

State of California
DEPARTMENT OF STATE HOSPITALS

**Final Statement of Reasons for Rulemaking,
Including Summary of Comments and Department Responses**

**THE PROPOSED ADOPTION TO THE
ALIENIST GUIDELINE REGULATIONS**

I. GENERAL

A. ACTION TAKEN DURING THIS RULEMAKING

The Department of State Hospitals (DSH) released the Initial Statement of Reasons for Rulemaking (ISOR) for the proposed adoption of the Alienist Guideline Regulations on January 18, 2019. The ISOR contains a description of the rationale for the proposed adoption of title 9, sections 4750, 4751, and 4752 of the California Code of Regulations (CCR). All documents associated with this rulemaking were made available to the public and continue to be available on the DSH Internet Website at: <http://www.dsh.ca.gov/Publications/Regulations.aspx>.

The 45-day comment period to consider the proposed rulemaking for the Alienist Guideline regulations closed on March 4, 2019. After the closing of the 45-day comment period, DSH considered all timely and relevant comments received.

The Notice, published on January 18, 2019, explained that no public hearing was scheduled, but instructions on how to request a hearing were provided. There were no requests for a public hearing as outlined in the Notice.

**B. MANDATES AND FISCAL IMPACTS TO LOCAL GOVERNMENTS AND
SCHOOL DISTRICTS**

DSH has determined that this regulatory action will not result in a mandate to any local agency or school district, the costs of which are reimbursable by the State pursuant to part 7 (commencing with section 17500), division 4, title 2 of the Government Code.

C. CONSIDERATION OF ALTERNATIVES

DSH has determined there are no reasonable alternatives considered by the Department that would be more effective in carrying out the purpose for which the regulatory action was proposed or would be as effective and less burdensome to affected private persons or would be more cost-effective to

affected private persons and equally effective in implementing the statutory policy or other provisions of law.

No alternatives were proposed to DSH that would lessen any adverse economic impact on small business.

II. MODIFICATIONS MADE TO THE ORIGINAL PROPOSAL

No modifications were made to the original proposal.

A. NON-SUBSTANTIAL MODIFICATIONS

Any modification correcting grammar and changes in numbering and formatting was made to improve clarity. These modifications are non-substantive changes made to the regulatory text for clarity and to more accurately reflect the numbering of sections, correct spelling, and correct grammar, but they do not materially alter the requirements, conditions, rights, or responsibilities in the originally proposed text.

Modifications made to the originally proposed text are indicated as follows: The added text is in underline and deleted text is in ~~strikeout~~.

DSH amended section 4750 to:

- **Text:** ~~These~~ This regulations ~~are~~ is established pursuant to Penal Code section 1369, subdivision (h), to create ~~standards~~ guidelines for education and training ~~that for the courts shall to~~ consider in the appointment of a psychiatrists or licensed psychologists ~~who are~~ to provide forensic evaluations in cases where a question has been raised, under Penal Code sections 1370, 1370.01, or 1370.1, as to a defendant's competency to stand trial. ~~Upon consideration of these standards, if~~ the court is unable to locate a reasonably available expert who meets the ~~standards~~ guidelines or who has equivalent experience and skills, the court has discretion to appoint an expert who does not meet these ~~standards~~ guidelines.
- **Rationale:** These non-substantive changes are necessary to clarify and better reflect the language in AB 1962. Further, these changes make more uniform this proposed section as they are more consistent with the language used in the entire section.

DSH amended section 4751, subdivision (e) to:

- **Text:** "Psychiatrist" means an allopathic physician licensed by the Medical Board of California who has completed a Board-approved residency-training program in psychiatry or an osteopathic physician licensed by the

Osteopathic Medical Board of California ~~and~~ who has completed a Board-approved residency-training program in psychiatry.

- **Rationale:** This non-substantive change is necessary to clarify that the completion of a Board-approved residency-training program in psychiatry applies to the allopathic physician or the osteopathic physician.

DSH amended section 4752, subdivision (a) to:

- **Text:** The court shall appoint a psychiatrist or licensed psychologist to evaluate whether a criminal defendant is incompetent to stand trial. This evaluation shall include: the nature of a defendant's mental disorder; a defendant's ability or inability to understand the nature of the criminal proceedings or -to assist counsel in a rational manner in the conduct of a defense; and, if within the scope of his or her license, whether treatment with antipsychotic medication is medically appropriate and likely to restore the defendant to mental competence. In considering an appointment, the court shall appoint an expert who meets the provisions in subsection (1), (2), **or** (3) of this section **and** who meets the provision in subsection (4) of this section, or an expert with equivalent experience and skills.
- **Rationale:** This non-substantive change of removing a space before the word "to" is necessary for clarity and correct grammar.

DSH amended section 4752, subdivision (a)(2)(C) to:

- **Text:** -completion of a post-doctoral training in forensic psychology.
- **Rationale:** This non-substantive change of removing a space before the word "completion" is necessary for clarity and correct grammar.

DSH amended section 4752, subdivision (a)(3) to:

- **Text:** If a psychiatrist or psychologist who does not meet ~~the provision in~~ either subsection (1) or (2) above, the expert shall have training or experience consisting of:
- **Rationale:** This non-substantive change of removing "the provision in" is necessary for clarity and brevity.

DSH amended section 4752, subdivision (a)(3)(B) to:

- **Text:** Experience in drafting forensic reports submitted to a court. If a peer review panel composed of members who are experienced in the criminal justice system and familiar with the issues of competency and criminal responsibility ~~are~~ is available, the court may require a psychiatrist or

licensed psychologist to provide proof, prior to appointment, that three of a psychiatrist or licensed psychologist’s redacted reports have been reviewed by such a panel.

- **Rationale:** This non-substantive change from “are” to “is” is necessary for clarity and correct grammar.

DSH amended section 4752, subdivision (b)(1) to:

- **Text:** If, within a reasonable period of time, the court is unable to locate a reasonably available psychiatrist or licensed psychologist who meets these guidelines or who has equivalent experience and skills, the court shall have the discretion to appoint an expert who does not meet these guidelines.
- **Rationale:** This non-substantive change from “the” to “these” is necessary to make more uniform this proposed section as the phrase “these guidelines” is more consistent with the language used in the entire section.

DSH amended section 4752, subdivision (b)(2) to:

- **Text:** In cases wherein the court may benefit from an evaluation by an expert with a specialized area of expertise to ~~inform on the opinion of~~ evaluate competency, the court may appoint a specialized expert who does not meet these guidelines.
- **Rationale:** This non-substantive change of removing “inform on the opinion of” is necessary for clarity and brevity.

III. SUMMARY OF COMMENTS AND AGENCY RESPONSE

DSH received written comments during the 45-day comment period in response to the Notice published on January 18, 2019.

Listed below are the organizations and individuals that provided comments during the 45-day comment period:

No.	Commenter	Affiliation	Date received
1	Robin Lipetzky	California Public Defenders Association	February 22, 2019
	Robin Lipetzky	California Public Defenders Association (corrected)	February 25, 2019
2	L.D. Louis	Alameda County District Attorney	March 4, 2019

1. Commenter 1: Robin Lipetzky

Comment 1.1: Commenter states that DSH asserts in its Initial Statement of Reasons, “without any data, that these findings of competency at admission are the result of evaluations conducted by individuals who are not trained in ‘forensic psychiatry or psychology.’”

Response: DSH disagrees with the comment. The proposed regulation is a guideline rooted in best practices. DSH’s assertion is that the training and experience indicated in the proposed regulation would be best to minimize evaluation errors.

Comment 1.2: Commenter states that DSH does not know whether inaccurate evaluations are due to the evaluators' inadequate training, their "lack of board certification in forensics," or the time these individuals spend waiting to be admitted.

Response: DSH disagrees with the comment. The proposed regulation is a guideline rooted in best practices. Evaluations are more likely to be accurate when evaluators have more training and experience, as indicated in the proposed regulation.

Comment 1.3: Commenter believes that unreliable evaluations are due to courts being unwilling or unable to give evaluators sufficient time to conduct the evaluations. Commenter also believes that It is more important that evaluators be required to spend more time conducting evaluations than evaluators be trained in forensics. "Trainings alone" will not improve the reliability of "drive-by evaluations."

Response: DSH has no substantive response. This comment is outside of the scope of the proposed regulation and beyond DSH’s scope of authority pursuant to Penal Code section 1369, subdivision (h).

Comment 1.4: Commenter believes that the proposed provision regarding an evaluator with a specialized area of expertise “does not encourage judges to seek the expertise of those most qualified to opine.”

Response: DSH has no substantive response. This comment is outside of the scope of the proposed regulation and beyond DSH’s scope of authority pursuant to Penal Code section 1369, subdivision (h). The statute mandates DSH to adopt only guidelines for courts to consider in appointing evaluators. Courts retain their discretion to appoint an evaluator they believe is appropriate.

Comment 1.5: Commenter recommends that the definition of mental incompetence be changed to reflect No. 3551 of the Judicial Council of California’s Criminal Jury Instructions.

Response: DSH disagrees with this comment. The definition used in the proposed regulation mirrors the language in Penal Code section 1369.

Comment 1.6: Commenter recommends that references to “competency diagnoses” be changed since a finding of incompetency is not a diagnosis.

Response: DSH agrees with this comment. However, there are no current references to “competency diagnoses” in the proposed regulation text.

Comment 1.7: Commenter recommends the following language: “In cases where specialized expertise would be helpful, courts are encouraged to appoint experts with specialized expertise and training, even if the expert does not have the board certification or training described in these guidelines.”

Response: DSH disagrees with this comment. This comment is outside of the scope of the proposed regulation and beyond DSH’s scope of authority pursuant to Penal Code section 1369, subdivision (h). The statute mandates DSH to adopt only guidelines for courts to consider in appointing evaluators. Courts retain their discretion to appoint an evaluator they believe is appropriate.

Comment 1.8: Commenter recommends that evaluators **not** be required to evaluate “the nature of the disorder” of the individual but instead “be required to simply state whether or not the defendant suffers from a mental disorder.”

Response: DSH disagrees with this comment. Penal Code section 1369, subdivision (a)(2) explicitly states that one of the things an evaluator must evaluate is “the nature of the defendant’s mental disorder.” The proposed regulation mirrors this language.

Comment 1.9: Commenter recommends that DSH include language “to encourage courts to provide sufficient funding to evaluators so that the evaluator spends the time necessary to conduct the evaluation and render a reliable opinion.”

Response: DSH has no substantive response. This comment is outside of the scope of the proposed regulation and beyond DSH’s scope of authority pursuant to Penal Code section 1369, subdivision (h). The statute mandates DSH to adopt only guidelines for courts to consider in appointing evaluators.

2. Commenter 2: L.D. Louis

Comment 2.1: Commenter recommends that DSH add a provision with the “express requirement that each evaluation must include a diagnosis of either a mental disorder or developmental disability.”

Response: DSH disagrees with this comment. DSH has no substantive response. This comment is outside of the scope of the proposed regulation and beyond DSH's scope of authority pursuant to Penal Code section 1369, subdivision (h). The statute mandates DSH to adopt only guidelines for courts to consider in appointing evaluators.

Comment 2.2: Commenter recommends that DSH include as a requirement that evaluators be educated and trained specifically in California competency law.

Response: DSH disagrees with this comment. To DSH's knowledge, no such California-specific competency training for evaluators exists. Further, this comment is outside of the scope of the proposed regulation and beyond DSH's scope of authority pursuant to Penal Code section 1369, subdivision (h). The statute mandates DSH to adopt only guidelines for courts to consider in appointing evaluators. Courts retain their discretion to appoint an evaluator they believe is appropriate.

Comment 2.3: Commenter recommends that DSH include as a requirement that evaluators receive "instruction from a judge or licensed attorney with extensive demonstrated experience in California competency law."

Response: DSH disagrees with this comment. This comment is outside of the scope of the proposed regulation and beyond DSH's scope of authority pursuant to Penal Code section 1369, subdivision (h). The statute mandates DSH to adopt only guidelines for courts to consider in appointing evaluators. Courts retain their discretion to appoint an evaluator they believe is appropriate.

Comment 2.4: Commenter recommends that DSH include as a requirement that evaluators be provided "guidance on the mandatory components of [an] evaluation report." Commenter believes that an evaluator, whether a psychiatrist or licensed psychologist, giving the court an opinion on involuntary medication would "speed [] up the restoration process significantly."

Response: DSH disagrees with this comment. The proposed regulation already states the components of the evaluation: "The court shall appoint a psychiatrist or licensed psychologist to evaluate whether a criminal defendant is incompetent to stand trial. This evaluation shall include: the nature of a defendant's mental disorder; a defendant's ability or inability to understand the nature of the criminal proceedings or to assist counsel in a rational manner in the conduct of a defense; and, ***if within the scope of his or her license, whether treatment with antipsychotic medication is medically appropriate and likely to restore the defendant to mental competence***" (emphasis added).