

WSR 23-14-109
INDETERMINATE SENTENCE
REVIEW BOARD

[Filed July 3, 2023, 3:28 p.m., effective August 3, 2023]

Reviser's note: The following material has not been adopted under the Administrative Procedure Act, chapter 34.05 RCW, but has been filed in the office of the code reviser and is published in the Register exactly as filed.

Following are chapter 381-90 WAC for filing. The indeterminate sentence review board is exercising its exemption to the Administrative Procedure Act under RCW 34.05.030 and is requesting the code revisor's office publish the revisions to this chapter as contained in the attachment.

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Executive Director, ISRB

OTS-4739.1

AMENDATORY SECTION (Amending WSR 09-08-109, filed 3/31/09, effective 5/1/09)

WAC 381-90-010 Purpose. The purpose of this chapter is to specify policies and procedures for hearings conducted to determine the release of individuals convicted of community custody board (~~inmates sentenced under RCW 9.94A.507~~) offenses pursuant to RCW 9.95.420, and individuals convicted of offenses committed as juveniles who are eligible for release consideration pursuant to RCW 10.95.030(3) and 9.94A.730. The following regulations set forth procedural guidelines. These guidelines do not create procedural or substantive rights in any person, and should not be interpreted or applied in such a manner as to abridge rights already guaranteed by the United States Constitution or the Washington state Constitution. The regulations should be interpreted to have sufficient flexibility so as to be consistent with law and to permit the indeterminate sentence review board to accomplish its statutory purposes.

AMENDATORY SECTION (Amending WSR 09-08-109, filed 3/31/09, effective 5/1/09)

WAC 381-90-020 Authority. RCW 9.95.420 (~~and~~), 9.94A.507, 10.95.030(3), and 9.94A.730.

AMENDATORY SECTION (Amending WSR 09-08-109, filed 3/31/09, effective 5/1/09)

WAC 381-90-030 Scope. The provisions of this chapter shall apply to (~~offenders~~) individuals sentenced under RCW 9.94A.507 and 9.95.420, or eligible for release consideration under RCW 10.95.030(3) or 9.94A.730.

AMENDATORY SECTION (Amending WSR 09-08-109, filed 3/31/09, effective 5/1/09)

WAC 381-90-040 Definitions. For purposes of this chapter, the following words have the following meanings:

"Actuarial risk assessment instruments" means the tools used by the department of corrections to assess an (~~inmate's~~) individual's risk of reoffense.

"Board" means the appointed members of the indeterminate sentence review board created under chapter 9.95 RCW.

"Classification counselor" means an employee of the department of corrections responsible for carrying out specific duties concerning the supervision of sentenced (~~offenders~~) individuals in the prison system.

"Community custody" means that portion of an (~~offender's sentence of confinement served in the community subject to the controls placed on the offender's movement and activities by the court, board and department of corrections~~) individual's sentence subject to controls including crime-related prohibitions and affirmative actions from the court or the board based on risk to community safety, that is served under supervision in the community and which may be modified or revoked for violations or release conditions.

"Department" means the Washington state department of corrections.

"Electronically" when used in reference to submission of documents to the board, means via facsimile, electronic mail or other generally accepted electronic means.

"End of sentence review process" means the review and report issued by the end of sentence review committee in compliance with RCW 72.09.340, 72.09.345 and where appropriate RCW 72.09.370.

"In person" means physical presence, or presence via teleconference or videoconference.

"ISRB" means the indeterminate sentence review board.

"Revocation" means a repeal of community custody and a return to prison.

AMENDATORY SECTION (Amending WSR 09-08-109, filed 3/31/09, effective 5/1/09)

WAC 381-90-050 Release determination for community custody board cases. (1) RCW 9.95.420 requires that any convicted person sentenced under the provisions of RCW 9.94A.507 shall be subject to a board hearing to determine releasability. The hearing must be held no later than (~~ninety~~) 90 days before the expiration of the minimum term. However the hearing cannot be held unless the board has received:

(a) The results from the end of sentence review process;

(b) Recommendations for conditions of community custody from the department.

(2) The end of sentence review committee report may include, but is not limited to:

(a) A prediction based upon the administration of actuarial risk assessment instruments and the sexual and criminal history of the (~~offender~~) person, of the likelihood that the (~~offender~~) individual will commit new sex offenses if released;

(b) The institutional progress report(s) covering the (~~inmate's~~) individual's adjustment, achievement, infractions and program participation during incarceration;

(c) Psychiatric or psychological reports, such as IQ appraisals, personality inventories, actuarial risk assessments and sexual history polygraphs;

(d) Behavioral details of the crime(s) of conviction, such as law enforcement reports, prosecutor's statements, court records, and pre-sentence investigation reports;

(e) Recommendations for conditions of community custody in addition to those set by the sentencing court;

(f) The department's risk management level and the sex offender notification level;

(g) Written confirmation that the (~~inmate~~) individual has had an opportunity to review the information the department is submitting to the board and an opportunity to make a written statement.

(3) The board shall determine whether it is more likely than not that the (~~offender~~) individual will engage in sex offenses if released to the community in spite of board-imposed conditions of community custody. The board decision related to an (~~offender's~~) individual's likelihood of sexual reoffense is based upon a preponderance of the evidence.

(4) In making a release decision the board may also consider:

(a) The length of time necessary for the (~~offender~~) individual to complete treatment and programming;

(b) The (~~offender's~~) individual's failure to participate in required evaluations;

(c) The (~~offender's~~) individual's proposed release plan;
(~~and~~)

(d) Testimony of relevant persons related to the case to include but not limited to the case manager or designee and any relevant treatment providers or designee; and

(e) Other pertinent information.

(5) If the board finds the (~~offender~~) individual not releasable, the board may add up to (~~sixty~~) 60 months to the minimum term.

(6) If the (~~offender~~) individual is found not releasable and time is added to the minimum term:

(a) The (~~offender may petition for~~) individual may request an earlier review when (~~the offender completes~~) they have completed required treatment or programming.

(b) The board retains the authority to schedule an earlier review at its discretion.

NEW SECTION

WAC 381-90-052 Release determination for juvenile board cases.

(1) (a) RCW 10.95.030(3) requires that any convicted person sentenced under its provisions shall be subject to a board hearing to determine releasability. The hearing shall be held on the first available hearing date following the completion of the court-imposed minimum term.

(b) No later than 180 days prior to the expiration of the minimum term, the department shall conduct, and the individual shall participate in a psychological evaluation. The evaluation shall include, but is not limited to:

(i) A prediction based upon administration of actuarial risk assessment instruments and the criminal history of the person, of the likelihood that the individual will engage in future criminal behavior if released on conditions to be set by the board;

(ii) The institutional progress report(s) covering the inmate's adjustment, achievement, infractions, and program participation during incarceration;

(iii) Prior psychiatric or psychological reports such as IQ appraisals or personality inventories;

(iv) Behavioral details of the crime(s) of conviction, such as law enforcement reports, prosecutor's statements, court records, and presentence investigation reports;

(v) The department's risk management level and the sex offender notification level (if applicable).

(2) According to the provisions of RCW 9.94A.730, any person who meets the specified criteria may petition the board for early release. The hearing will be held upon receipt of a psychological evaluation and after completion of appropriate notifications pursuant to RCW 9.95.422.

(a) If an individual does not meet eligibility criteria, the board will notify the person of the denial of their petition, and will provide information whether the individual will be eligible to petition at a future date.

(b) No later than 180 days from the receipt of the approved petition for early release, the department shall conduct, and the individual shall participate in a psychological evaluation. The evaluation shall include information as noted under subsection (1)(b) of this section.

(c) RCW 9.95.422 requires that the board must provide notice of release hearings, a copy of the petition for early release, and any evaluation or information relevant to the release decision without redaction, except as provided by law, to the sentencing court, the prosecuting attorney, and the crime victim or surviving family member upon request, at least 90 days prior to the early release hearing.

(3) For hearings held under either RCW 10.95.030(3) or 9.94A.730, the board shall determine whether it is more likely than not the individual will engage in new criminal law violations if released to the community in spite of board-imposed conditions of community custody. The board decision related to an individual's likelihood of criminal reoffense is based upon a preponderance of the evidence.

(4) In making a release decision, the board may also consider:

(a) An end of sentence review committee report if the individual has been convicted of an offense with sexual elements;

(b) A psychological report;

(c) Rehabilitative efforts and the length of time necessary for the individual to complete treatment and programming;

(d) The individual's failure to participate in required evaluations;

(e) The individual's proposed release plan;

(f) Testimony of relevant persons related to the case to include but not limited to the case manager or designee and any relevant treatment providers or designee; and

(g) Other pertinent information.

(5) If the board finds an individual sentenced under RCW 10.95.030(3) not releasable, the board may add up to five years to the minimum term. Subsequent hearings will be held approximately 90 days prior to the expiration of the minimum term.

(a) The individual may request an earlier review when they have completed required treatment or programming.

(b) The board retains the authority to schedule an earlier review at its discretion.

(6) If the board finds an individual who filed a petition for early release consideration pursuant to RCW 9.94A.730 not releasable, the individual may file a new petition for early release five years from the date of the denial, or at an earlier date as set by the board.

(7) RCW 9.95.422 requires that the board provide comprehensive minutes of all related meetings and hearings on petitions for early release filed pursuant to RCW 9.94A.730 within 30 days of the meeting or hearing. Minutes will be posted to the public website of the board.

AMENDATORY SECTION (Amending WSR 09-08-109, filed 3/31/09, effective 5/1/09)

WAC 381-90-060 Release determination after community custody revocation. The board may set a new minimum term if the ~~((offender))~~ individual is returned to prison on a revocation.

(1) For individuals released pursuant to RCW 9.95.420, the new minimum term shall not exceed the remaining portion of the maximum sentence. Subsequent release determinations will be conducted as set out in WAC 381-90-050.

(2) For individuals released pursuant to RCW 10.95.030(3), the new minimum term shall not exceed five years. Subsequent release determinations will be conducted as set out in WAC 381-90-052.

(3) For individuals released pursuant to RCW 9.94A.730, the board may return the individual for up to the remainder of the court-imposed term of incarceration. The individual may file a new petition for early release five years from the date of return to the institution, or at an earlier date as set by the board. Subsequent release determinations will be conducted as set out in WAC 381-90-052.

AMENDATORY SECTION (Amending WSR 09-08-109, filed 3/31/09, effective 5/1/09)

WAC 381-90-080 ((Inmate)) Incarcerated individual to be served notice. The board will send the hearing notice to the institution superintendent/designee in advance of any hearing. The hearing notice shall specify the reason for the hearing, time, date, and place.

(1) Upon receipt of the hearing notice, the superintendent or designee shall serve the ~~((inmate))~~ incarcerated individual with the document.

(2) The original hearing notice is to be signed by the ~~((inmate))~~ individual with date of service noted and returned to the board ~~((headquarters))~~ electronically. The department should retain a copy in the ~~((inmate's))~~ incarcerated individual's institutional file and provide a copy to ~~((the inmate))~~ them.

(3) In cases where the ~~((inmate))~~ incarcerated individual refuses to sign the notice, the superintendent or designee shall note the date of service and obtain the signature of a witness to such service. A

copy of the signed form should be returned to the board electronically.

(4) ~~((The inmate))~~ For individuals being considered for release pursuant to RCW 9.95.420, they will be allowed to review a copy of the end of sentence review report with supporting documents prior to the hearing. The ((inmate)) incarcerated individual shall sign an acknowledgment form that the documents have been reviewed, noting the date and amount of time spent in review. If an interpreter assisted the ((offender)) individual, the interpreter shall also sign and date the acknowledgment form. A copy of the signed form should be returned to the board electronically.

(5) For individuals being considered for release pursuant to RCW 10.95.030(3) or 9.94A.730, they will be allowed to review copies of relevant file material prior to the hearing. The person shall sign an acknowledgment form that the documents have been reviewed, noting the date and amount of time spent in review. If an interpreter assisted the individual, the interpreter shall also sign and date the acknowledgment form. A copy of the signed form should be returned to the board electronically.

(6) ~~The ((inmate))~~ incarcerated individual shall be given the opportunity to make a written statement to the board.

AMENDATORY SECTION (Amending WSR 09-08-109, filed 3/31/09, effective 5/1/09)

WAC 381-90-090 ((Inmate)) Incarcerated individual shall be advised of rights. Each ~~((inmate))~~ individual who becomes the subject of a hearing conducted under the provisions of RCW 9.95.420, 10.95.030(3), or 9.94A.730, shall be advised of their rights at the time(s) he/she is served with a notice of the hearing. The written notice provided by the board will advise the ~~((inmate))~~ individual of the following rights:

- (1) To participate in a hearing before a panel of the board and to testify under oath. The board may hold the hearing with the ~~((inmate))~~ individual in person, by telephone, or via video conferencing;
- (2) To submit letters or statements in support of release;
- (3) To review the ESRC report ~~((and supporting))~~ or relevant documents prior to the hearing; and
- (4) To receive a written decision from the board.

AMENDATORY SECTION (Amending WSR 09-08-109, filed 3/31/09, effective 5/1/09)

WAC 381-90-100 Conducting a hearing. All hearings conducted under the provisions of this chapter shall be held before a panel of at least two members of the indeterminate sentence review board. One member shall be designated, by decision of the panel, as the presiding member.

At the time of the hearing under the provisions of RCW 9.95.420, 10.95.030(3), and 9.94A.030, the presiding member will determine if the ~~((inmate))~~ incarcerated individual was given proper notice of the hearing, was advised of the reason for the hearing, and was properly advised of their rights.

A limited number of observers may be present by prior approval of the panel members conducting the hearing, provided that the superintendent or designee authorizes such observers in the facility. Observers may also be permitted telephonically or via video conferencing.

The board reserves the right to exclude any person from the (~~room during a~~) hearing upon its own motion or the motion of any party to the hearing provided that good cause for such exclusion is articulated on the record.

The presiding member may recess the hearing at any time for consultation with the other panel member(s) or for any reason.

The panel conducting the hearing will submit its recommendation to the full board for final determination.

In the event of a language and/or communication problem, a certified interpreter shall be present to interpret and assist.

The board will accept written information pertaining to the (~~inmate~~) individual from any interested person.

AMENDATORY SECTION (Amending WSR 09-08-109, filed 3/31/09, effective 5/1/09)

WAC 381-90-120 ((Inmate)) Incarcerated individual to be present.

(1) The subject of any hearing conducted under the provisions of this chapter may participate in the hearing. However, in the event the ((inmate)) incarcerated individual refuses to appear, the board ((will)) may:

(a) Continue the hearing until the next available docket ((The ISRB will notify the inmate that if they refuse to attend the next scheduled hearing, the hearing will be conducted)); or

(b) Hold the hearing in absentia ((and)). The board's decision will be based on all available evidence.

(2) If an individual is found not releasable after a hearing that is held in absentia, the individual may request an earlier review if they are willing to attend a rescheduled hearing.

(3) The board retains the authority to schedule an earlier review at its discretion.

AMENDATORY SECTION (Amending WSR 09-08-109, filed 3/31/09, effective 5/1/09)

WAC 381-90-150 Disposition. (1) The board shall make a finding of whether ((or not)) it is more likely than not that the ((inmate)) incarcerated individual will commit another sex offense if released to the community, pursuant to RCW 9.95.420.

(2) The board shall make a finding of whether it is more likely than not that the inmate will engage in new criminal behavior if released to the community, pursuant to RCW 10.95.030(3) or 9.94A.730.

(3) A list of factors that the board may consider includes, but is not limited to:

((1)) (a) Refusal to participate in available programs or resources designed to assist an inmate to reduce the risk of reoffense (e.g., stress and anger management, victim awareness, substance abuse treatment, mental health treatment, sex ((offender)) offense specific treatment).

~~((2))~~ (b) Serious and/or repetitive disciplinary infractions during incarceration.

~~((3))~~ (c) Evidence of an inmate's continuing intent or propensity to engage in sex offenses, violent acts, or criminal behavior.

~~((4))~~ (d) Statements or declarations by the inmate of intent not to comply with conditions of community custody.

~~((5))~~ (e) End of sentence review determination based on actuarial assessments identifying risk to sexually reoffend.

(f) Psychological evaluation including actuarial assessment information identifying risk to engage in criminal behavior.

(g) Testimony of relevant persons related to the case to include but not limited to the case manager or designee and any relevant treatment providers or designee.

AMENDATORY SECTION (Amending WSR 09-08-109, filed 3/31/09, effective 5/1/09)

WAC 381-90-170 Hearing record preservation. There will be ~~((a))~~ an audio recording made of all hearings conducted under the provisions of this chapter. Such recordings shall be preserved ~~((at the offices of the ISRB in Olympia))~~ by the board in compliance with the current record retention schedule. Parties requesting a copy of any hearing must do so in writing. Parties may be required to reimburse the ~~((ISRB))~~ board for the costs involved in duplication.