

FINAL STATEMENT OF REASONS

New to California Code of Regulations, Title 15, § 2240
Psychological Risk Assessments

RN 01-10

SPECIFIC PURPOSE AND NECESSITY OF EACH REGULATORY CHANGE

This new section codifies the Board of Parole Hearings' existing guidelines for the preparation of Psychological Risk Assessments for parole consideration hearings held pursuant to Penal Code Sections 3041 and 3041.5.

The specific purpose of each subsection of the proposed text and the rationale supporting the Board of Parole Hearings' determination that each amendment is reasonably necessary to carry out the purpose for which the regulation is proposed is as follows:

Proposed section 2240(a)

This section identifies when an inmate will receive a Comprehensive Risk Assessment. It also makes clear that psychological reports prepared before January 1, 2009 are valid for three years, or until used at a hearing that was conducted and completed after January 1, 2009, whichever is earlier.

Proposed section 2240(b)

This section provides that a Comprehensive Risk Assessment will be completed every five years and defines what is generally contained in the report. It contemplates that risk assessment instruments may be used to evaluate an inmate's potential for future violence.

Proposed section 2240(c)

This section provides when a Subsequent Risk Assessment will be prepared and defines what is generally contained in the report. The Subsequent Risk Assessment will predominantly focus on dynamic factors and it will not contain an opinion of the inmate's potential for future violence.

Proposed section 2240(d)

This section provides that the CDCR's inmate appeal process does not apply to the Board's psychological evaluations. The inmate may challenge the report and its conclusions at the hearing. The hearing panel will determine what evidentiary weight to give psychological reports.

Proposed section 2240(e)

This section describes how substantial factual errors in a psychological report will be handled if they are identified by the hearing panel.

Proposed section 2240(f)

This section describes how administrative factual errors in a psychological report will be handled if they are identified by the hearing panel.

Proposed section 2240(g)

This section provides that life inmates who don't reside in California may not receive a risk assessment or other psychological evaluation due to other state's licensing requirements for psychologists and variations in confidentiality laws from state-to-state.

Proposed section 2240(h)

This section specifies that this regulation will not apply to medical parole hearings or applications for sentence recall.

TECHNICAL, THEORETICAL, AND EMPIRICAL STUDY, REPORTS OR DOCUMENTS

The Board did not rely on any technical, theoretical, or empirical studies in consideration of this proposed regulation.

LOCAL MANDATE DETERMINATION

The proposed regulation does not impose any mandate on local agencies or school districts, or a mandate, which requires reimbursement pursuant to Part 7 (Section 17561) of Division 4.

CONSIDERATION OF REASONABLE ALTERNATIVES

The Board has not identified any alternatives to the proposed regulatory change that would fully meet its objectives.

EFFECT ON SMALL BUSINESS

The subject of this regulatory action directly affects prisoners serving life sentences. The Board has not identified any alternatives that would lessen any adverse impact on small businesses. However, no impact on small business is expected.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY PUBLIC COMMENT PERIOD FROM DECEMBER 17, 2010, THROUGH JANUARY 31, 2011.

The Public Comment period on the proposed text was open for public comment for 45 days from December 17, 2010, through January 31, 2011. One Hundred and twenty-eight written comment letters, e-mails and faxes were received during that period. Eight comments were received during the public hearing conducted on January 31, 2011. Thirteen written comment and e-mails were received after the comment period closed on January 31, 2011. Pursuant to Government Code section 11346.9(a)(3), the Board of Parole Hearings (Board) has summarized and responded to those comments as follows:

I. COMMENTS OF GENERAL OPPOSITION

4, 8, 18, 20, 21, 26, 27, 31, 33, 34, 35, 48, 52, 54, 55, 56, 61, 63, 77, 78, 79, 81, 86, 87, 89, 90, 91, 92, 94, 95, 96, 97, 109, 110, 115, 116, 119, 121, 122, 124, 129, 135
Comments: The comments consist of general opposition to the proposed regulation.

Response: There is no substantive comment to which to respond.

Accommodation: None.

II. COMMENTS REGARDING NOTIFICATION AND/OR POSTING OF THE REGULATIONS

8 Comment: The comment states the proposed rule change is not being made available to prisoners, that the writer has not seen it posted in the facility law library, and that no notice was sent to him.

Response: The Board disagrees with the comments. The Board is not required to post proposed rulemaking in facility law libraries. Penal Code section 5076.2 provides that the Board shall post rules and regulations in conspicuous places throughout each institution no less than 20 days prior to their effective date. Regarding the inmate's claim that he did not receive special notice as requested, his mailing address had changed and he had not provided the Board with a forwarding address.

Accommodation: None.

49 Comment: The comment claims that the proposed rule was not properly posted in the Ironwood State Prison Housing Units, nor was it properly posted in the California State Prison-Corcoran III Housing Units.

Response: The Board disagrees with the comments. See response to Comment 8, supra.

Accommodation: None.

55, 57 Comment: The comment claims that receipt of a Notice of Public Hearing without proposed text caused him to be unable to provide relevant comment prior to end of the public comment period.

Response: The Board disagrees with the comments. There is no requirement that a Notice of Public Hearing be accompanied by the proposed text.

Accommodation: None.

109 Comment: The comment claims that a large portion of the general population did not receive notice of the proposed changes.

Response: The Board disagrees with the comments. The Board is not required to post proposed rulemaking in facility law libraries. Penal Code section 5076.2 provides that the Board shall post rules and regulations in conspicuous places throughout each institution no less than 20 days prior to their effective date.

Accommodation: None.

III. COMMENTS REGARDING ADMINISTRATIVE PROCEDURE ACT REQUIREMENTS

5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 22, 23, 29, 30, 36, 37, 39, 40, 41, 42, 45, 50, 51, 53, 54, 55, 59, 60, 62, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 80, 83, 84, 85, 88, 89, 99, 100, 101, 102, 103, 104, 106, 111, 112, 113, 114, 115, 117, 118

Comments: The comments contend that the regulation does not meet the necessity, authority, clarity, consistency and reference requirements of the Administrative Procedure Act.

Response: The Board disagrees with the comments.

The provision of psychological risk assessments is reasonably necessary to assist the Board in determining whether an inmate sentenced to life with the possibility of parole poses a current unreasonable risk of danger to society if released on parole. *See* Penal Code sections 3041 and 3041.5 and 15 CCR sections 2281 and 2402. Moreover, the proposed regulation is necessary because on November 8, 2010, the Office of Administrative Law determined that the “Board’s Psychological Report Process contains provisions that meet the definition of a “regulation” as defined in section 11342.600 that should have been adopted pursuant to the APA.” *See* 2010 OAL Determination No. 27.

The Board has the authority pursuant to Penal Code section 3052 “to establish and enforce rules and regulations under which prisoners committed to state prisons may be allowed to go upon parole outside the prison buildings and enclosures when eligible for parole.”

The language used in the proposed regulation is clear. The plain meaning of “static” is to be characterized by a lack of movement, animation, or progression. *See* Merriam-Webster’s Dictionary (10th ed. 1996) p. 1149. The plain meaning of “dynamic” is the underlying cause of change or growth. *See* Merriam-Webster’s Dictionary (10th ed. 1996) p. 361.

The proposed regulation is consistent with existing statutes, court decisions, and other provisions of law. It appropriately references Penal Code sections 3041, 3041.5 and 3052. Moreover, the proposed regulation implements the Governor’s 2008-09 Budget which authorized continuous funding to allow the Board of Parole Hearings to conduct initial and follow-up psychological evaluations for parole hearings held pursuant to Penal Code sections 3041 and 3041.5. *See* Chapter 268, Statutes of 2008.

Accommodation: None.

20 Comment: The comment contends that the regulation is inconsistent with Title 15 CCR section 2402(b).

Response: The Board disagrees with the comment. The proposed regulation is consistent with 15 CCR section 2402 (b) which provides that the panel shall consider all “relevant, reliable information available” including an inmate’s “past and present mental state.”

Accommodation: None.

76 Comment: The comment contends that the “Legislature has foreclosed the Board’s authority to base a parole determination on “psychological risk assessments” or on anything other than the timing and gravity of the commitment or past offense(s)”. It also states that the OAL determined “that the use of the psychological evaluations is beyond the Board’s authority.”

Response: The Board disagrees with the comments. Under the Board’s current regulations a myriad of factors, other than just the gravity of the commitment offense, tending to show suitability and unsuitability are considered by the Board. *See* 15 CCR sections 2281 and 15 CCR 2402. The California Supreme Court addressed this issue when it interpreted the provisions of Penal Code section 3041 in *In re Lawrence* 44 Cal. 4th 1181 (2008). The court held that “current dangerousness is the fundamental and overriding question for the Board and the Governor. In addition,...evidence in the record corresponding to both suitability and unsuitability factors -- including the facts of the commitment offense, the specific efforts of the inmate toward rehabilitation, and, importantly, the inmate's attitude concerning his or her commission of the crime, as well as the psychological assessments contained in the record -- must, by statute, be considered and relied upon by both the Board and the Governor.” *See, In re Lawrence* 44 Cal. 4th 1181, 1213 (2008).

The comment incorrectly cites OAL Determination No. 27, p. 12 to support his contention that the OAL determined “that the use of the psychological evaluations is beyond the Board’s authority.” The context of the language cited indicated that it was the author of the comment, and not the OAL, who made this claim.

Accommodation: None.

IV. COMMENTS REGARDING FISCAL IMPACT

5, 18, 26, 27, 31, 33, 34, 35, 48, 52, 61, 79, 78, 86, 87, 91, 92, 95, 97, 113, 116, 118, 121, 122, 124, 125, 129, 131, 132, 133, 135, 136 Comments: The comments claim the provision of these risks assessments is a waste of tax dollars and they could be completed by CDCR staff.

Response: The Board disagrees with the comments. CDCR psychological staff is devoted to providing mental health treatment to inmates. The Governor's 2008-09 Budget authorized continuous funding to allow the Board of Parole Hearings to conduct initial and follow-up psychological evaluations for parole hearings held pursuant to Penal Code sections 3041 and 3041.5. *See* Chapter 268, Statutes of 2008. This funding was expressly approved by the Legislature in Assembly Bill No. 1781, "The Budget Act of 2008." This bill was chaptered by the Secretary of State on September 23, 2008, Chapter 268, Statute of 2008. Thus, the proposed regulation does not create any new fiscal impact.

Accommodation: None.

92 Comment: The comment claims that the State of California should use public funds in an efficient way and that having more of our population in prison than any other jurisdiction than China is not a good investment of public funds.

Response: The comment was not substantively related to the proposed regulation.

Accommodation: None.

107 Comment: The comment claims that the new provisions will not only serve to create future backlogs [of parole suitability hearings], but they will also force taxpayers to incur new costs in response to the legal challenges that the state will be forced to defend.

Response: The comment was not a substantive comment about the proposed regulation.

Accommodation: None.

21, 55, 111, 116 Comment: The comment claims that keeping inmates in prison longer than what is necessary is a financial burden to the state and taxpayers when they are no longer a threat to society.

Response: The comment was not a substantive comment about the proposed regulation.

Accommodation: None.

V. COMMENTS REGARDING THE RISK ASSESSMENT INSTRUMENTS

2 Comment: The comment states the regulation does not “specify which risk assessment instruments BPH psychologists may use” and that the regulation “must explicitly prohibit the use of any risk instruments... specifically, the PCL-R, HCR-20, LS/CMI, and, optionally, the Static- 99...”

Response: The Board disagrees with the comment. Subsection (b) of the proposed regulation provides that the “Board of Parole Hearings may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate’s potential for future violence.” The Board will only incorporate actuarially derived and structured professional judgment approaches to risk assessment that have excellent technical properties and which provide consistent results.

Accommodation: None.

4, 5, 19, 20, 21, 24, 25, 31, 32, 58, 63, 76, 77, 82, 90, 95, 96, 98, 105, 107, 113, 116, 120, 121, 122, 124, 126, 135

Comments: The comments claim that the use of risk assessment tools by the Board and the Forensic Assessment Division (FAD) is of no evidentiary value and the FAD’s assessment tools are unreliable.

Response: The Board disagrees with the comments. The provision of psychological risk assessments is reasonably necessary to assist the Board in determining whether an inmate sentenced to life with the possibility of parole poses a current unreasonable risk of danger to society if released on parole. *See* Penal Code sections 3041 and 3041.5 and 15 CCR sections 2281 and 2402. The Board will only incorporate actuarially derived and structured professional judgment approaches to risk assessment that have excellent technical properties and which provide consistent results. Moreover, a psychological risk assessment is only one piece of information available to a hearing panel. The hearing panel will determine what weight to give to various information in considering whether an inmate is suitable for parole.

Accommodation: None.

VI. COMMENTS REGARDING FUTURE VIOLENCE

7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 22, 36, 37, 39, 40, 41, 45, 50, 51, 59, 60, 65, 80, 88, 104, 115, 124, 126, 131, 136 **Comments:** The comments claim it is impossible to predict future violence.

Response: Subsection (b) of the proposed regulation provides that the “Comprehensive Risk Assessment will provide the clinician’s opinion, based on the available data, of the inmate’s potential for violence.” A psychological risk assessment is only one piece of information available to a hearing panel. The hearing panel will determine what weight

to give to various information in considering whether an inmate poses a current unreasonable risk of danger to society if released on parole.

Accommodation: None

VII. COMMENTS REGARDING SUBSEQUENT RISK ASSESSMENTS

21, 24, 25, 32, 46, 58, 63, 76, 89, 105, 108 116, 121, 122, 124 Comments: The comments claim that because a Subsequent Risk Assessment will not contain an opinion regarding the inmate's potential for future violence, inmates will be found unsuitable for parole until they receive a new Comprehensive Risk Assessment.

Response: The Board disagrees with the comments. A psychological risk assessment is only one piece of information available to a hearing panel. The hearing panel will determine what weight to give to various information in considering whether an inmate is suitable for parole. Pursuant to subsection (c) of the proposed regulation, a "Subsequent Risk Assessment will address changes in the circumstances of the inmate's case, such as new programming, new disciplinary issues, changes in mental status, or changes in parole plans since the completion of the Comprehensive Risk Assessment."

Accommodation: None.

83, 84, 85 & 117 Comments: The comments state that the proposed regulation does not address whether Subsequent Risk Assessments would be prepared if an inmate's hearing is advanced under the Victim Rights Act of 2008.

Response: If an inmate's hearing is advanced pursuant to Penal Code section 3041.5 (b)(4) or (d)(1), that hearing will be a regularly scheduled parole hearing covered under subsection (c) of the proposed regulations.

Accommodation: None.

VIII. COMMENTS REGARDING BIAS

5, 18, 23, 24, 25, 32, 26, 27, 31, 33, 34, 35, 48, 52, 53, 58, 61, 63, 76, 78, 86, 87, 91, 92, 94, 96, 97, 109, 116, 120, 121, 122, 124, 125, 130, 131, 136 Comments: The comment states that the use of risk assessment tools by the Board and FAD is unethical and the psychologists who administer the tests may be biased.

Response: The Board disagrees with the comments. Board psychologists adhere to the American Psychological Association's "Ethical Principles of Psychologists and Code of Conduct."

Accommodation: None.

IX. COMMENTS REGARDING TRAINING

18, 21, 33, 34, 35, 48, 26, 27, 52, 61, 78, 79, 81, 86, 87, 91, 92, 97, 116, 121, 122, 125, 130 Comments: The comments claim that there is no assurance that the FAD received the specialized training needed to administer or interpret risk assessment tools.

Response: The Board disagrees with the comments. Psychologists are appropriately trained prior to doing an evaluation and administering any risk assessment tool used in an evaluation.

Accommodation: None.

31, 94, 95, 96, 98, 107, 124, 125, 126 Comments: The comments oppose the proposed regulation because of a Special Report issued by the Office of the Inspector General in July 2010 on *The Board of Parole Hearings: Psychological Evaluations and Mandatory Training Requirements*.

Response: The comment did not make a substantive comment about the proposed regulation. The Board has demonstrated substantial compliance with the OIG's recommendations and CDCR's Office of Compliance will monitor and document the Board's progress in addressing the reports recommendations.

Accommodation: None.

108, 124 Comments: The comment claims that Commissioners are not trained in weighing psychological reports.

Response: The comment did not make a substantive comment about the proposed regulation.

Accommodation: None.

X. COMMENTS REGARDING INMATE APPEALS

2, 6, 18, 21, 23 24, 25, 26, 27, 31, 32, 33, 34, 35, 38, 42, 43, 48, 52, 53, 54, 56, 58, 61, 63, 76, 77, 78, 79, 81, 86, 87, 91, 92, 94, 96, 97, 105, 107, 108, 111, 116, 121, 122, 124, 125, 130, 134 **Comments:** The comments object to subsection (d) of the proposed regulation which provides that the CDCR inmate appeal process would not apply to evaluations prepared by BPH psychologists and because the denial of the grievance process does not give inmates an opportunity to have errors in the report corrected prior to their scheduled hearing.

Response: The Board disagrees with the comment. Psychological reports, which are prepared solely for parole hearings to assist a hearing panel or the Board in determining whether an inmate is suitable for parole, are not subject to the inmate appeal process. Pursuant to Section 3084.1 of Title 15 of the California Code of Regulations, an inmate may only appeal “any department decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare.” Board actions are not subject to the CDCR’s appeal process.

However, an inmate does have the right to enter a written response to a psychological report pursuant to Penal Code section 3041.5 (a)(1) and 15 CCR section 2247. Moreover, subsection (d) of the proposed regulation provides that “the inmate and his/her attorney, at the hearing, will have an opportunity to rebut or challenge the psychological report and its findings on the record. The hearing panel will determine, at its discretion, what evidentiary weight to give psychological reports.” Additionally, subsection (e) and subsection (f) of the proposed regulation establish a process of reviewing errors in a psychological report.

Accommodation: None.

20 Comment: The comment claims that the proposed regulation fails to define what constitutes “an opportunity to rebut or challenge the psychological report and its findings on the record.”

Response: The Board disagrees with the comments. The language in subsection (d) of the proposed regulation clearly defines how issues may be contested at a hearing and it does not require additional definition.

Accommodation: None.

23, 82 Comment: The comment opposes the proposed regulation because “a life inmate would not be allowed to utilize a private licensed psychologist to obtain his or her Comprehensive Risk Assessment” and because the psychological report cannot be appealed.

Response: The Board disagrees with the comment. A life inmate may hire a private psychologist to prepare an alternate risk assessment at his or her own expense. Pursuant

to 15 CCR section 2249, an inmate has the right to present relevant documents to the hearing panel. Although there is not a formal appeal process, the psychological report may be rebutted or challenged. (See response to Comment 2 above.)

Accommodation: None.

89 Comment: The comment claims that inmates who had a psychological report prepared prior to this rulemaking won't have an opportunity to challenge the report and its findings on the record.

Response: The Board disagrees with the comments. An inmate or his/her attorney may challenge the findings of any psychological report considered by the Board at the hearing; therefore, enactment of the proposed regulation will not affect an inmate's ability to challenge the findings of a report that was prepared prior to the enactment of the proposed regulation.

Accommodation: None.

94, 96, 108 Comments: The comments oppose the proposed regulation because inmates and attorneys are being denied access to the scoring sheet that FAD uses when administering risk assessments.

Response: The comment did not make a substantive comment about the proposed regulation.

Accommodation: None.

111 Comment: The comment claims that evaluations should be recorded to allow for independent challenges to their conclusions.

Response: The Board disagrees with these comments. The hearing panel only considers the final psychological report and the report may be challenged as detailed above.

Accommodation: None.

XI. COMMENTS REGARDING OUT-OF-STATE INMATES

23, 76, 82, 111, 118, 124, 127, 136 Comment: The comment questions why a psychological risk assessment will be prepared for inmates housed in California if one won't be prepared for out-of-state inmates.

Response: The provisions of this regulation may not apply to inmates who reside in states other than California due to restraints imposed by other states' licensing requirements, rules of professional responsibility for psychologists, and variations in confidentiality law among states.

Accommodation: None.

XII. MISCELLANEOUS

1 Comment: Comment deleted.

Response: The comment was received prior to open public comment period.

3 Comment: The comment states that this proposed regulation “is not apart of title 15 Div 2 yet” and that his interview with a Board psychologist in September 2010 “was unlawful”.

Response: The comment did not make a substantive comment about the proposed regulation.

Accommodation: None.

28 Comment: Comment deleted.

Response: Comment deleted because it wasn't related to the proposed rulemaking.

44, 107, 131 Comment: The comment opposes the proposed regulation because of an OAL determination that the Board's Psychological Report Process was an underground regulation.

Response: The comment did not make a substantive comment about the proposed regulation. On November 8, 2010, the Office of Administrative Law determined that the “Board's Psychological Report Process contains provisions that meet the definition of a “regulation” as defined in section 11342.600 that should have been adopted pursuant to the APA.” See 2010 OAL Determination No. 27.

Accommodation: None.

42 Comment: The comment opposes the proposed regulation because it runs “afoul of the Information Practices Act, California Civil Code, Sections 1798 et seq.

Response: The Board disagrees with the comments. The proposed regulation is not inconsistent with the Information Practices Act as that law relates to protecting an individual's right to privacy that is “being threatened by the indiscriminate collection, maintenance, and dissemination of personal information...” See Civil Code Section 1798.1(a).

Accommodation: None.

42 Comment: The comment states that the proposed regulation “assume[s] that all life prisoners are serving time for violent offenses. There is no distinction made between violent lifer's and non-serious, non-violent prisoners serving life sentences for petty theft,

minor drug possession, or any number of commitment offenses of a relatively minor nature.”

Response: The Board disagrees with the comment. The nature of a lifer’s commitment offense is contemplated in the proposed regulation because subsection (b) provides that the psychological report may contain an evaluation of the commitment offense and risk factors from the prisoner’s history. Moreover, Penal Code section 3041 (b) provides that the Board shall consider “the timing and gravity of current or past convicted offenses...”

Accommodation: None.

47 Comment: The comment states that psychological evaluations are not necessary when all the Board needs to determine is “whether or not the person in front of them is happy.”

Response: The comment did not make a substantive comment about the proposed regulation.

Accommodation: None.

76 Comment: The comment claims that there are viable alternatives to the regulation.

Response: The Board disagrees with the comments. The comment did not propose any specific alternatives.

Accommodation: None.

83, 84, 85 & 117 Comments: The comments suggest that the proposed regulation should require that psychological evaluations be prepared 150 days prior to a scheduled parole hearing. The comments state that the 5-year interval between Comprehensive Risk Assessments (CRA) bears no relation to the amount of time required for a prisoner to rehabilitate himself.

Response: The Board disagrees with the comments. It is not necessary to require that psychological evaluations be prepared 150 days prior to the scheduled hearing. Penal Code section 3041.5 (a)(1) requires that “[a]t least 10 days prior to any hearing by the Board of Parole Hearings, the prisoner shall be permitted to review his or her file which will be examined.” The psychological evaluations does not make a determination about whether a prisoner is rehabilitated or how much time it will take a prisoner to rehabilitate himself. The hearing panel will determine whether an inmate is a current, unreasonable risk of danger to society if released from prison.

Accommodation: None.

113 Comment: The comment objects contends that the 5-year interval between CRAs does not meet the *Lawrence* standard that requires use of current information to determine an inmate’s risk of dangerousness.

Response: The Board disagrees with the comment. Subsection (c) of the proposed regulation contemplates that a Comprehensive Risk Assessment or Subsequent Risk Assessment will generally be prepared before every regularly scheduled parole consideration hearing. At the hearing, the panel will determine whether an inmate is a current, unreasonable risk of danger to society if released from prison.

Accommodation: None.

124, 133 Comments: The comments oppose the proposed regulation because “very few states actually require each and every prisoner to be evaluated before every parole hearing...”

Response: The comment did not make a substantive comment about the proposed regulation.

Accommodation: None.

128 Comments: The comment emailed an attachment that only contained blank pages.

Response: The comment did not make a substantive comment about the proposed regulation.

Accommodation: None.

137 - 149 Comments: These comments were received after January 31, 2011, of the comment period deadline.

Response: The comment did not make a substantive comment about the proposed regulation.

Accommodation: None.