



February 7, 2024

Senator Gelser Blouin, Chair
Members of the Senate Committee on Human Services

Thank you for the opportunity to participate in your interim work group on repeal of civil commitments under Chapter 427. We appreciate learning more about all members of our community and hearing voices of advocates for persons experiencing intellectual and developmental disabilities. We also appreciate being given an opportunity to share our perspective and to voice our concerns with the proposed repeal.

As District Attorneys, it is our job to seek justice for victims of crime and to hold offenders accountable for their actions. As such, we view your proposal through a lens of public safety and our constitutional duties to victims of crime. **Through that lens, ODAA opposes SB 1522 its current form.** We urge the Committee to examine the consequences for repealing these statutes should a safety net not be in place at the time the repeal would come into effect.

ODAA believes that Ch. 427 commitments should be used sparingly and only in cases of last resort, a situation reflected by the current number of individuals under this type of commitment order. We also believe alternatives to 427 commitments can and should be developed before repeal. We support efforts to build alternatives services and programs now so that a future repeal can be celebrated by all partners.

ODAA supports:

- Thoughtful and considerate approach to building an effective system before removing a critical safety net for dangerous individuals who cannot be prosecuted;
- Adequate and abundant services for those in IDD systems as well as Mental Health systems;
- Collaboration between the two systems so all needs are met;
- Include individuals who are experiencing intellectual and developmental disabilities within 426.701 commitments if other existing statutory provisions are satisfied;
- Increase funding for Public Guardian services;
- Increase capacity for private guardian services/reimbursement of private guardianship services;

- Mandatory appointment of guardians for individuals subject to Ch 427 and create automatic review of commitment after 180 days. If warranted, convert to conditional release or terminate commitment.

Conduct that places others or self at risk of serious harm cannot be ignored. Many participants in the work group have raised concerns that a very small population of individuals experiencing intellectual disabilities engage in behaviors that place the individuals or those around them in danger. This is the population that is subject to possible commitment under Chapter 427 and is the focus of the conversation. We appreciate your attentiveness to these concerns and look forward to working with you to develop a safety net that allows for repeal of Chapter 427 commitments.

We are including as an addendum a further compendium of authorities that we believe may be helpful in further consideration of this issue as we move forward. Thank you for your consideration.

ADDENDUM

Background and Clarification

Before addressing the specific issues raised in the work group by advocates for repeal, we feel it would be helpful to delineate the various systems at play. Throughout the work group meetings, we heard conflation of the criminal case process and the civil commitment case process. Outlined below are various systems that have been referenced in the work group.

Aid and Assist: In situations in which an individual is charged with a crime, if there are concerns that the defendant is unable to aid and assist in their own defense due to a qualifying mental health diagnosis, the defendant receives services to restore them to competency. Those services are available in the community or at the Oregon State Hospital. If a defendant is deemed never able to aid and assist in their own defense, perhaps due to an intellectual disability, the case must be dismissed. If the crime is of a serious nature (murder, forcible compulsion rape, assault causing serious physical injury), the state may be able to pursue a commitment under 427.701, but such cases are rare.

Guilty Except for Insanity: A GEI is a type of defense to a criminal charge. A defendant must be able to aid and assist in their own defense in order to move forward with a case, including pursuing a GEI defense. If a person is unable to aid and assist, they cannot pursue GEI until restored. In order to be found GEI, the evidence must show that as a result of a qualifying mental disorder *at the time of engaging in the criminal conduct*, the person lacks substantial capacity to either appreciate the criminality of the conduct or to conform the conduct to the requirements of the law. A defendant who is GEI is placed under the jurisdiction of the Psychiatric Security Review Board and placement is fact dependent.

Commitments: There are three types of civil commitments in Oregon, each serving a different population with different needs.

426 Commitments: The vast majority of civil commitments in Oregon are initiated under Chapter 426 when a person's mental health disorder makes them a danger to self or others or unable to meet their basic needs. The risk posed by the person's conduct must be acute and serious in order to meet the standards for a civil commitment. This commitment is up to 180 days. The person is placed under the jurisdiction of the Oregon Health Authority.

426.701 Commitments: This is the "extremely dangerous person" commitment. As outlined above, it requires a showing that the person engaged in extreme conduct (caused the death of another person, caused serious physical injury by means of a dangerous weapon or physical injury by means of a firearm, engaged in specific sex crimes, or engaged in or attempted specific arson crimes). The state must also prove that the person is exhibiting substantially similar behaviors as before the extreme conduct and the person, because of a qualifying mental disorder, presents a serious danger to the safety of others and unless committed, will continue to be an extreme safety risk to others in the foreseeable future. Individuals committed under 426.701 are under the jurisdiction of the PSRB and the commitment lasts for 24 months. Administrative rules make clear that individuals experiencing IDD are not eligible for commitment under 426.701 as it is not a qualifying mental disorder.

427 Commitments: These are the intellectual disability commitments. In these rare cases, the state must show, by clear and convincing evidence, that the person has an intellectual disability and because of intellectual disability, the person is either a danger to self or others, or is unable to provide for the personal needs of the person and is not receiving care as necessary for the health, safety, or habilitation of the person. If the person can give informed consent and is willing and able to participate on a voluntary basis, even if the person otherwise meets criteria, the court must dismiss the case. The court can also order a commitment with conditional release to family, friend, or guardian. If the court determines that voluntary treatment or conditional release to family, friend, or guardian is not in the person's best interest, the court may commit the person to the Department of Human Services for up to one year for care, treatment or training. Treatment, as defined by ORS 427.005, means "provision of specific physical, mental, social interventions and therapies that halt, control or reverse processes that cause, aggravate or complicate malfunctions or dysfunctions."

Intersection of Systems:

With the exception of 426.701 commitments, in many cases, a person placed on a precommitment hold or a person who has been civilly committed has no criminal case associated with the conduct which led to their commitment. As commitments exist as a separate and distinct system from the aid and assist system or a determination of "guilty except for insanity (GEI)," even when a criminal case has been initiated, it has no bearing on the civil commitment process. The systems do not communicate or coordinate their efforts.

As you and several members of the work group pointed out, a person experiencing IDD is experiencing "a natural and positive part of the human condition" and "is not an illness or disease." We agree that an intellectual disability is an inherent characteristic of an individual and should not be viewed as a negative trait. We also believe persons experiencing intellectual disabilities should have inherent dignity, ability to make choices, and full opportunities for participation and inclusion in society. In some situations, a person experiencing an intellectual disability may make a choice that harms themselves or others or deny assistance in a manner that places their lives at risk. We believe that when this occurs, our community has an obligation to respond appropriately.

In many instances, a criminal justice response is not available. In many criminal cases brought against persons with intellectual disabilities, the court will dismiss the criminal case because the defendant will never be able to be aid and assist in their own defense due to their intellectual disability. If the state cannot proceed, there is no justice for the victim and the community is denied a measure of safety and rehabilitation through offender accountability. These is true no matter how serious the charges might be.

In a 427 civil commitment, the state must show at least one of three things: the person is a danger to themselves; the person is a danger to others; or the person is unable to meet their own needs and the person is not currently receiving the necessary care for their health, safety, or habilitation. As with a 426 commitment, this danger or showing of necessity must be imminent and the risk must be significant and concrete. If the person can consent, the commitment is dismissed, and if there is a guardian or friend or family able to assist, the case is

dismissed or set for conditional release. Again, the 427 commitments are only used in extreme cases when the state can show an immediate and concrete need for intervention to keep the person or others from grave harm.

A person experiencing an intellectual disability who engages in conduct that harms others is unlikely to remain in the criminal justice system due to the effect of their disability on their ability to aid and assist in their defense. They are not eligible for commitment under 426.701, even for the most serious behaviors. That leaves only two options for increasing safety for people who have an intellectual disability and who engage in behaviors that place themselves and others at risk: Commitment under Chapter 426 and Commitment under Chapter 427.

Justifications for Repeal:

Advocates for repeal propose three main reasons why Chapter 427 commitments must be repealed: 1) individuals could be committed under Chapter 426 if there is a co-occurring mental health disorder; 2) guardianship is already an effective tool to meet the needs of those experiencing IDD; and 3) it puts federal Medicaid dollars at risk. Additional concerns were identified, including arguments that IDD is an intrinsic characteristic of a person, treatment is ineffective, or that a committed person's civil liberties are being infringed. We believe that current statutes address these concerns. While it is not our intent to diminish them, for space reasons we have chosen to concentrate our feedback to the other justifications:

Commitment Under 426 for Those with Co-occurring IDD and Mental Health Disorder

You and other members of the work group have argued that individuals experiencing both IDD and a qualifying mental health disorder qualify for commitment under Chapter 426 commitments. In the work group, we learned that the overwhelming majority of individuals in a 427 commitment also have a co-occurring mental health disorder. Currently, the two chapters require a nexus between the condition or disorder and the behavior in order to proceed with the commitment. Allowing commitment of IDD individuals with co-occurring mental health disorders may be an option in some cases and could become more accessible with modifications in the controlling statutes. However, even if all individuals with co-occurring mental health disorders and intellectual disabilities were able to be committed under Ch 426, the services and treatments available to the individuals would not be appropriate.

In Oregon's civil commitment structure, the condition that drives the behavior also dictates which chapter the person can be committed under. As seen in ORS 426.005(f), a "person with a mental illness" is a person who because of a mental disorder, is a danger to self, a danger to others, or unable to meet their basic needs. In 427.290, as updated by House Bill 3234 (2021, C.339, Section 5), a judge must only find that the person has an intellectual disability and is in need of commitment for residential care, treatment and training. 427.215 provides that for a person to be considered a person with an intellectual disability for the purposes of Ch 427 commitment, they must be a person who meets the statutory definition and be a danger to self or others or unable to provide for their basic needs and not receiving care. The nexus between the behavior and the intellectual disability was removed by House Bill 3234.

A brief chart below highlight a few of the differences between the two systems.

	426	427
Nexus	Danger to self, others, or unable to meet basic needs because of a mental disorder.	No nexus to dangerousness or unable to provide for basic needs due to intellectual disability.
Treatment	426.072(2)(a): The person shall receive the care, custody and treatment required for mental and physical health and safety.	427.005 (17): the provision of specific physical, mental, social interventions and therapies that halt, control or reverse processes that cause, aggravate or complicate malfunctions or dysfunctions.
Facility	...state mental hospital, community hospital, residential facility, detoxification facility, or such other facility as the authority determines suitable that provides diagnosis and evaluation, medical care, detoxification, social services or rehabilitation.	...a group home, activity center, community mental health clinic or other facility or program that the Department of Human Services approves to provide necessary services to persons with intellectual disabilities or other developmental disabilities.
Commitment to	Oregon Health Authority	Department of Human Services

SB 1522 itself contemplates that these are very different domains and should not intersect. Section 17(3) inserts language into Chapter 426 commitments that specifically exclude individuals with IDD from the purview of Chapter 426, “A person with mental illness may be a person with a mental illness who also has an intellectual or developmental disability, but an intellectual or developmental disability is not a mental disorder...”

As such, the driver of the behavior or conduct is critical in a 426 civil commitment hearing and the person’s status as a person with an intellectual disability is critical in a 427 civil commitment hearing. In situations in which a person has multiple diagnoses, the nexus between the behavior and the underlying disorder must be clearly established on the record. For example, in a Chapter 426 commitment of a person who is engaged in delusional behaviors, a medical practitioner must conclude that the conduct associated with the delusion stems from a mental health disorder and not from some other reason, such as the use of drugs. If a medical provider is unable to make that distinction, the state cannot show that the mental health disorder is the reason the person is a danger to self or others or unable to meet their basic needs.

Furthermore, recent case law (*Matter of ABK*, 323 Or App 246 (2022)) makes clear that “developmental disorders” are not considered mental disorders for the purposes of commitment under Chapter 426. In that case, an individual with autism was committed under Chapter 426 and the State argued it was appropriate given that autism spectrum disorder is categorized as a mental disorder in the DSM-5. The Court found that, because autism is included as a developmental disorder in Chapter 427, and a separate framework exists for 427 commitments, the Legislature intended to omit developmental disorders from Chapter 426 commitments. That leaves only Chapter 427 commitments when the sole diagnosis is considered a developmental disorder. Chapter 426 is not available.

Even with a single umbrella for commitment of individuals with co-occurring disorders, the care and treatment provided in the two systems is not the same and providing the same services to individuals experiencing primarily IDD as those experiencing a mental health disorder would be inappropriate.

Providing the correct IDD related supports and services to a person experiencing intellectual disability while in a mental health commitment, while also receiving mental health services, is incredibly important. If the services are not appropriately tailored to the need of the person, they will not be successful. As we heard from multiple providers in the January 4th meeting, the State and providers are not denying services to those who need mental help services; but instead the person doesn’t qualify for mental health services because that is not what the person needs. Placing a person whose primary needs are in the IDD services into a domain providing mental health services would be ineffective to meet both the needs of the individual and the needs of the community that would be met within a 427 commitment.

Guardianship

Various members of the workgroup touted guardianship as a solution to the thorny problems posed here. We agree that a robust and well-funded guardianship system could provide a guardian with the authority necessary to provide the safety net for the individual and those around them. This idea is bolstered by the language in ORS 427.290(2), which provides the court with the option to conditionally release a committed person to a legal guardian and in 427.290(4) that if the person is incapacitated, the court could appoint a legal guardian separate from the commitment.

We support efforts to increase the capacity of our Office of the Public Guardian and Conservator. But as our Public Guardian noted at our last meeting, even if guardians were available to provide guardianship services to all of those in need, the mental health, housing, and support services necessary for success are not present. A guardian can only exert authority on services that exist. Without a well-funded and robust collaboration of mental health and IDD services in this arena, an increase in the number of guardians will be fruitless.

Medicaid Funding

Several times in the previous session and in this workgroup, we heard that our state is in jeopardy of losing Medicaid funding because we are out of compliance with CMS rules regarding voluntary placement in facilities. To our understanding, CMS has rules for facility

funding and reimbursement that require all services provided under the IDD system (ODDS) to be voluntary. Involuntary measures would make the state out of compliance.

In communication with DHS regarding this issue, we learned that this is a speculative risk. There is no imminent risk of an audit of voluntary or involuntary services. Further, DHS reviewed their data and as of November 1, 2023, of the 19 individuals under a 427 commitment in Oregon, 16 of them were in a SACU, a Stabilization and Crisis Unit. According to DHS, of these 16 individuals in SACUs, all 16 were voluntarily placed pre-commitment and there is no causation between the commitment and placement.

In sum, there appears to be no risk of an immediate deprivation of Medicaid funding and this argument should not be advanced as a justification for rushing the deliberative process.