



TO: Oregon Board of Parole and Post-Prison Supervision

FR: Michael Wu
Executive Director
Oregon District Attorneys Association

RE: ODAA Comments on Draft Rules for AICs when offense was committed as a juvenile.

November 24, 2021

Thank you for the opportunity to offer comment on these important rules. ODAA has focused our comments on victims' rights and an offender's risk to the victim and the community. Victims must have a clear and transparent expectation of what their rights will be at these hearings. The Board's rules should also remedy the lack of legislatively enacted release factors that address the offender's risk to the victim, family members and the community.

ODAA recognizes that ORS 144.397's language makes it difficult for the Board to adopt rules that would include release factors for the proportionality of the offender's sentence to the harm caused or the facts and circumstances of the crime of commitment and that this deficiency is not limited to only these hearings.¹ Recognizing that the Board's authority to adopt rules can be no greater than what ORS 144.397 grants, we are accordingly focusing our recommendations to the rules as outlined below:

Victim Rights at Hearings

While the proposed draft of the administrative rules does incorporate, by reference, other Board rules (OAR 255-030-0026 and 255-030-0027) that allow for victims to attend hearings ODAA recommends that the final rules make this commitment to victim input at these hearings more transparent and easier to find. The sequence of events that led to the Governor's commutation decisions being reported in the media prior to any victim being notified, casts significant doubt on this process' commitment to meaningful victim presence and input at these hearings. We acknowledge the Board's strong commitment to vindicating victim rights but we would, based on these circumstances, make the following redline recommendations:

¹ While statutory release criteria for murderers and dangerous offenders in Oregon do encompass the risk the offender still presents, the criteria does not include whether the sentence is proportional to the harm caused or the facts and circumstances of the crime of commitment.

ADOPT: 255-033-0040

RULE TITLE: Hearing Protocols

RULE SUMMARY: Rules on how hearings are conducted. References Board Administrative Rule 255-030.

RULE TEXT:

(1) The Board shall send written notice of the hearing and its purpose to the AIC. The AIC shall receive a copy of the Board Review Packet, including the notice of rights (Exhibit NOR-4JC), at least 14 days prior to the hearing.

(2) Manner of Hearing

(a) **Victims' rights:** Victims shall have the right to attend the hearing in person and have their attorney present pursuant to OAR 255-030-0026. Victims shall also have the right to address the Board, in addition to any statement their counsel may make on their behalf, pursuant to OAR 255-030-0026 and OAR 255-030-0027. Victims shall have the right to submit written statements and supporting documents and rebut any material in the Board Review Packet pursuant to OAR 255-030-0026, OAR 255-030-0027, and OAR 255-030-0040. Victims shall have the right to have access to all materials that the Board will rely upon at the hearing pursuant to ORS 144.750. Nothing in this OAR is to be construed as limiting any other right a victim would have at this hearing under the United State and Oregon Constitutions, any Oregon Statute or any Oregon Administrative Rule.

(b) Prosecutors shall have all applicable rights pursuant to ORS 144.740, ORS 144.750, Oregon Administrative Rule 255, Division 30, Subsections 21, 23, 25, 26, 27, 32, 40 and 46. Nothing in this OAR is to be construed as limiting any other right a prosecutor would have at this hearing under the United State and Oregon Constitutions, any Oregon Statute or any Oregon Administrative Rule.

(c) The proceedings shall be governed by the hearings procedures outlined in Oregon Administrative Rule 255, Division 30, Subsections 21, 23, 25, 26, 27, 32, 40, and 46.

Factors Determining Release of Offender

ODAA appreciates that the draft Board rules address ORS 144.397's lack of legislatively created release factors regarding the risk the offender may still present to the victim and the community. Of the 7 legislative criteria for releasing an offender none explicitly address the risk the offender may still present to the safety of the victim, the family of the victim or the community. A significant number of the factors, should and must, focus on the offender and their progress towards rehabilitation, however the lack of any specific risk factors focused on the safety of the victim, the victim's family and the community is troubling. Especially since ORS 420A.203, the statute governing juvenile second look hearings by the court, does specifically include risk to the victim and the community as criteria for release. We support the Board's inclusion of factors such as the offender's institutional discipline, assessments for risk of re-offending, and whether the offender understands, addresses or mitigates the risk factors that led them to commit their crime.

We understand that the legislative framework created by ORS 144.397 limits the Board's latitude because of its focus on the offender. However, we would make the following

recommendations based on ORS 420A.203 (Second Look Statute) to explicitly include the risk the offender presents to the victim, the victim's family and the community²:

ADOPT: 255-033-0030

RULE TITLE: Hearing Considerations

RULE SUMMARY: This rule shows the factors the Board will consider when making a determination for release at a hearing under this division.

RULE TEXT:

(1) The hearing shall provide the person a meaningful opportunity to be released on parole or post-prison supervision.

(2) The Board may require the person, before holding a hearing described in this Division, to be examined by a psychiatrist or psychologist with expertise in adolescent development. Within 60 days of the evaluation, the examining psychiatrist or psychologist shall file a written report of the findings and conclusions of the examination with the Board. A certified copy of the report shall be included in a Board Review Packet. This packet need not include all documents in the AIC's file but shall contain information relevant to the purpose of the hearing and shall be provided to the person and the person's attorney.

(3) During a hearing under this section, the Board shall consider and give substantial weight to the fact that a person under 18 years of age is incapable of the same reasoning and impulse control as an adult and the diminished culpability of minors as compared to that of adults. The Board shall also consider the following circumstances, if relevant to the specific person and offense:

(a) the age and immaturity of the person at the time of the offense;

(b) whether and to what extent an adult was involved in the offense;

(c) the person's family and community circumstances at the time of the offense, including any history of abuse, trauma, and involvement in the juvenile dependency system;

(d) the person's subsequent emotional growth and increased maturity during the person's imprisonment;

(e) the person's participation in rehabilitative and educational programs while in custody if such programs have been made available to the person and use of self-study for self-improvement;

(f) a mental health diagnosis; and

(g) any other mitigating factors or circumstances presented by the person.

(4) Under no circumstances may the Board consider the age of the person as an aggravating factor.

² ORS 144.397 requires the Board to "give substantial weight to the fact that a person under 18 years of age is incapable of the same reasoning and impulse control as an adult and the diminished culpability of minors as compared to that of adults." ORS 144.397 also requires the Board to release offender if "based on the consideration of the age and immaturity of the person at the time of the offense and the person's behavior thereafter, the person has demonstrated maturity and rehabilitation"

(5) Other factors the Board may consider in determining maturity and rehabilitation include:

- (a) the person's involvement in correctional treatment, medical care, educational, vocational, or other training in the institution which will substantially enhance the person's capacity to lead a law-abiding life when released;
- (b) the person's institutional employment history;
- (c) the person's institutional disciplinary conduct;
- (d) the adequacy of the person's release plan including community support from family, friends, treatment providers, and others in the community; type of residence, neighborhood, or community in which the person plans to live;
- (e) the person's ability to demonstrate remorse and understanding of the impact the person's crime had on the victims and the community;
- (f) the person's attitude and evidence of behavioral change;
- (g) the extent the person takes personal responsibility for their actions;
- (h) any psychiatrist or psychologist's assessment of the person's current risk of re-offending, risk of harm, and suitability for community supervision;
- (i) the person understands long-term consequences;
- (j) the person can delay impulses and identify alternative actions;
- (k) the degree of premeditation or deviancy involved in the commission of the crime and the ability to understand, address, and mitigate those underlying risk factors; and
- (l) the person, if paroled, would not be a threat to the safety of the victim, the victim's family or the community;
- (m) the likelihood that the person, if paroled, would comply with release conditions;
- (n) any other relevant factors.