2)(a) provides that "history and prognosis" reports and material will continue to be privileged—whether maintained in the supplemental confidential file or whether they ultimately become part of the record of the case. Attaching "history and prognosis" material to a motion will not make the material lose its privileged status. The work group found it very important to keep this material privileged to preclude public access to these sensitive records. The bill also continues to provide specifically that "history and prognosis" reports and material shall be withheld from public inspection. This subsection also specifies that "[o]nce offered as an exhibit, reports and other material relating to the child, ward, youth or youth offender's history and prognosis become part of the record of the case." This clarification is intended to help emphasize to the bench and bar proper evidentiary procedure and curb misuse of the "supplemental confidential file." In short, if parties want reports or materials in the supplemental confidential file to be relied on, they need to be offered as an exhibit, become evidence, and then be maintained in the record of the case. This clarification also is intended to clarify that, once supplemental confidential file material becomes part of the record of the case, it is subject to the access rules that apply to the record of the case.

INSPECTION—SUPPLEMENTAL CONFIDENTAIL FILE

Subsection (2)(b) of this section provides a list of who shall be given inspection access to the supplemental confidential file as that file is newly defined in Section 1. The first sentence of existing ORS 419A.255(2) is significantly revised and broken apart with semi-colons to clarify inspection rights in the provision and provide a new list in the bill's subsection (2)(b). The first sentence of present ORS 419A.255(2) has long caused confusion and been inconsistently applied because it is susceptible to a variety of interpretations due to the complex modifying clauses and awkward punctuation. The confusion has particularly centered on what the phrase "attorneys of record" modifies. Many members of the bench and bar read the first sentence to essentially allow inspection of this file only by the judge, services providers and attorneys for a long list of persons. Other members of the bench and bar, however, read the sentence to also allow inspection by parents, guardians, CASAs, surrogates and intervenors. They argue for example, that CASAs and surrogates don't have attorneys and thus to read "attorneys of record" to modify these persons does not make sense. While the Work Group also could not agree on the present law's meaning, all on the Work Group agreed that present law is confusing and in need of revision.

Existing law, in the second and third sentence of ORS 419A.255(2) also provides both inspection and copy rights of this file to school superintendents and their designees (for delinquency cases if youth offender resides in district), service providers, and attorneys. The wording of the third sentence is vague as to which attorneys are covered in these sentences but "attorneys of record" for the child, ward, youth or youth offender are clearly also provided in the first sentence. Practice is for all attorneys to get copies.

In the end, the work group compromised and agreed upon the list provided in subsection (2)(b) to finally address the inspection rights ambiguities. The significant change is that the bill clearly provides that now all parents, guardians, and guardian ad litems for parents in juvenile court proceedings will have inspection rights to the supplemental confidential file--- with the qualification that for delinquency proceedings they will need either the consent of the youth/youth offender or authorization of the court. This could be no change in practice in some counties but a change in others. Depending on how one reads present law, the following persons may have been added to the list of persons given inspection rights to the newly labeled "supplemental confidential file":

1. Parent or a guardian of the child or ward in a dependency case (Section 3(2)(b)(B))

   The Work Group had no objection to clearly providing parents or guardians inspection rights to this file in dependency cases. This tends to be practice today in most counties, and due process may require this approach. If there are problems with access, the court and parties have other tools, namely protective orders that can be used to restrict access.

2. Guardian ad litem for the parent of a child or ward in a dependency case (Section 3(2)(b)(C))

   The provision for guardian ad litems for parents is a new addition, but an important addition as a guardian ad litem is a representative of the parent. ORS 419B.234(2). The court may appoint a guardian ad litem only if a parent lacks substantial capacity either to understand the nature and consequences of the court proceeding or give direction and assistance to the parent's attorney due to the parent's mental or physical disability or impairment. ORS 419B.231(2). As explained earlier in the report, the work group concluded that a guardian ad litem should be afforded the same access rights to juvenile court records that a parent is provided.

3. Parent or guardian of the youth or youth offender in a delinquency case (if the youth or youth offender consents or the court authorizes inspection) (Section 3(2)(b)(D))

   The Work Group found that restricted access was necessary in delinquency cases because a parent or guardian is not a party in a delinquency proceeding until the dispositional stage. In addition, the OYA stressed how progress can be seriously impeded if information is shared with parents, family members, etc. To allow unrestricted access would also be a significant change in present practice. OYA and the juvenile departments, with the Attorney General's support in public records opinions,[8] have long held that parents and others do not have inspection rights to this file in delinquency cases under existing ORS 419A.255. See also ORS 192.496(3) (providing that records of a person who is or has been in custody or under the lawful supervision of a state agency, a court or a unit of local government, are exempt from disclosure to the extent disclosure would interfere with rehabilitation). That is, they contend that today only if the youth

[8] See e.g, Oregon Attorney General Public Records Order, June 28, 1996, issued to Leslie L. Zaitz, Publisher of Keizertimes, at 5-6.

or youth offender consents or the court otherwise permits access may parents or guardians inspect this file. The phrase "except at the request of the child, ward, youth or youth offender" in present ORS 419A.255(2) provides support to OYA's practice of requiring the youth offender's consent or court approval before disclosure of "history and prognosis" reports and material. OYA and the juvenile departments were supportive of clarifying this issue and Section 3(2)(b)(D) is intended to simply codify the practice that is working today. This provision is also consistent with the bill's Section 5 which provides access rules for records created or maintained by or on behalf of OYA and the juvenile department.

4. Guardian ad litem for the parent of the youth or youth offender in a delinquency case (if the youth or youth offender provides consent or the court authorizes inspection) (Section 3(2)(b)(E))

   Again, with this provision in the bill, the Work Group recommends affording guardian ad litems the same rights as parents. This addition is consistent with that principle.

5. Attorneys or prospective appellate attorneys for listed persons (Section 3(2)(b)(G))

   This new paragraph is meant to only clarify the law. The Work Group did not believe that substantive changes were made generally by this paragraph's addition as attorneys in practice always receive copies; however, there is a small addition with Section 3(2)(b)(G)(vi). Because guardians ad litem were added in Section 3(2)(b)(E), it was logical to also add attorneys of guardians ad litem to the list with (vi). Also, as discussed earlier in this report, it is necessary to cover prospective appellate attorneys when attorneys are included.

6. Court Appointed Special Advocates (CASAs) (Section 3(2)(b)(J))

   Due to the nature of a CASA's duties and the explicit record access already provided in 419A.170, the work group concluded that CASAs should be included within the list of persons entitled to both inspect and obtain copies of the record of the case in this section of the bill. If present law omits them (depends on how one interprets present ORS 419A.255(2)), it seems to be a mistake. Providing copy rights is also consistent with present practice.

7. Any other person allowed by the court (Section 3(2)(b)(O))

   This is a catch-all provision that gives the court discretion to allow inspection rights to others. Some believe the court already has this discretion.

SUPPLEMENTAL CONFIDENTIAL FILE--COPIES

Subsection (2)(d) provides a list of who shall be entitled to copies of the supplemental confidential file. Presently, ORS 419A.255(2) and ORS 419A.257(1) provide copy rights to service providers, superintendents (and their designee in delinquency case if youth offender resides in district), attorneys, district attorneys or assistant attorneys, the juvenile department, DHS, and OYA.

This bill adds the following persons to the list of persons given copy rights to the newly labeled "supplemental confidential file":

1. The judge of the juvenile court and those acting under the judge's direction (Section 3(2)(d)(A))

   Again, the work group felt this was axiomatic but adding courts dispels any questions.

2. Court Appointed Special Advocates (CASAs) (Section 3(2)(d)(I))

   This is an addition to ORS 419A.255, but in the CASA statutes it seems CASAs have copy rights already. See ORS 419A.170. Thus, this addition resolves any conflict.

3. Any other person allowed by the court (Section 3(2)(d)(J))

   This is a catch-all that gives the court discretion to allow access to others. Some believe the court already as this discretion. See e.g. ORS 419A.255(3).

In short, the persons entitled to a copy of the supplemental confidential file continue to be necessarily limited.

Subsection (2)(e) of Section 3 is just renumbered. It maintains existing law but makes conforming changes and also deletes the requirement to "return" copies to the court and instead requires service providers, school superintendents and designees to "destroy" copies of reports or materials obtained in the supplemental confidential file. Returning copies doesn't presently work well, most do not comply, and return of electronic records is not feasible.

Subsection (3) maintains present law but makes conforming changes for terms and cross-references. This subsection is written in the passive and is confusing. Some attorneys and judges read subsection (3) to restrict the court on who the court can allow copies to be provided but others read it to restrict redisclosures by persons who receive copies from the court. This section remains ambiguous and unamended as the work group could not agree on redisclosure rules.

Present law's subsection (4) is deleted and moved to ORS 419A.256 in Section 4 of the bill to consolidate the juvenile court transcript provisions.

New subsection (4)(a) provides some redisclosure and use prohibitions and restrictions. This provision is moved over from current law, presently located in ORS 419A.257(3) as ORS 419A.257 is replaced with new substance in Section 5. No substantive changes are intended. It restricts usage and disclosure of records if obtained through the court, for certain identified persons.

Subsection (4)(b) is moved over from present law in ORS 419A.257(2). It continues to permit sharing of records between permitted persons. The new "person" term is substituted for "agency or person" for clarity.

Subsection (5)(a) to (c) is renumbered for organizational purposes; this provision is found in present law at ORS 419A.255(7)(a) to (c). The provision is substantively the same; the bill's defined terms are substituted as necessary.

Subsection (6) is renumbered because of the insertions before it. One change is made to add a cross reference to subsection (8). The bill's subsection (6) continues to list information (as opposed to records) that is not confidential in juvenile delinquency cases. In present law it is unclear who shall disclose this information—most often to the press. Practice is that it is the juvenile department that prepares the information and releases it. The revised (8) now clarifies that the court or the juvenile department may disclose this information.

Subsection (7) is renumbered because of the insertions before it. One change is made to add a cross reference to subsection (8). The bill's subsection (7) lists more information (as opposed to records) that is not confidential in juvenile delinquency cases; the information in this section has some timing restrictions in order to protect victims and not harm investigations. In present law it is unclear who shall disclose this information—most often to the press. Practice is that it is the juvenile department that prepares the information and releases it. The revised (8) now clarifies that the court or the juvenile department may disclose this information, unless otherwise directed by the court.

Present law's subsection (7)(a) to (c) is deleted in the bill here as it is renumbered and moved to subsection (5)(a) to (c).

Present law's subsection (8) is revised to permit both the juvenile court and the juvenile department to disclose the information under subsections (6) and (7) of this section. Since the court maintains the records that contain the necessary information, the work group agreed it was proper for the court to also have authority to disclose this information.

Subsection (9) is new to ORS 419A.255, but it is existing law that is simply moved over from ORS 419A.253(3). It is a provision that assures the appellate court's access to the juvenile court records when reviewing a juvenile court order or judgment. The Work Group recommended moving it for organizational reasons.

Subsections (10) to (12) are maintained verbatim but simply are renumbered because of the inserts above them.

Section 4

This section primarily moves ORS 419A.255(4) over to ORS 419A.256 as a new subsection (2) so as to assemble the transcript provisions all in the same provision. Thus, with this bill, subsection (1) provides that once prepared, a transcript of a juvenile court proceeding becomes a part of the record of the case and thus is subject to the "record of the case" rules described above for inspection and copying. Then, subsection (2) goes on to provide that if the court finds that the child, ward, youth, or youth offender or parent or guardian of the child, ward, youth or youth offender is without financial means to purchase the transcript, the court shall order payment in the manner used in criminal cases. Subsection (3) continues to provide inspection rights of the audio,

video or other recording of a juvenile court proceeding to listed persons but not copy rights. Subsection (3) is revised to reference the new list of persons in ORS 419A.255(1)(b)(A) to (P) who have inspection rights to the record of the case instead of keeping the present list. The present list in subsection (3) omits many persons, including the state agencies, the district attorney, and juvenile departments, etc. by mistake.

Some work group members renewed their objection to not expressly providing for unrestricted rights to copies of the record of the case to parties (see Section 3(1)(c)(B) providing limited rights) here because transcripts are a part of the record of the case. They maintained that having a copy of the transcript is required for parties under the Due Process Clause—particularly unrepresented parties. As discussed above in Section 3, the Work Group could not reach consensus on this issue.

Section 5

This section amends existing ORS 419A.257. The substance of that existing provision has been improved and folded into Section ORS 419A.255 (Section 3). The statute was moved because it had always worked in conjunction with 419A.255 anyway but was unnecessarily confusing. The ORS number, ORS 419A.257, instead will now be used to address access rules regarding certain OYA and juvenile department records. The provision will now provide that a juvenile's "history and prognosis" records that are created or maintained by or on behalf of the Oregon Youth Authority or the juvenile department are privileged and shall be withheld from public inspection. The juvenile may consent or the court may authorize disclosure of such records. This section is derived from current practice and present ORS 419A.255 which makes "history and prognosis" records confidential and privileged. There is important caselaw interpreting existing ORS 419A.255 and thus by mirroring language from that ORS provision, it is intended that the courts will use the same interpretations with this new section. Since ORS 419A.255, as amended by the bill, will now focus on court records, OYA and the juvenile department needed this statutory provision addressing their own history and prognosis records that may or may not also be in the court files. This Section provides in subsection (2) that OYA and the juvenile department may disclose records to listed persons. This list tracks the same list in ORS 419A.255. Furthermore, the section parallels present ORS 419A.257. Subsection (3) of Section 5 requires persons to preserve the confidentiality of materials obtained under this section. That is, this provision prohibits unauthorized redisclosure. This language is duplicated from present ORS 419A.255(2). Subsection (4) also restricts disclosure but allows disclosure for special education purposes and other limited purposes. Wording is duplicated from ORS 419A.255(3) as the restrictions and exceptions are to be the same. Note that parents are not included in the list with access, but attorneys for parents may have access. This is in line with current practice as parents are not parties in delinquency cases. Subsection (5) of Section 5 allows disclosure when there is an emergency, i.e. a clear and immediate danger to another or society. Protections and restrictions on the use of such emergency disclosures are also provided in subsection (5). This subsection is modeled on ORS 419A.255(7) of existing law as the immediate danger exception is to be the same. In short, the access rules regarding "history and prognosis" records created or maintained by or on behalf of OYA or the juvenile department are not intended to be changed by this

Section. Practice should not change. Instead, the authority for the access rules, the restrictions, and exceptions are intended to be clearer as the OYA and the juvenile department will now have a stand-alone provision that is not interwoven with the juvenile court's records provision.

Section 6

This section amends the guardianship report requirements, found in ORS 419B.367 of the juvenile dependency code. When a juvenile court appoints a guardian for a ward, the court requires the guardian to file a written report with the court roughly every 30 days. The amendment to subsection (3) makes it clear that the guardianship report itself is to be maintained in the juvenile court's supplemental confidential file under 419A.255(2). In addition, subsection (3) requires the filing of a new "summary sheet" at the time of filing the guardianship report. The "summary sheet" must simply identify that a report was filed and include both the date of submission of the report as well as the name of the person who submitted the report. The summary sheet shall be maintained as part of the record of the case under ORS 419A.255(1). Existing law has been ambiguous as to whether the guardianship report shall be filed in record of the case or the "social file"—it just noted that it must be made a part of the court file. Practice has varied in counties but the work group agreed that the best practice is to have it filed in the more restricted supplemental confidential file as guardianship reports contain detailed information regarding the nature of visitations and contacts between relatives, including siblings (other minors), but to have the fact of the filing -- reflected in the summary -- maintained as part of the record in the case. The ambiguous language ("cause the report to become part of the juvenile court file") has been deleted in this section of the bill. Renumbering is also done to accommodate inserts to this section.

Sections 7-10

These sections largely make conforming cross-reference amendments to address the renumbering of ORS 419A.255 and the repeal of ORS 419A.257 as it is provided in existing law (it is replaced with different substance; see Section 5). Section 8 also amends ORS 419A.200 by adding a new paragraph to (10) to address an omission at the appellate courts. Audio and video recordings of oral proceedings on appeal will be treated in the same manner as such recordings at the trial court in Section 4. See ORS 419A.256.

Section 11

This section provides that all sections of the bill apply to proceedings commenced on or after the effective date of the Act. That is, there are no retroactive provisions and there is no emergency clause with this bill.

Miscellaneous

The work Group considered adding custodial parent to the list of persons with inspection access to the record of the case and the supplemental confidential file. Such persons are not the legal parent or guardian and thus have no access. If the party statutes are amended during session, the

group agreed that a conforming change should be made in this bill.

VI. Conclusion

This bill amends juvenile court records statutes in ORS Chapter 419A and creates new provisions; the provisions apply to records in both juvenile dependency and delinquency proceedings. As Commissioner Julie McFarlane said during the Work Group's last meeting, "access to records depends on what door you knock on. If you knock on DHS's door, their record statutes apply, if you knock on the court's door, these sections will apply." With this bill the two juvenile record files are better defined in new Section 1 of the bill—they are now referred to as "the record of the case" and the "supplemental confidential file." Both files remain confidential and are to be withheld from the public. The bill more clearly enumerates the persons who, however, are entitled to inspection rights and copy rights for each file. The access rules for juvenile court records are complex, have been confusing, and have long had unintended omissions. In addition, some of the present provisions no longer reflect practice or good policy. This bill helps shore up some of these shortcomings and will assist as the courts transition to an electronic court environment. Some issues remain unresolved and will require further work in sessions to come. The bill, SB 622, is a consensus product that should be adopted to improve this area of law.