



# PROPOSED RULE MAKING

## CR-102 (December 2017) (Implements RCW 34.05.320)

Do NOT use for expedited rule making

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STATE OF WASHINGTON  
FILED

DATE: February 20, 2019

TIME: 10:04 AM

WSR 19-05-087

**Agency:** Department of Social and Health Services, Behavioral Health Administration

**Original Notice**

**Supplemental Notice to WSR** \_\_\_\_\_

**Continuance of WSR** \_\_\_\_\_

**Preproposal Statement of Inquiry was filed as WSR** 18-06-102 ; or

**Expedited Rule Making--Proposed notice was filed as WSR** \_\_\_\_\_; or

**Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1); or**

**Proposal is exempt under RCW** \_\_\_\_\_.

**Title of rule and other identifying information:** (describe subject) The department is proposing to repeal one section and amend other existing sections in chapter 388-875 WAC "Criminally insane person committed to the care of the department of social and health services – evaluation, placement, care and discharge".

**Hearing location(s):**

Date:	Time:	Location: (be specific)	Comment:
March 26, 2019	10:00 a.m.	Office Building 2 DSHS Headquarters 1115 Washington Olympia, WA 98504	Public parking at 11 <sup>th</sup> and Jefferson. A map is available at: <a href="https://www.dshs.wa.gov/sesa/rules-and-policies-assistance-unit/driving-directions-office-bldg-2">https://www.dshs.wa.gov/sesa/rules-and-policies-assistance-unit/driving-directions-office-bldg-2</a>

**Date of intended adoption:** Not earlier than March 27, 2019 (Note: This is **NOT** the **effective** date)

**Submit written comments to:**

Name: DSHS Rules Coordinator

Address: PO Box 45850  
Olympia, WA 98504

Email: [DSHSRPAURulesCoordinator@dshs.wa.gov](mailto:DSHSRPAURulesCoordinator@dshs.wa.gov)

Fax: 360-664-6185

Other:

By (date) 5:00 p.m. March 26, 2019

**Assistance for persons with disabilities:**

Contact Jeff Kildahl, DSHS Rules Consultant

Phone: 360-664-6092

Fax: 360-664-6185

TTY: 711 Relay Service

Email: [Kildaja@dshs.wa.gov](mailto:Kildaja@dshs.wa.gov)

Other:

By (date) March 12, 2019

**Purpose of the proposal and its anticipated effects, including any changes in existing rules:** The department intends to update outdated terms such as "mental health division", revise the rules to more clearly reflect the changes that have occurred since the implementation of 2E2SSB 5177 (Chapter 7, Laws of 2015) including clarification of maximum payment for forensic evaluation in WAC 388-875-0040, and clarify the role and function of the Office of Forensic Mental Health Services.

**Reasons supporting proposal:** Many of these rules have not been updated since 2000. The department intends to bring this chapter up to date by clarifying rule language and ensuring that these rules are consistent with statute, other rules, any forthcoming legislation, and with current department organization and procedures.

**Statutory authority for adoption:** Chapter 10.77 RCW, RCW 72.01.090, RCW 70.02.290, RCW 70.02.340, RCW 71.05.560, RCW 71.24.035(5)(c), RCW 71.34.380

**Statute being implemented:**

**Is rule necessary because of a:**

- Federal Law?  Yes  No  
Federal Court Decision?  Yes  No  
State Court Decision?  Yes  No

If yes, CITATION:

**Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:**

**Name of proponent:** (person or organization) Department of Social and Health Services  Private  
 Public  
 Governmental

**Name of agency personnel responsible for:**

	Name	Office Location	Phone
Drafting:	Jason Karpen	Blake Office Park, 4500 10 <sup>th</sup> Ave SE, Lacey, WA 98503	360-725-3529
Implementation:	Dr. Thomas J. Kinlen	Blake Office Park, 4500 10 <sup>th</sup> Ave SE, Lacey, WA 98503	360-725-1388
Enforcement:	Dr. Thomas J. Kinlen	Blake Office Park, 4500 10 <sup>th</sup> AVE SE, Lacey, WA 98503	360-725-1388

**Is a school district fiscal impact statement required under RCW 28A.305.135?**  Yes  No

If yes, insert statement here:

The public may obtain a copy of the school district fiscal impact statement by contacting:

- Name:  
Address:  
Phone:  
Fax:  
TTY:  
Email:  
Other:

**Is a cost-benefit analysis required under RCW 34.05.328?**

- Yes: A preliminary cost-benefit analysis may be obtained by contacting:  
Name:  
Address:  
Phone:  
Fax:  
TTY:  
Email:  
Other:

No: Please explain: This revision is exempt under RCW 34.05.328(5)(b)(ii) because it relates only to internal governmental operation; under 34.05.328(5)(b)(iii) because the revisions contain no material change other than the repeal of 388-875-0080, which is covered by statute; under 34.05.328(5)(b)(iv) because the revisions only correct typographical

errors, make address or name changes, or clarify language without changing its effect; and under RCW 34.05.328(5)(b)(vi) because the revisions relate to rules that set or adjust fees or rate pursuant to legislative standards. i

**Regulatory Fairness Act Cost Considerations for a Small Business Economic Impact Statement:**

This rule proposal, or portions of the proposal, **may be exempt** from requirements of the Regulatory Fairness Act (see chapter 19.85 RCW). Please check the box for any applicable exemption(s):

This rule proposal, or portions of the proposal, is exempt under RCW 19.85.061 because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Please cite the specific federal statute or regulation this rule is being adopted to conform or comply with, and describe the consequences to the state if the rule is not adopted.

Citation and description:

This rule proposal, or portions of the proposal, is exempt because the agency has completed the pilot rule process defined by RCW 34.05.313 before filing the notice of this proposed rule.

This rule proposal, or portions of the proposal, is exempt under the provisions of RCW 15.65.570(2) because it was adopted by a referendum.

This rule proposal, or portions of the proposal, is exempt under RCW 19.85.025(3). Check all that apply:

RCW 34.05.310 (4)(b)  
(Internal government operations)

RCW 34.05.310 (4)(e)  
(Dictated by statute)

RCW 34.05.310 (4)(c)  
(Incorporation by reference)

RCW 34.05.310 (4)(f)  
(Set or adjust fees)

RCW 34.05.310 (4)(d)  
(Correct or clarify language)

RCW 34.05.310 (4)(g)  
((i) Relating to agency hearings; or (ii) process requirements for applying to an agency for a license or permit)

This rule proposal, or portions of the proposal, is exempt under RCW \_\_\_\_\_.

Explanation of exemptions, if necessary:

**COMPLETE THIS SECTION ONLY IF NO EXEMPTION APPLIES**

If the proposed rule is **not exempt**, does it impose more-than-minor costs (as defined by RCW 19.85.020(2)) on businesses?

No Briefly summarize the agency's analysis showing how costs were calculated. \_\_\_\_\_

Yes Calculations show the rule proposal likely imposes more-than-minor cost to businesses, and a small business economic impact statement is required. Insert statement here:

The public may obtain a copy of the small business economic impact statement or the detailed cost calculations by contacting:

- Name:
- Address:
- Phone:
- Fax:
- TTY:
- Email:
- Other:

**Date:** February 14, 2019

**Name:** Katherine I. Vasquez

**Title:** DSHS Rules Coordinator

**Signature:**

AMENDATORY SECTION (Amending WSR 01-01-008, filed 12/6/00, effective 1/6/01)

**WAC 388-875-0010 Purpose.** (~~(These regulations are adopted pursuant to and in accordance with chapter 117, Laws of 1973 1st sess. They are adopted)~~) To provide procedures for the evaluation, restoration, placement, care, and discharge of persons committed to the care of the department of social and health services, required under (~~(the aforementioned act, relating to the criminally insane)~~) chapter 10.77 RCW.

AMENDATORY SECTION (Amending WSR 01-01-008, filed 12/6/00, effective 1/6/01)

**WAC 388-875-0020 Definitions.** "Administration" means the behavioral health administration, department of social and health services.

"Department" means the state department of social and health services.

~~(("Division" means the mental health division, department of social and health services.))~~

"Director" means the director of the office of forensic mental health services.

"Evaluation" means the initial procedure when a court requests the department to provide an opinion if a person charged with a crime is competent to stand trial or, if indicated and appropriate, if the person was suffering under a mental disease or defect excluding responsibility at the time of the commission of the crime.

"Indigent" means any person who is financially unable to obtain counsel or other necessary expert or professional services without causing substantial hardship to ((himself)) the person or his or her family.

"Office" means the office of forensic mental health services, department of social and health services.

**"Professional person" means:**

(1) A psychiatrist. This is defined as a person having a license as a physician and surgeon in this state, who has in addition, completed three years of graduate training in psychiatry in a program approved by the American Medical Association or the American Osteopathic Association and who is certified or is eligible to be certified by the American Board of Psychiatry and Neurology or the American Osteopathic Board of Neurology and Psychiatry.

(2) A psychologist. This is defined as a person who has been licensed as a psychologist (~~(pursuant to)~~) under chapter 18.83 RCW.

(3) A social worker. This is defined as a person with a (~~(master's)~~) bachelor's or further advanced degree from an accredited school of social work (~~(or a degree deemed equivalent under rules adopted by the secretary)~~) educational program accredited and approved under RCW 18.320.010.

"Secretary" means the secretary of the department of social and health services or his or her designee.

"Superintendent" means the person responsible for the functioning of a treatment facility.

"Treatment" means any currently standardized medical or mental health procedure including medication.

"Treatment facility" means any facility operated or approved by the department of social and health services ~~((for the treatment of))~~ that provide services for the criminally insane or persons receiving competency services. ~~((Such))~~ This definition ~~((shall))~~ does not include any state correctional institution or facility.

AMENDATORY SECTION (Amending WSR 01-01-008, filed 12/6/00, effective 1/6/01)

**WAC 388-875-0030 ~~((Mental health division))~~ Evaluation & treatment.** (1) The secretary designates to the ~~((division))~~ administration the responsibility for:

~~((1))~~ (a) Evaluation and treatment of any person committed to the secretary for evaluation or treatment, under chapter 10.77 RCW; and

(b) Determination of which treatment facility must have custody of the persons committed to the secretary under chapter 10.77 RCW.

(2) The secretary designates to the office the responsibility for:

(a) Assisting the court in obtaining nondepartmental experts or professional persons to participate in the evaluation or a hearing on behalf of the defendant and ~~((supervising the procedure whereby))~~ providing quality standards in addition to compensating such professionals ~~((will be compensated))~~, according to ~~((fee))~~ payment schedule published under WAC 388-875-0040 if the person being evaluated or treated is an indigent person;

~~((3) Assuring)~~ (b) Ensuring that any nondepartmental expert or professional person requesting compensation has maintained adequate evaluation and treatment records, as determined by the office, which justify compensation;

~~((4))~~ (c) Assisting the court by designation of experts or professional persons to examine the defendant and report to the court when the defendant is not committed to the secretary; and

~~((5) Determination of what treatment facility shall have custody of persons committed to the secretary under chapter 10.77 RCW.~~

~~(6) If the court is advised by any party that the defendant may be developmentally disabled, at least one of the experts or professional persons appointed shall be a)~~ (d) Assisting the court by designating an expert or professional person who is a developmental disabilities professional to examine the defendant if the court is advised by any party that the defendant may be developmentally disabled.

AMENDATORY SECTION (Amending WSR 01-01-008, filed 12/6/00, effective 1/6/01)

**WAC 388-875-0040 Schedule of ~~((maximum))~~ payment for defendant expert or professional person.** Department payments to an expert or professional person for department services an indigent person receives ~~((shall not exceed))~~ must occur as follows:

- (1) ~~((One hundred dollars an hour for services; or  
(2) Eight hundred dollars total payment for services.))~~

The department ~~((shall only approve an exception to this section ruling when the exception is approved, in writing, by the division director))~~ must publish a schedule of hourly fees, and travel time, in amounts that the department determines to be fair and reasonable. The department will review the hourly reimbursement schedule annually and make adjustments as appropriate. This schedule may be found online at: <https://www.dshs.wa.gov/bha/office-service-integration/office-forensic-mental-health-services>.

(2) Under RCW 10.77.140, the department ((shall)) must only approve payment for one mental health examination per indigent person in each six month period.

(3) All invoices for court-ordered services must be submitted using the department's invoicing procedure, with each service itemized by hour and quarter-hour increments. Forensic evaluation reports conducted by a professional person and submitted for payment are subject to accounting and quality review by the office prior to approving payment.

AMENDATORY SECTION (Amending WSR 01-01-008, filed 12/6/00, effective 1/6/01)

**WAC 388-875-0050 Time limitations and requirements.** If a person is committed to the secretary as criminally insane, commitment and treatment ~~((cannot))~~ must not exceed the maximum possible sentence for any offense charged. Therefore:

(1) The ~~((superintendent))~~ administration, ~~((if no superintendent then the division,))~~ with the assistance of the office of the attorney general where necessary ~~((shall))~~ must determine at the time of commitment the maximum possible sentence for any offense charged, and thereby compute a maximum release date for every individual so committed.

(2) If the committed person has not been released by court order six months prior to the expiration of the maximum possible release date, the ~~((superintendent))~~ administration, ~~((if no superintendent, the division, shall))~~ must notify the committing court and prosecuting attorney of its computation of maximum release date and the requirement that the person must be released on that date unless civil proceedings are instituted or the court determines that the computation of maximum release date is incorrect.

AMENDATORY SECTION (Amending WSR 01-01-008, filed 12/6/00, effective 1/6/01)

**WAC 388-875-0060 Individualized treatment.** (1) Whenever a person is committed to the secretary as criminally insane, the treatment facility to which the person is assigned ~~((shall))~~ must, within fifteen days of admission to the facility, evaluate and diagnose the committed person for the purpose of devising an individualized treatment program.

(2) Every person, committed to the secretary as criminally insane, ~~((shall))~~ must have an individualized treatment plan formulated by the treatment facility. This plan shall be developed by appropriate treatment team members and implemented as soon as possible but no later than fifteen days after the ~~((person's admission))~~ person is admitted to the treatment facility ~~((as criminally insane))~~. Each individualized treatment plan ~~((shall))~~ must include, but not be limited to:

(a) A statement of the nature of the specific problems and specific needs of the patient;

(b) A statement of the physical setting necessary to achieve the purposes of commitment;

(c) A description of intermediate and long-range treatment goals, with a projected timetable for their attainment;

(d) A statement and rationale for the plan of treatment for achieving these intermediate and long-range goals;

(e) A specification of staff responsibility and a description of proposed staff involvement with a patient in order to attain these treatment goals; and

(f) Criteria for recommendation to the court for release.

(3) This individualized treatment plan ~~((shall))~~ must be reviewed by the treatment facility periodically, at least every six months ~~((and a copy of the))~~.

(4) This individualized treatment plan ((shall)) must be ((sent)) made available to the committing court, and other authorized persons or entities, upon request.

AMENDATORY SECTION (Amending WSR 16-13-087, filed 6/15/16, effective 7/16/16)

**WAC 388-875-0070 Transfer of a patient between ~~((state-operated))~~ treatment facilities ~~((for persons with mental illness))~~.** In some instances, it is appropriate for the department to transfer a patient currently residing in a state facility to another state facility for ongoing treatment. The department accomplishes the transfer with the utmost care given to the therapeutic needs and legal status of the patient. This section describes the procedures for handling a patient transfer between state facilities in a manner consistent with the best interest of the patient.

(1) The department uses the following criteria when determining the appropriateness of a patient transfer:

(a) The patient's family resides within the receiving facility's service area; ~~((or))~~

(b) The patient's primary home of residence is in the receiving facility's service area; ~~((or))~~

(c) A particular service or need of the patient is better met at the receiving facility; ~~((or))~~

(d) Transfer to the receiving facility may facilitate ~~((community discharge due to the availability of community service in the receiving facility's service area))~~ continuity of care; or

(e) The ~~((county, behavioral health organization (BHO), or patient))~~ prosecutor, defense counsel, or the court requests a transfer.

(2) Prior to any proposed transfer of a patient, the ~~((state))~~ treatment facility must comply with the following:

(a) The sending facility, at the request of the (~~chief executive officer (CEO)~~) superintendent, must have forwarded in writing information necessary to make a decision on whether transfer is appropriate to the receiving facility's attending physician or the physician's designee (~~and the (BHO) liaison~~), copying the prosecutor and defense counsel on that communication;

(b) The receiving facility's attending physician or the physician's designee (~~and the BHO liaison~~) must have recommended appropriate action to the ((CEO)) superintendent of the sending facility in writing within five calendar days of receipt of the request, and where exigent circumstances exist, necessitating immediate transfer of a patient, these communications must be made immediately as well;

(c) If the receiving facility accepts the proposed patient transfer, the sending facility must notify the patient, guardian, (~~BHO liaison, and attorney, if known~~) prosecutor and defense counsel, at least five days before the proposed patient transfer;

(d) The sending facility is responsible for all patient transfer arrangements, such as, transportation and staff escort, and coordinates the day and time of arrival with the receiving facility; and

(e) The sending facility arranges for the transfer of patient's medical record to the receiving facility.

(3) The sending facility must document the following in the patient's record:

(a) That the physician documented the medical suitability of the patient for transfer; and

(b) That the (~~social worker~~) facility documented:

(i) Justification as to why the transfer is considered in the patient's best interests; and

(ii) The patient's wishes regarding transfer.

(4) The sending facility must contact the prosecuting attorney's office of the committing county, and defense counsel before the transfer. Where court orders need to be amended as a result of transfer of a patient, the relevant court must also be contacted in order to affect such amendments.

AMENDATORY SECTION (Amending WSR 01-01-008, filed 12/6/00, effective 1/6/01)

**WAC 388-875-0090 Conditional release.** (1) Any person committed to the secretary as criminally insane may make application to the secretary for conditional release.

(2) The (~~secretary designates the superintendent of the treatment facility, if no superintendent, then the director of the division, as the person to receive and act on such application~~) administration is responsible for receiving and acting on applications for conditional release.

(3) The person making application for conditional release ((shall)) must not, under any circumstances, be released until there is a court hearing on the application, and recommendations and a court order authorizing conditional release has been issued.

(4) If conditional release is denied by the court the person making the applications may reapply after a period of six months from the date of denial.

(5) If the court grants conditional release and places the person making application under the supervision of ((a)) the department ((employee)), ((that supervising)) the department ((employee shall)) must make monthly reports((, unless indicated otherwise by the court,)) for the first six months, and semi-annually thereafter, unless indicated otherwise by the committing court, concerning the conditionally released person's progress and compliance with the terms and conditions of conditional release. Such reports ((shall)) must be forwarded to the committing court, ((the division,)) the prosecuting attorney, and the treatment facility in which the person was most recently housed.

(6) The following persons are designated to exercise power and authority of the secretary contained in RCW 10.77.190:

(a) The assistant secretary of the behavioral health administration, the director or designee of the ((division)) office;

(b) The probation and parole office, if any, supervising the conditionally released person; and

(c) The treatment facility supervising the conditionally released person or from which the person was conditionally released.

AMENDATORY SECTION (Amending WSR 01-01-008, filed 12/6/00, effective 1/6/01)

**WAC 388-875-0110 Access to records by criminal justice agencies.**

Upon written request, criminal justice agencies ((shall)) must have access to the following documents developed pursuant to the procedures set forth in chapter 10.77 RCW. The most recent forensic:

(1) Psychiatric assessment;

(2) Release summary; and

(3) Pretrial report of the examination, either inpatient or outpatient.

Other relevant information may be provided by agreement between the requesting criminal justice agency and the treatment facility, subject to federal and state confidentiality provisions.

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 388-875-0080 Restoration procedure for a former involuntarily committed person's right to firearm possession.