

WSR 23-07-068
PROPOSED RULES
DEPARTMENT OF
SOCIAL AND HEALTH SERVICES
(Behavioral Health Administration)
[Filed March 10, 2023, 4:59 p.m.]

Supplemental Notice to WSR 23-01-074.

Preproposal statement of inquiry was filed as WSR 22-19-078.

Title of Rule and Other Identifying Information: WAC 388-880-010 Definitions (amend), 388-880-055 How SCC processes recommendations related to releases, discharges, and revocations (repeal), 388-880-056 How SCC considers a resident for release to an LRA (amend), 388-880-057 How SCC considers a resident's revocation of LRA status (repeal), 388-880-058 How SCC considers a recommendation for a resident's unconditional discharge (repeal), 388-880-059 Communicating and coordinating resident discharge and conditional release related matters (amend), and possible other sections as required.

Hearing Location(s): On April 25, 2023, at 10:00 a.m., Office Building 2, Department of Social and Health Services (DSHS) Headquarters, 1115 Washington [Street S.E.], Olympia, WA 98504. Public parking at 11th and Jefferson. A map is available at <https://www.dshs.wa.gov/office-of-the-secretary/driving-directions-office-bldg-2>; or virtually. Due to the COVID[-19] pandemic, hearings are being held virtually. Please see the DSHS website for the most up-to-date information.

Date of Intended Adoption: Not earlier than April 26, 2023.

Submit Written Comments to: Rules and Policies Assistance Unit, Rules Coordinator, P.O. Box 45850, Olympia, WA 98504, email DSHSRPAURulesCoordinator@dshs.wa.gov, fax 360-664-6185, by 5:00 p.m. on April 25, 2023.

Assistance for Persons with Disabilities: Contact Shelley Tencza, phone 360-664-6036, fax 360-664-6185, TTY 711 relay service, email tenczsa@dshs.wa.gov, by 5:00 p.m. on April 11, 2023.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: DSHS recognizes these WAC have not been updated since 2013 and, since then, there have been policy and RCW changes that require an update. The department has decided to combine WAC 388-880-056 through 388-880-058 into one WAC. This will help clarify expectations of the senior clinical team and clarify how the special commitment center (SCC) reviews residents whose less restrictive alternative (LRA) status is revoked. WAC 388-880-059 is being amended to clarify communication expectations for SCC when a resident is conditionally released or discharged. WAC 388-880-010 Definitions will also be updated to ensure consistency as the WAC are updated. DSHS held a public rule-making hearing January 24, 2023. Testimony was received and we have made changes to the rule text.

Reasons Supporting Proposal: See above.

Statutory Authority for Adoption: RCW 71.09.070, 71.09.090, and 71.09.097.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: DSHS, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Emma Palumbo, P.O. Box 45090, Olympia, WA, 360-972-6214.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328. Not a significant legislative rule. RCW 34.05.328 (5)(b)(ii): Rules relating only to internal governmental operations that are not subject to violation by a nongovernment party.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(3) as the rules relate only to internal governmental operations that are not subject to violation by a nongovernment party.

Is exempt under RCW 34.05.328 (5)(b)(ii): Rules relating only to internal governmental operations that are not subject to violation by a nongovernment party.

Scope of exemption for rule proposal:

Is fully exempt.

March 10, 2023
Katherine I. Vasquez
Rules Coordinator

SHS-4955.4

AMENDATORY SECTION (Amending WSR 10-13-130, filed 6/22/10, effective 7/23/10)

WAC 388-880-010 Definitions. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

"Appropriate facility" means the total confinement facility the department uses to hold and evaluate a person court-detained under chapter 71.09 RCW.

"Authorized third party" means a person approved in writing by the resident on a DSHS Form 17-063 (Authorization to disclose records), who may request and have access to the resident clinical file under chapter 71.09 RCW or the resident's medical records under chapter 70.02 RCW.

"Care" means a service the department provides during a person's detention or commitment within a secure facility toward adequate health, shelter, and physical sustenance.

"Chief executive officer (CEO)" means the person appointed by the secretary of the department to be responsible for the general operation, program, and facilities of the SCC. Also referred to as "superintendent of the special commitment center" and "superintendent" under chapter 71.09 RCW.

"Control" means a restraint, restriction, or confinement the department applies protecting a person from endangering self, others, or property during a period of custody under chapter 71.09 RCW.

"Department" means the department of social and health services or DSHS.

"Escorted leave" means a leave of absence under the continuous supervision of an escort from a facility housing persons who are court-detained or civilly committed under chapter 71.09 RCW.

"Evaluation" means an examination, report, or recommendation by a professionally qualified person to determine if a person has a person-

ality disorder, ~~((and/or))~~ mental abnormality, or both, which renders the person likely to engage in predatory acts of sexual violence if not confined in a secure facility. The four types of evaluations that occur related to a person's commitment or detention under chapter 71.09 RCW are as follows:

- The **initial evaluation** occurs before the person is detained at the SCC, usually occurring while the person is in prison, department of children, youth, and families, ~~((juvenile rehabilitation administration (JRA),))~~ a state mental hospital, a county jail, or in the community following commission of a recent overt act.

- **Supplemental evaluations**, as required by RCW 71.09.040, are performed for civil commitment trial purposes.

- **Annual review evaluations** occur only after a person has been civilly committed under RCW 71.09.070.

- **Post commitment evaluations**, as required by RCW 71.09.090, when the person qualifies for a conditional or unconditional release trial.

"Health care facility" means any hospital, hospice care center, licensed or certified health care facility, health maintenance organization regulated under chapter 48.46 RCW, federally qualified health maintenance organization, federally approved renal dialysis center or facility, or federally approved blood bank.

"Health care practitioner" means an individual or firm licensed or certified to engage actively in a regulated health profession.

"Health care services" means those services provided by health professionals licensed pursuant to RCW 18.120.020(4).

"Health profession" means those licensed or regulated professions set forth in RCW 18.120.020(4).

"Immediate family" includes a resident's parents, stepparents, parent surrogates, legal guardians, grandparents, spouse, brothers, sisters, half or stepbrothers or sisters, children, stepchildren, registered domestic partner, and other dependents.

"Indigent" refers to the financial status of a resident who has maintained a total balance of ~~((forty dollars))~~ \$40 or less, combined, in ~~((his/her))~~ their resident trust and resident store accounts for the past ~~((thirty))~~ 30 days, after paying court ordered legal financial obligations, child support, or cost-of-care reimbursement, and who swears or affirms under penalty of perjury that ~~((he/she has))~~ they have no additional outside resources, including but not limited to pension income, business income, and a spouse's or registered domestic partner's employment or other income.

"Individual treatment plan (ITP)" means an outline the SCC staff persons develop detailing how control, care, and treatment services are provided to a civilly committed person or to a court-detained person.

"Legal mail" means a resident's written communications, to or from: Courts/court staff regarding a legal action currently before a court, a licensed attorney, a public defense agency, a licensed private investigator retained by private counsel representing a resident or appointed by a court, an expert retained by an attorney representing a resident or appointed by a court, and a law enforcement agency.

"Less restrictive alternative (LRA)" means court-ordered treatment in a setting less restrictive than total confinement which satisfies the conditions stated in RCW 71.09.092. A less restrictive alternative may not include placement in the community protection program as pursuant to RCW 71A.12.230.

"Less restrictive alternative facility" means a secure community transition facility as defined under RCW 71.09.020(16).

"Mental abnormality" means a congenital or acquired condition affecting the person's emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

"((Native)) Original format" means the format in which a record subject to public disclosure was originally produced.

"Oversight" means official direction, guidance, review, inspection, investigation, and information gathering activities conducted for the purposes of program quality assurance by persons or entities within, or external to, the SCC.

"Personality disorder" means an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment. Purported evidence of a personality disorder must be supported by testimony of a licensed forensic psychologist or psychiatrist.

"Predatory" means acts a person directs toward:

- (1) Strangers;
- (2) Individuals with whom a relationship has been established or promoted for the primary purpose of victimization; or
- (3) Persons of casual acquaintance with whom no substantial personal relationship exists.

"Professionally qualified person":

(1) **"Psychiatrist"** means a person licensed as a physician in this state, in accordance with chapters 18.71 and 18.57 RCW. In addition, the person (~~shall~~) must:

(a) Have completed three years of graduate training in a psychiatry program approved by the American Medical Association or the American Osteopathic Association; and

(b) Be certified, or eligible to be certified, by the American Board of Psychiatry and Neurology.

(2) **"Psychologist"** means a person licensed as a doctoral level psychologist in this state, in accordance with chapter 18.83 RCW.

"Relapse prevention plan (RPP)" details static and dynamic risk factors particular to the resident and contains a written plan of interventions for the purpose of reducing the risk of sexual offending.

"Resident" means a person court-detained or civilly committed pursuant to chapter 71.09 RCW.

"Resident trust account" means the custodial bank account, held by the state, which represents the resources of the individual resident which is held for the individual resident's use.

"Responsivity" refers to the delivery of treatment in a manner that is consistent with the abilities and learning style of the (~~offender~~) resident. Responsivity can be conceptualized within the following categories: Physical limitations and sensory impairments, cognitive and learning impairments, mental health symptoms and behavioral disorders, cultural and subcultural differences to the extent that these differences may interfere with treatment participation.

"Risk factors" means resident factors, supported by empirical evidence, shown to increase the likelihood an individual will engage in sexual offending behavior.

"Secretary" means the secretary of the department of social and health services or the secretary's designee.

"Secure community transition facility (SCTF)" means a residential facility for persons civilly committed and conditionally released to a less restrictive alternative under chapter 71.09 RCW. A secure commun-

ity transition facility has supervision and security, and either provides or ensures the provision of sex offender treatment services. Secure community transition facilities include, but are not limited to, the facilities established in RCW 71.09.((201))250 and any community-based facilities established under chapter 71.09 RCW and operated by the secretary or under contract with the secretary.

"SCTF residential community transition team ((~~CTT-SCTF~~)) (RCTT)" means a team made up of three key individuals who will be closely involved with day to day decision making related to the transition activities of a resident residing in an SCTF operated by the department of social and health services. These three individuals include the department of corrections (DOC) (~~community corrections officer~~) correctional specialist, the certified sex offender treatment provider employed by (~~the department~~) DSHS or who has been contracted by SCC, and the SCTF manager, the chief of clinical (~~director~~) services or designee may substitute for the SCTF manager. The ((~~CTT-SCTF~~)) RCTT must approve all community activities of an SCTF resident. As the agency responsible for funding SCTF activities, (~~the department~~) DSHS through its SCTF manager may consider budgetary constraints when approving or supporting discretionary activities such as community shopping or recreation, or personal activities such as visiting family and friends.

"Secure facility" means a residential facility for persons court-detained or civilly committed under the provisions of chapter 71.09 RCW that includes security measures sufficient to protect the community. Such facilities include total confinement facilities, secure community transition facilities, and any residence used as a court-ordered placement in RCW 71.09.096.

"Senior clinical team" means a (~~body of clinical professionals as described below which has been designated by the superintendent~~) team of professionally qualified persons employed by the department which are designated by the CEO to meet regularly to:

- Make decisions about the implementation of the sex (~~offender~~) offense treatment (~~program~~).
- (~~• Review for the purposes of approval or denial, treatment team recommendations for phase promotions or demotions.~~)
- Make clinical recommendations to provide input about residents (~~in community~~) discharging to less restrictive alternative (LRA) settings.
- Provide general consultation regarding resident treatment and behavioral management issues.
- Conduct outreach to program areas of SCC including staffing and consultation of residents in sex (~~offender~~) offense treatment.
- As requested, provide guidance and advice to the (~~clinical director, the superintendent~~) chief of clinical services, the CEO, and the treatment teams.

Members of the senior clinical team are expected to (~~take into account~~) consider all available relevant information, including contextual and situational factors, to make optimal, clinically supportable decisions.

(~~The senior clinical team shall consist of a team of professionally qualified persons employed by the department which are designated by the superintendent.~~) The team may include either a SCC contracted community-based psychologist with advanced forensic assessment and treatment expertise, (~~and/or~~) a contracted community-based psychiatrist with advanced expertise in forensic assessment and treatment, or both.

The senior clinical team (~~(shall)~~) may not include the following persons, (~~(+)~~) unless needed at the request of the (~~(clinical director)~~) chief of clinical services for consultation on a specific issue(s):

- The resident's attorney;
- The prosecuting agency;
- Any representative from DOC;
- Potential certified sex offender treatment providers (CSOTPs) or community providers of any type who may treat the resident; or
- Any other party who may serve to financially gain from the resident's release.

"Sexual predator program" means a department-administered and operated program including the special commitment center (SCC) established for:

- (1) A court-detained person's custody and evaluation; or
- (2) Control, care, and treatment of a civilly committed person defined as a sexually violent predator under chapter 71.09 RCW.

"Sexually violent offense" means an act defined under chapter 9A.28 RCW, RCW 9.94A.030 and 71.09.020.

"Sexually violent predator" means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

(~~"Superintendent" means the person appointed by the secretary of the department to be responsible for the general operation, program, and facilities of the SCC.~~)

"Special commitment center (SCC)" means the department operated secure facility that provides supervision and sex offender treatment services in a total confinement setting for individuals committed under RCW 71.09.

"Total confinement facility" means a facility that provides supervision and sex offender treatment services in a total confinement setting. Total confinement facilities include the special commitment center and any similar facility designated as a secure facility by the secretary.

[Statutory Authority: Chapter 71.09 RCW and RCW 72.01.090. WSR 10-13-130, § 388-880-010, filed 6/22/10, effective 7/23/10. Statutory Authority: RCW 71.09.040(4). WSR 03-23-022, § 388-880-010, filed 11/10/03, effective 12/11/03. Statutory Authority: Chapter 71.09 RCW, 2000 c 44, 2001 c 286. WSR 02-02-054, § 388-880-010, filed 12/27/01, effective 1/27/02. WSR 99-21-001, recodified as § 388-880-010, filed 10/6/99, effective 10/6/99. Statutory Authority: RCW 71.09.230. WSR 97-24-054, § 275-155-010, filed 12/1/97, effective 1/1/98. Statutory Authority: 1990 c 3. WSR 90-17-120 (Order 3054), § 275-155-010, filed 8/21/90, effective 9/21/90.]

AMENDATORY SECTION (Amending WSR 10-13-130, filed 6/22/10, effective 7/23/10)

WAC 388-880-056 How SCC considers a resident for release to an LRA. When the department (~~(, based on a forensic evaluation or progress in sex offender treatment,)~~) considers a (~~(SCC)~~) resident in total confinement for a less restrictive alternative, modification or

revocation of a less restrictive alternative, ((placement under RCW 71.09.090(1), or considers a resident currently residing in a secure community transition facility (SCTF) on a conditional release for further transition into a nonSCTF less restrictive alternative,)) or unconditional discharge, ((the clinical director shall schedule)) the senior clinical team ((to)) must review the matter and formulate a clinical recommendation to the ((superintendent)) chief executive officer (CEO). When the department, based on a forensic evaluation that opined that a resident no longer meets the definition of a sexually violent predator, the senior clinical meeting must occur within 30 days and provide a recommendation to the CEO.

The senior clinical meeting will provide ((an adequate staffing of the case, to include the resident's)) a review of the resident's case, to include:

(1) Participation and progress in sex ((offender)) offense treatment.

(2) Behavior.

(3) ((Latest)) Progress since most recent annual forensic evaluation.

(4) ((Relapse prevention plan)) Manifestation and management of risk factors.

(5) ((Any other relevant information such as: medication compliance, manifestation and management of dynamic risk factors, evidence or absence of paraphilia and personality disorder, responsivity, psychological testing, polygraph results, PPG assessments results, etc.

(6) When the resident is being considered for a LRA placement in a nonstate sponsored setting such as a private home or apartment option, the team shall also consider the resident's finances such as savings, benefits, eligibility for social services, housing options, employment or employability, absence or availability of community supports, family supports, etc.) Barriers to discharge.

(6) Other factors related to an LRA recommendation, if applicable, including:

(i) The resident's transition activity;

(ii) The factors surrounding the situation(s)/behavior(s) causing the revocation review;

(iii) The ability of SCC and department of corrections (DOC) to adequately manage the resident in the community given existing resources;

(iv) The ability of SCC and DOC to adequately assure for the public's safety and the resident's compliance with less restrictive alternative conditions if the resident remains in the community or is allowed community access.

(7) Any other relevant information which may include, but is not limited to: medication compliance, evidence or absence of paraphilia and personality disorder, responsivity, psychological testing, polygraph results, existing penile plethysmograph (PPG) assessment results, etc.

(8) Lack of resources will not be the sole factor in recommending that a resident not be released on an LRA.

The CEO or designee will notify the prosecuting attorney, the resident's attorney, the resident's corrections specialist (CS), certified sex offender treatment provider (CSOTP), and local law enforcement of SCC's position pertaining to the resident's less restrictive alternative or unconditional release status.

[Statutory Authority: Chapter 71.09 RCW and RCW 72.01.090. WSR 10-13-130, § 388-880-056, filed 6/22/10, effective 7/23/10.]

AMENDATORY SECTION (Amending WSR 10-13-130, filed 6/22/10, effective 7/23/10)

WAC 388-880-059 Communicating and coordinating resident discharge and conditional release related matters. (1) Communication with the department.

~~(a) ((The SCC clinical director, or designee serves as the principal party at SCC responsible to communicate discharge and release matters internally within SCC.~~

~~(b) When a resident's request for advancement to community transition status is approved by the superintendent, the superintendent shall inform the DSHS secretary.~~

~~(c) If the SCC superintendent endorses the resident's request to petition the court for conditional release to either a secure community transition facility or other type of less restrictive alternative, the superintendent (as the secretary's designee) shall formally authorize the resident, in writing, to petition the court for a less restrictive alternative hearing in accordance with RCW 71.09.090.) If the SCC CEO endorses the resident's request to petition the court for conditional release to either a secure community transition facility or other type of less restrictive alternative, the CEO (as the secretary's designee) must formally authorize the resident, in writing, to petition the court for a less restrictive alternative hearing in accordance with RCW 71.09.090.~~

~~((d)) (b) Once the ((superintendent)) CEO has made a decision to support a resident's request to petition the court, the ((superintendent shall)) CEO must notify ((the clinical director)) forensic services of that decision. ((At that point the clinical director or designee shall serve as the principal party at)) SCC ((to)) staff will communicate discharge and release matters to the resident, their attorney, to external stakeholders which, among others, ((shall)) must include the state attorney general's criminal justice division's sexually violent predator unit, and the King County prosecuting attorney's sexually violent predator unit, and ((to)) organize the necessary activities in support of that discharge or conditional release.~~

(2) Responsibility to communicate court related activities.

~~(a) ((The resident's attorney is responsible to coordinate the court hearing.)) It is not the SCC's responsibility to petition the court for a resident to be conditionally released or discharged.~~

~~(b) When the court orders a resident to be conditionally released to a less restrictive alternative, ((the)) SCC ((clinical director or designee shall)) must:~~

~~(i) Manage the release process, including community notification to the appropriate law enforcement agency at least ((thirty)) 30 days prior to the resident's release to the court-approved LRA.~~

~~(ii) Keep internal SCC stakeholders apprised of the status of the case.~~

~~(iii) Coordinate the transition with the:~~

~~(A) DOC end of sentence review committee program manager;~~

~~(B) Assigned DOC community ((corrections officer)) correctional specialist, if applicable;~~

(C) Court-approved certified sex offender treatment provider, if applicable;

(D) Appropriate SCTF manager, if applicable; and

(E) Other court-approved providers or persons for the resident's court-approved living setting.

(iv) The coordination will address civil commitment issues, community safety, and the court-ordered conditions of release.

(3) When the secretary or designee objects to a pending release.

When the ((DSHS)) secretary or designee objects to a pending release under RCW 71.09.090, before the scheduled less restrictive alternative court hearing or following the hearing such as in the case of newly discovered information, that objection ((shall)) must be presented to the court in writing and ((shall be)) signed by the secretary or designee.

(4) When a less restrictive alternative placement is approved by the court.

When a resident ((of)) from SCC or a resident already conditionally released is approved to transfer to a less restrictive alternative placement ((or a resident of a secure community transition facility is approved to transfer to an alternative less restrictive alternative placement)), that placement will occur ((no sooner than thirty)) within 30 days following the day the court approves that placement but not before the department of corrections files their investigation or the court orders release to a specific placement, whichever occurs first. This ((thirty)) 30 day period will allow SCC to fulfill its law enforcement notification obligations under RCW 9A.44.130 and the affected county sheriff to fulfill their public notification obligations under RCW 4.24.550.

(5) When a resident is unconditionally released by the court.

When a resident of the SCC total confinement facility or a secure community transition facility is determined by the court to no longer meet the criteria of a sexually violent predator under chapter 71.09 RCW, and the court orders that the resident ((shall)) be unconditionally released, SCC ((shall)) must release the person within ((twenty-four)) 24 hours of the court's decision.

(6) When a resident or attorney proposes ((an alternative)) a different less restrictive alternative placement.

(a) When a resident or attorney proposes ((an alternative)) a different less restrictive alternative placement other than what SCC recommends or supports, the resident or the attorney ((shall)) must bear the responsibility to locate and identify that alternative.

(b) The department ((shall)) may not reimburse attorneys or other parties for assisting residents in finding ((an alternative)) a different less restrictive alternative placement unless otherwise ordered by the commitment court for good cause.

[Statutory Authority: Chapter 71.09 RCW and RCW 72.01.090. WSR 10-13-130, § 388-880-059, filed 6/22/10, effective 7/23/10.]

REPEALER

The following sections of the Washington Administrative Code are repealed:

- WAC 388-880-055 How SCC processes recommendations related to releases, discharges and revocations.
- WAC 388-880-057 How SCC considers a resident's revocation of LRA status.
- WAC 388-880-058 How SCC considers a recommendation for a resident's unconditional discharge.