

DEPARTMENT OF STATE HOSPITALS

Supplement to the Initial Statement of Reasons

ADOPTION OF PROPOSED REGULATIONS FOR THE SEXUALLY VIOLENT PREDATOR STANDARDIZED ASSESSMENT PROTOCOL

California Code of Regulations
Title 9. Rehabilitative and Developmental Services
Division 1. Department of Mental Health
Chapter 15. Assessment of Sexually Violent Predators

The Department of State Hospitals (Department) proposes to adopt new sections 4011, 4012, 4013, 4014, and 4015.

I. GENERAL

A. Background

On November 28, 2017, the Department of State Hospitals (DSH) submitted the Initial Statement of Reasons (ISOR) for the rulemaking action entitled “Public Hearing to Consider Adoption of the Proposed Regulations for the Sexually Violent Predator Standardized Assessment Protocol,” to the Office of Administrative Law (OAL) for its review and approval.

In the course of its review, OAL noted that several non-substantial modifications were required to correct in the ISOR to improve readability of sentences, and correct grammar and punctuation. Those modifications are described below.

B. Modifications to Initial Statement of Reasons

The following modifications were made to sections 4011, 4012, 4013, 4014, and 4015 of the Initial Statement of Reasons. The changes are shown in single underline to indicate additions and ~~single strikeout~~ to indicate deletions from the originally submitted ISOR.

PROBLEM STATEMENT

The Sexually Violent Predator Act (SVPA), codified in Welfare and Institutions Code sections 6600 et seq., provides how an individual may be committed to the Department as a Sexually Violent Predator (SVP). The statute SVPA also provides the steps of procedure for the referral and evaluation that needs to occur of individuals. Specifically, the Department is to complete an evaluation of each individual in accordance with a standardized assessment protocol (protocol). ~~This protocol is, to be developed and updated by the Department.~~

ANTICIPATED BENEFITS

One benefit of the regulations will be to ensure that the due process in place for the determination, commitment, and treatment of SVPs, as laid out in the ~~Sexually Violent Predator Act (SVPA)~~, is clear, detailed, unambiguous, and transparent, thereby ensuring that the rights of those implicated by the SVPA are upheld and that the public health, safety, and welfare of California residents are protected. The Department anticipates that making the SVPA more specific will increase efficiency in the State and county governments, reduce time and costs, and streamline the working relationships among DSH, district attorneys, defense counsel, the courts, and evaluators.

Section 4011. Evaluation Overview.

Purpose: To provide an overview of the evaluation process; ~~and provide definitions. This regulation will also;~~ and provide the criteria for each evaluator to be used for ~~consider in conducting an~~ the evaluations, when an evaluator is evaluating of an individual.

Necessity: The overview is necessary to provide a clear scope of the evaluation process. Providing the definitions of terms is also necessary to give clarity to the language used in SVP evaluations, ensuring that interested parties are on the same page. Further, laying out the information that each criterion seeks gives ~~This provides the definition of the evaluator and provides clarity to an evaluator and other interested parties on of the criterion that needs to be met~~ which findings must be made for an individual to be determined a ~~S~~ sexually V ~~iolent P~~ redator. The proposed text mirrors the language in Welfare and Institutions Code section 6600, but it is necessary to do so to provide uniformity and clarity on the precise information required for an individual to be found a Sexually Violent Predator.

Section 4012. Record Review.

Purpose: To ~~provide~~ require a standard list of records for an evaluator to review and to provide a requirement for an evaluator to review the listed records as a part of the evaluation.

Necessity: This proposed regulation is necessary ~~because it helps to~~ ensure that the an ~~evaluators, as mandated, uses their~~ his or her due diligence in obtaining and reviewing all necessary and available records that are available ~~to them, in order to~~ conduct a ~~and~~ clinically-sound evaluation. Further, it is necessary to identify a minimum list of documents to review for clinical soundness and also give an evaluator the professional discretion ~~The proposed regulations guide evaluators as to which records to consider without providing any specified limits on the to review of any additional information, at their professional discretion as he or she finds appropriate. This ensures that an evaluator has enough information on an individual to review, resulting in a~~ The more information an evaluator has to inform them about the individual, the more accurate and complete the evaluation will be.

Section 4013, Interview, subdivision (a).

Purpose: To provide ~~the steps in making for~~ any necessary communication accommodations for the interview of the referred individual to participate in an interview by an evaluator.

Necessity: ~~‡ This proposed regulation is necessary to ensure that the~~instruct an evaluators on the particular way to provide an individual with communication accommodations, which is are aware of how to obtain the information needed from the California Department of Corrections and Rehabilitation (CDCR) the Disability Effectiveness Communication Statement (DECS). The DECS specifically is required because it contains a summary of an individual's communication issues, if any, throughout his or her stay with CDCR. Further, this proposed regulation also provides for when the DECS may be unavailable, mandating an evaluator to then test and to assess the individual's ability to comprehend, communicate, and participate meaningfully in the evaluation. These is proposed requirements are a check necessary to ensures that the evaluators ass the individual's ability to communicate and provide the proper and necessary accommodations are arranged for an individual to be interviewed or needs for the interview process, including any language translation services.

Section 4013, Interview, subdivision (b).

Purpose: To provide the standard that the evaluators make reasonable attempts for a face-to-face interview and discuss the nature of the evaluation process.

Necessity: This proposed regulation is necessary to ensure that an evaluator can conduct the most comprehensive and complete clinical evaluation possible, which includes a face-to-face interview for which there is no substitute. Further, during a face-to-face interview, an evaluator may then also the evaluators attempt to conduct a face-to-face interview. This regulation also ensures that the evaluators make reasonable attempts to obtain informed consent from the individual; and explain their mandated reporting requirements and limits of confidentiality; as well as ensure that the communicate to the individual that the evaluation is completed in a non-biased and neutral manner. It also requires The proposed requirement for the evaluator to document interview refusals is necessary to keep a detailed and complete record on each individual evaluated.

Section 4014, Forensic Report. subdivision (a).

Purpose: To lay out a The proposed regulation provides specific section in the evaluation report for the individual's identifying information to be a part of a report produced by the evaluation.

Necessity: ~~†~~This proposed regulation is necessary to ensure that the evaluation reports produced by the evaluations and submitted to the courts pursuant to the Sexually Violent Predator Act, contain the same, uniform set of identifying information for all each individuals who have been evaluated. This is to ensure that each individual is the person in fact intended to be evaluated under the SVPA. Further, a section in the report on identifying information provides a snapshot on each individual, making the reports more reader-friendly and digestible for courts, attorneys, and other interested parties.

Section 4014, Forensic Report, subdivision (b).

Purpose: ~~To lay out a specific section in the evaluation report on~~ The proposed regulation provides for the evaluation report to provide documentation of the proper notification of the individual and the evaluator's attempts to obtain informed consent.

Necessity: ~~†~~This proposed regulation is necessary for clarity and transparency, to uniformly document and disclose ensure that the reports produced by the evaluators are uniform and that whether an evaluator gave the proper notifications to the individual, and how an evaluator attempted to obtain informed consent, and what kind of accommodations were provided to an individual. of the interviews are provided to the individuals. Also, the proposed regulation specifies evaluators must indicate how it was determined if effective communication was made, and if any modifications or accommodations were needed. This ensures that an individual's rights are secured and upholds his or her autonomy in making decisions.

Section 4014, Forensic Report, subdivision (c).

Purpose: ~~To lay out a specific section in the evaluation report~~ The proposed regulation provides for the evaluator to on document the documents on which an evaluator relied upon to complete the report.

Necessity: This proposed regulation is necessary to ensure that an evaluator complies with the mandate of proposed section 4012. Providing a specific section for this information ensures clarity and transparency, detailing precisely which records an evaluator reviewed in conducting the evaluation, which allows for courts, attorneys, and other interested parties ~~It is necessary to ensure that the reports produced by the evaluations and submitted to the courts pursuant to the Sexually Violent Predator Act, contain citations of the documents relied upon. This allows both parties the readers to the action to be aware of what know exactly which documents the evaluators relied upon to in come to their reaching his or her conclusions. Moreover, this transparency and disclosure are necessary to clearly identify and, if appropriate, question any relied-upon record in an evidentiary assessment of the evaluation for court purposes.~~

Section 4014, Forensic Report, subdivision (d).

Purpose: ~~To lay out a specific section in the evaluation report~~ The purpose is to have the evaluators document on the evaluation procedures an evaluator used, including any risk instruments utilized for the evaluation.

Necessity: This proposed regulation is necessary to ensure clarity and transparency in the evaluation methodology that an evaluator takes in conducting his or her evaluation of an individual, which allows for courts, attorneys, and other interested parties to know exactly how an evaluator conducted the evaluation. that the reports produced by the evaluations and submitted to the courts pursuant to the Sexually Violent Predator Act contain the methodology and procedures used by the evaluator to complete the evaluation. Moreover, transparency and disclosure are necessary for readers to understand what instruments and examinations were utilized to support an evaluator's conclusion and to clearly identify and, if appropriate, question the methodology used in an evidentiary assessment of the evaluation for court purposes.

Section 4014, Forensic Report, subdivision (e)(1).

Purpose: ~~To lay out a specific section in the evaluation report on~~ The proposed regulation requires that the evaluator's provide the findings onf Criterion A of the SVPA. The proposed regulation further clarifies the statute by providing To define terms used in the SVPA: definitions for "force," "violence," "menace," "fear," "duress," and "threats to retaliate."

Necessity: This proposed regulation is necessary to clearly identify an evaluator's conclusion as to Criterion A. Further, require that the evaluators provide the finding of Criterion A. This also requires that the evaluators the proposed mandate to list all offenses including the qualifying offenses, and to make sure to including any juvenile offenses, ensures transparency and accountability, clearly showing how the elements of each qualifying crime The evaluator is to identify the presence of the specified sexually-violent elements for all cases meeting meets Ppenal Ccode requirements for each qualifying victim. The definitions of the terms are necessary to ensure that the understanding of each evaluator is the same with regard to how to qualify crimes under the SVPA. With this same understanding comes equal treatment of each individual evaluated. This proposed regulation is necessary to hold an evaluator accountable to his or her analysis of the individual. The proposed regulation also provides guidance on how to evaluate offenses and how an offense may fit into the criteria.

Section 4014, Forensic Report, subdivision (e)(2).

Purpose: ~~To lay out a specific section in the evaluation report on~~ The proposed regulation requires that the evaluator's provide the findings onf Criterion B. relating to the diagnosed mental disorder. The proposed regulation further clarifies the statute by defining To define terms used in the SVPA: "emotional capacity" and "volitional capacity."

Necessity: ~~This proposed regulation is necessary to clearly identify an evaluator's conclusion as to require that the evaluators provide the finding of Criterion B. The proposed mandate regulation provides direction of the analysis of the diagnosed mental disorder. It requires evaluators to describe the facts of the qualifying offenses or convictions and; to indicate the specified sexually violent elements. The regulations require evaluators; to include any diagnostic tools and literature used. Also, this regulation provides direction; to explain the nexus between the diagnosed mental disorder and the individual's emotional and or volitional capacity. The proposed regulation provides guidance of what factors the evaluator should consider to reach their conclusion for Criterion B. is necessary to be transparent as to the information an evaluator uses in conducting the evaluation. The definitions of "emotional capacity" and "volitional capacity" are necessary to ensure that the understanding of each evaluator is the same with regard to how to evaluate the extent to which an individual's diagnosed mental disorder affects his or her decision-making or grasp of his environment. With this same understanding comes equal treatment of each individual evaluated. This proposed regulation is necessary to hold an evaluator accountable to his or her analysis of the individual.~~

Section 4014, Forensic Report, subdivision (e)(3).

Purpose: ~~To lay out a specific section in the evaluation report on The proposed regulation requires that the evaluator's provide the findings onf Criterion C, and provide guidance of how to analyze Criterion C. The proposed regulation. To further clarifies the statute and further defines the SVPA term "likely." and provides guidance to the factors to consider in making this assessment.~~

Necessity: ~~This proposed regulation is necessary to clearly identify an evaluator's conclusion as to require that the evaluators provide the finding of Criterion C. and provide the overall summary of the evaluation. The proposed regulation provides guidance of what to consider and provides clarification on the terms for Criterion C. The Sexually Violent Predator Act does not. Because the SVPA does not prescribe a range of time, this proposed regulation is necessary to specify the a limited timeframe in which for the evaluator shall to consider the when assessing whether an individuals is "likely" likelihood of engaging in sexually violent criminal behavior and the proposed regulation makes it clear that this is the case. The proposed mandate for an evaluator is to use their professional judgment to determine whether an individual's seeking desire for community supervision and treatment in the community is meaningful, sincere, and sufficiently addresses the individual's risk is necessary to show the balancing of interests between the individual and the community to which he or she may be released, ensuring a comprehensive evaluation.~~

Section 4014, Forensic Report, subdivision (f).

Purpose: ~~To lay out a specific section in the evaluation report The proposed regulation ensures that the evaluators provide a clear on the evaluator's conclusion in the report and provide a summary of the entire evaluation.~~

Necessity: ~~It~~ Since the SVPA requires that an evaluator reach a conclusion about the individual he or she evaluates, this proposed regulation is necessary to clearly state the evaluator's final conclusion as to whether an individual meets the Sexually Violent Predator criteria pursuant to the SVPA. ~~be able to ensure that the reports produced by the evaluations and submitted to the courts pursuant to the Sexually Violent Predator Act contain uniform information including a conclusion and a summary of the conclusion. This ensures that the evaluator provides a conclusion to the courts, and parties to the action.~~

Section 4015: Special Considerations.

Purpose: ~~To provide direction when there has been in a case where an individual that who has previously been evaluated previously, and found by the court not to not be meet criteria as a Sexually Violent Predator by the court.~~

Necessity: ~~Provides~~ This proposed regulation is necessary to provide clarity to what an evaluator may do when they encounter a situation where an the individual to be evaluated has been previously found to by the court not to be a Sexually Violent Predator by the court. It is necessary to provide for this circumstance because, as case law has discussed and this proposed section, subsection (2) addresses, there are times when facts may sufficiently change and thus require a subsequent review – and in these cases, it specifies the conditions in which the an evaluator may still provide an opinion, after evaluation, that the individual is meets criteria as a Ssexually Vviolent Ppredator. This Further, also provides clarification as it is necessary for the evaluator to provide the context of to how to explain theirthe current evaluation in relation relates to the previous court finding and how the evaluator is to provide an explanation as to why the new evaluation is sufficiently different to ensure that each individual evaluated is treated fairly, previous court finding notwithstanding, with regard to the facts and circumstances in his or her case. This proposed regulation is necessary to ensure that an evaluator's report is as comprehensive and complete as possible.

TECHNICAL, THEORETICAL OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The Department relied on the following:

Association for the Treatment of Sexual Abusers (ATSA)

- *Civil Commitment of Sexually Violent Persons*
 - o <http://www.atsa.com/civil-commitment-sexually-violent-predators> (accessed 11/14/2017)
- *Practice Guidelines for the Assessment, Treatment, and Management of Male Adult Sexual Abusers*, 2014, pages 11-29.
- *Risk Assessment*
 - o <http://www.atsa.com/risk-assessment> (accessed 11/14/2017)

ECONOMIC IMPACT ASSESSMENT / ANALYSIS

DSH does not anticipate any non-discretionary costs or savings imposed on any local agency, as a result of the proposed regulations, during the current fiscal year and the two subsequent fiscal years.

DSH does not anticipate any additional costs to the Department or any other state agency.

Creation or elimination of jobs within the State of California

These regulations are designed to make uniform the evaluations process of Sexually Violent Predators. This evaluation process is currently being managed by DSH evaluators who are existing State staff or State contractors, and these proposed regulations only enhance and clarify their job duties. As such, these proposed regulations affect only State positions already existing. Because Sexually Violent Predator evaluations are conducted only by State staff or State contractors and DSH does not anticipate creating or eliminating any DSH positions, the Department does not anticipate that there will be any creation or elimination of jobs within the State of California.

Creation of new businesses or the elimination of existing businesses within the State of California

These regulations are designed to make uniform the evaluation process of Sexually Violent Predators. This evaluation process is currently being managed by DSH evaluators who are existing State staff or State contractors, and these proposed regulations only enhance and clarify their job duties. As such, these proposed regulations affect only State positions already existing. While these proposed regulations implicate the private businesses of psychiatrists or psychologists who are existing or potential DSH contractors, DSH monitors these evaluations and assigns evaluators on a case-by-case, rotating basis. Consequently, because there will be no change to the appointment process as a result of these proposed regulations, the Department does not anticipate that there will be any creation of new businesses or elimination of existing businesses within the State of California.

Expansion of businesses currently doing business with the State of California

These regulations are designed to make uniform the evaluation process of Sexually Violent Predators. This evaluation process is currently being managed by DSH evaluators who are existing State staff or State contractors, and these proposed regulations only enhance and clarify their job duties. As such, these proposed regulations affect only State positions already existing. Because Sexually Violent Predator evaluations are conducted only by State staff or State contractors, the Department does not anticipate that there will be any expansion of businesses currently doing business with the State of California.

Benefits of the regulations to the health and welfare of California residents, worker safety, and the State of California's environment

These proposed regulations may benefit the health and welfare of California residents by ensuring that potential Sexually Violent Predators are evaluated equally, fairly, and

uniformly, resulting in the potential civil commitment of only those patients who meet the Sexually Violent Predator statutory criteria, treating and rehabilitating Sexually Violent Predators who are suitable and appropriate for treatment, and keeping the public safe from potentially dangerous Sexually Violent Predators – in congruence with the spirit of the Sexually Violent Predator Act, which is to keep the public safe and to provide treatment to Sexually Violent Predators who will benefit from it. These proposed regulations may also benefit worker safety by ensuring that only those patients who meet the Sexually Violent Predator criteria, as evaluated using these proposed regulations, are treated by hospital staff, resulting in appropriate treatment and workload. Lastly, these proposed regulations may benefit the State’s environment by streamlining the evaluation process, reducing carbon footprint, waste, use of resources, and energy costs.

EVIDENCE SUPPORTING FINDINGS OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

Although these proposed regulations implicate the businesses of psychiatrists or psychologists who are existing or potential State contractors, the impact on these businesses is minimal, if any. Each potential Sexually Violent Predator is evaluated by an appointed evaluator. DSH monitors these evaluations and assigns evaluators on a case-by-case, rotating basis, thereby eliminating the risk of these businesses competing with each other in the market. These proposed regulations do not change the rotating appointment process but only clarifies the duties of the evaluators regarding Sexually Violent Predator criteria and the evaluation process itself.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY’S REASONS FOR REJECTING THOSE ALTERNATIVES

The Department believes that there are no reasonable alternatives to the proposed regulations which would be more effective and less burdensome to affected private persons or equally effective in implementing the provision of law.

DUPLICATION OR CONFLICT WITH FEDERAL REGULATIONS OR STATUTES

The Department expects no duplication or conflict with federal regulations to occur.