

Mental Hygiene Law
Chapter 27. Of the Consolidated Laws
Title B. Mental Health Act
Article 10. Sex Offenders Requiring Civil Commitment or Supervision

§ 10.01 Legislative findings

The legislature finds as follows:

(a) That recidivistic sex offenders pose a danger to society that should be addressed through comprehensive programs of treatment and management. Civil and criminal processes have distinct but overlapping goals, and both should be part of an integrated approach that is based on evolving scientific understanding, flexible enough to respond to current needs of individual offenders, and sufficient to provide meaningful treatment and to protect the public.

(b) That some sex offenders have mental abnormalities that predispose them to engage in repeated sex offenses. These offenders may require long-term specialized treatment modalities to address their risk to reoffend. They should receive such treatment while they are incarcerated as a result of the criminal process, and should continue to receive treatment when that incarceration comes to an end. In extreme cases, confinement of the most dangerous offenders will need to be extended by civil process in order to provide them such treatment and to protect the public from their recidivistic conduct.

(c) That for other sex offenders, it can be effective and appropriate to provide treatment in a regimen of strict and intensive outpatient supervision. Accordingly, civil commitment should be only one element in a range of responses to the need for treatment of sex offenders. The goal of a comprehensive system should be to protect the public, reduce recidivism, and ensure offenders have access to proper treatment.

(d) That some of the goals of civil commitment - protection of society, supervision of offenders, and management of their behavior - are appropriate goals of the criminal process as well. For some recidivistic sex offenders, appropriate criminal sentences, including long-term post-release supervision, may be the most appropriate way to achieve those goals.

(e) That the system for responding to recidivistic sex offenders with civil measures must be designed for treatment and protection. It should be based on the most accurate scientific understanding available, including the use of current, validated risk assessment instruments. Ideally, effective risk assessment should begin to occur prior to sentencing in the criminal process, and it should guide the process of civil commitment.

(f) That the system should offer meaningful forms of treatment to sex offenders in all criminal and civil phases, including during incarceration, civil commitment, and outpatient supervision.

(g) That sex offenders in need of civil commitment are a different population from traditional mental health patients, who have different treatment needs and particular vulnerabilities. Accordingly, civil commitment of sex offenders should be implemented in ways that do not endanger, stigmatize, or divert needed treatment resources away from such traditional mental health patients.

§ 10.03 Definitions

As used in this article, the following terms shall have the following meanings:

(a) “Agency with jurisdiction” as to a person means that agency which, during the period in question, would be the agency responsible for supervising or releasing such person, and can include the department of correctional services, the office of mental health, the office of mental retardation and developmental disabilities, and the division of parole.

(b) “Commissioner” means the commissioner of mental health or the commissioner of mental retardation and developmental disabilities.

(c) “Correctional facility” means a correctional facility as that term is defined in section two of the correction law.

(d) “Counsel for respondent” means any counsel that has been retained or appointed for respondent, or if no other counsel has been retained or appointed, or prior counsel cannot be located with reasonable efforts, then the mental hygiene legal service.

(e) “Dangerous sex offender requiring confinement” means a person who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility.

(f) “Designated felony” means any felony offense defined by any of the following provisions of the penal law: assault in the second degree as defined in section 120.05, assault in the first degree as defined in section 120.10, gang assault in the second degree as defined in section 120.06, gang assault in the first degree as defined in section 120.07, stalking in the first degree as defined in section 120.60, manslaughter in the second degree as defined in subdivision one of section 125.15, manslaughter in the first degree as defined in section 125.20, murder in the second degree as defined in section 125.25, aggravated murder as defined in section 125.26, murder in the first degree as defined in section 125.27, kidnapping in the second degree as defined in section 135.20, kidnapping in the first degree as defined in section 135.25, burglary in the third degree as defined in section 140.20, burglary in the second degree as defined in section 140.25, burglary in the first degree as defined in section 140.30, arson in the second degree as defined in section 150.15, arson in the first degree as defined in section 150.20, robbery in the third degree as defined in section 160.05, robbery in the second degree as defined in section 160.10,

robbery in the first degree as defined in section 160.15, promoting prostitution in the second degree as defined in section 230.30, promoting prostitution in the first degree as defined in section 230.32, compelling prostitution as defined in section 230.33, disseminating indecent material to minors in the first degree as defined in section 235.22, use of a child in a sexual performance as defined in section 263.05, promoting an obscene sexual performance by a child as defined in section 263.10, promoting a sexual performance by a child as defined in section 263.15, or any felony attempt or conspiracy to commit any of the foregoing offenses.

(g) “Detained sex offender” means a person who is in the care, custody, control, or supervision of an agency with jurisdiction, with respect to a sex offense or designated felony, in that the person is either:

(1) A person who stands convicted of a sex offense as defined in subdivision (p) of this section, and is currently serving a sentence for, or subject to supervision by the division of parole, whether on parole or on post-release supervision, for such offense or for a related offense;

(2) A person charged with a sex offense who has been determined to be an incapacitated person with respect to that offense and has been committed pursuant to article seven hundred thirty of the criminal procedure law, but did engage in the conduct constituting such offense;

(3) A person charged with a sex offense who has been found not responsible by reason of mental disease or defect for the commission of that offense;

(4) A person who stands convicted of a designated felony that was sexually motivated and committed prior to the effective date of this article;

(5) A person convicted of a sex offense who is, or was at any time after September first, two thousand five, a patient in a hospital operated by the office of mental health, and who was admitted directly to such facility pursuant to article nine of this title or section four hundred two of the correction law upon release or conditional release from a correctional facility, provided that the provisions of this article shall not be deemed to shorten or lengthen the time for which such person may be held pursuant to such article or section respectively; or

(6) A person who has been determined to be a sex offender requiring civil management pursuant to this article.

(h) “Licensed psychologist” means a person who is registered as a psychologist under article one hundred fifty-three of the education law.

(i) “Mental abnormality” means a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that

results in that person having serious difficulty in controlling such conduct.

(j) “Psychiatric examiner” means a qualified psychiatrist or a licensed psychologist who has been designated to examine a person pursuant to this article; such designee may, but need not, be an employee of the office of mental health or the office of mental retardation and developmental disabilities.

(k) “Qualified psychiatrist” means a physician licensed to practice medicine in New York state who: (1) is a diplomat of the American board of psychiatry and neurology or is eligible to be certified by that board; or (2) is certified by the American osteopathic board of neurology and psychiatry or is eligible to be certified by that board.

(l) “Related offenses” include any offenses that are prosecuted as part of the same criminal action or proceeding, or which are part of the same criminal transaction, or which are the bases of the orders of commitment received by the department of correctional services in connection with an inmate's current term of incarceration.

(m) “Release” and “released” means release, conditional release or discharge from confinement, from supervision by the division of parole, or from an order of observation, commitment, recommitment or retention.

(n) “Respondent” means a person referred to a case review team for evaluation, a person as to whom a sex offender civil management petition has been recommended by a case review team and not yet filed, or filed by the attorney general and not dismissed, or sustained by procedures under this article.

(o) “Secure treatment facility” means a facility or a portion of a facility, designated by the commissioner, that may include a facility located on the grounds of a correctional facility, that is staffed with personnel from the office of mental health or the office of mental retardation and developmental disabilities for the purposes of providing care and treatment to persons confined under this article, and persons defined in paragraph five of subdivision (g) of this section. Personnel from these same agencies may provide security services, provided that such staff are adequately trained in security methods and so equipped as to minimize the risk or danger of escape.

(p) “Sex offense” means an act or acts constituting: (1) any felony defined in article one hundred thirty of the penal law, including a sexually motivated felony; (2) patronizing a prostitute in the first degree as defined in section 230.06 of the penal law, incest in the second degree as defined in section 255.26 of the penal law, or incest in the first degree as defined in section 255.27 of the penal law; (3) a felony attempt or conspiracy to commit any of the foregoing offenses set forth in this subdivision; or (4) a designated felony, as defined in subdivision (f) of this section, if sexually motivated and committed prior to the effective date of this article.

(q) “Sex offender requiring civil management” means a detained sex offender who suffers from a mental abnormality. A sex offender requiring civil management can, as

determined by procedures set forth in this article, be either (1) a dangerous sex offender requiring confinement or (2) a sex offender requiring strict and intensive supervision.

(r) "Sex offender requiring strict and intensive supervision" means a detained sex offender who suffers from a mental abnormality but is not a dangerous sex offender requiring confinement.

(s) "Sexually motivated" means that the act or acts constituting a designated felony were committed in whole or in substantial part for the purpose of direct sexual gratification of the actor.

§ 10.05 Notice and case review

(a) The commissioner of mental health, in consultation with the commissioner of the department of correctional services and the commissioner of mental retardation and developmental disabilities, shall establish a case review panel consisting of at least fifteen members, any three of whom may sit as a team to review a particular case. At least two members of each team shall be professionals in the field of mental health or the field of mental retardation and developmental disabilities, as appropriate, with experience in the treatment, diagnosis, risk assessment or management of sex offenders. To the extent practicable, the workload of the case review panel should be evenly distributed among its members. Members of the case review panel and psychiatric examiners should be free to exercise independent professional judgment without pressure or retaliation for the exercise of that judgment from any source.

(b) When it appears to an agency with jurisdiction, other than the division of parole, that a person who may be a detained sex offender is nearing an anticipated release, the agency shall give notice of that fact to the attorney general and to the commissioner of mental health. When the division of parole is the agency with jurisdiction, it may give such notice. The agency with jurisdiction shall seek to give such notice at least one hundred twenty days prior to the person's anticipated release, but failure to give notice within such time period shall not affect the validity of such notice or any subsequent action, including the filing of a sex offender civil management petition.

(c) The notice to the attorney general and the commissioner of mental health shall, to the extent possible, contain the following:

(1) The person's name, aliases, and other identifying information such as date of birth, sex, physical characteristics, and anticipated future residence;

(2) A photograph and a set of fingerprints;

(3) A description of the act or acts that constitute the sex offense and a description of the person's criminal history, including the person's most recent sentence and any supervisory terms that it includes;

(4) The presentence reports prepared pursuant to article three hundred ninety of the criminal procedure law and other available materials concerning the person's sex offense; and

(5) A description of the person's institutional history, including his or her participation in any sex offender treatment program.

(d) The commissioner shall be authorized to designate multidisciplinary staff, including clinical and other professional personnel, to provide a preliminary review of the need for detained sex offenders to be evaluated under the procedures of this section. When the commissioner receives notice pursuant to subdivision (b) of this section, such staff shall review and assess relevant medical, clinical, criminal, or institutional records, actuarial risk assessment instruments or other records and reports, including records and reports provided by the district attorney of the county where the person was convicted, or in the case of persons determined to be incapacitated or not responsible by reason of mental disease or defect, the county where the person was charged. Upon such review and assessment, the staff shall determine whether the person who is the subject of the notice should be referred to a case review team for evaluation.

(e) If the person is referred to a case review team for evaluation, notice of such referral shall be provided to the respondent. Upon such referral, the case review team shall review relevant records, including those described in subdivisions (c) and (d) of this section, and may arrange for a psychiatric examination of the respondent. Based on the review and assessment of such information, the case review team shall consider whether the respondent is a sex offender requiring civil management.

(f) If the case review team determines that the respondent is not a sex offender requiring civil management, it shall so notify the respondent and the attorney general, and the attorney general shall not file a sex offender civil management petition.

(g) If the case review team finds that the respondent is a sex offender requiring civil management, it shall so notify the respondent and the attorney general, in writing. The written notice must be accompanied by a written report from a psychiatric examiner that includes a finding as to whether the respondent has a mental abnormality. Where the notice indicates that a respondent stands convicted of or was charged with a designated felony, it shall also include the case review team's finding as to whether the act was sexually motivated. The case review team shall provide its written notice to the attorney general and the respondent within forty-five days of the commissioner receiving the notice of anticipated release. However, failure to do so within that time period shall not affect the validity of such notice or finding or any subsequent action, including the attorney general's filing of a sex offender civil management petition subsequent to receiving the finding of the case review team.

§ 10.06 Petition and hearing

(a) If the case review team finds that a respondent is a sex offender requiring civil

management, then the attorney general may file a sex offender civil management petition in the supreme court or county court of the county where the respondent is located. In determining whether to file such a petition, the attorney general shall consider information about any continuing supervision to which the respondent will be subject as a result of criminal conviction, and shall take such supervision into account when assessing the need for further management as provided by this article. If the attorney general elects to file a sex offender civil management petition, he or she shall serve a copy of the petition upon the respondent. The petition shall contain a statement or statements alleging facts of an evidentiary character tending to support the allegation that the respondent is a sex offender requiring civil management. The attorney general shall seek to file the petition within thirty days after receiving notice of the case review team's finding, but failure to do so within that period shall not affect the validity of the petition.

(b) Within ten days after the attorney general files a sex offender civil management petition, the respondent may file in the same court a notice of removal to the county of the underlying criminal sex offense charges. The attorney general may, in the court in which the petition is pending, move for a retention of venue. Such motion shall be made within five days after the attorney general is served with a notice of removal, which time may be extended for good cause shown. The court shall grant the motion if the attorney general shows good cause for such retention. If the attorney general does not timely move for a retention of venue, or does so move and the motion is denied, then the proceedings shall be transferred to the county of the underlying criminal sex offense charges. If the respondent does not timely file a notice of removal, or the attorney general moves for retention of venue and such motion is granted, then the proceedings shall continue where the petition was filed.

(c) Promptly upon the filing of a sex offender civil management petition, or upon a request to the court by the attorney general for an order pursuant to subdivision (d) of this section that a respondent submit to an evaluation by a psychiatric examiner, whichever occurs earlier, the court shall appoint counsel in any case where the respondent is financially unable to obtain counsel. The court shall appoint the mental hygiene legal service if possible. In the event that the court determines that the mental hygiene legal service cannot accept appointment, the court shall appoint an attorney eligible for appointment pursuant to article eighteen-B of the county law, or an entity, if any, that has contracted for the delivery of legal representation services under subdivision (c) of section 10.15 of this article. Counsel for the respondent shall be provided with copies of the written notice made by the case review team, the petition and the written reports of the psychiatric examiners.

(d) At any time after receiving notice pursuant to subdivision (b) of section 10.05 of this article, and prior to trial, the attorney general may request the court in which the sex offender civil management petition could be filed, or is pending, to order the respondent to submit to an evaluation by a psychiatric examiner. Upon such a request, the court shall order that the respondent submit to an evaluation by a psychiatric examiner chosen by the attorney general and, if the respondent is not represented by counsel, the court shall appoint counsel for the respondent. Following the evaluation, such psychiatric examiner

shall report his or her findings in writing to the attorney general, to counsel for the respondent, and to the court.

(e) At any time after the filing of a sex offender civil management petition, and prior to trial, the respondent may request the court in which the petition is pending to order that he or she be evaluated by a psychiatric examiner. Upon such a request, the court shall order an evaluation by a psychiatric examiner. If the respondent is financially unable to obtain an examiner, the court shall appoint an examiner of the respondent's choice to be paid within the limits prescribed by law. Following the evaluation, such psychiatric examiner shall report his or her findings in writing to the respondent or counsel for the respondent, to the attorney general, and to the court.

(f) Notwithstanding any other provision of this article, if it appears that the respondent may be released prior to the time the case review team makes a determination, and the attorney general determines that the protection of public safety so requires, the attorney general may file a securing petition at any time after receipt of written notice pursuant to subdivision (b) of section 10.05 of this article. In such circumstance, there shall be no probable cause hearing until such time as the case review team may find that the respondent is a sex offender requiring civil management. If the case review team determines that the respondent is not a sex offender requiring civil management, the attorney general shall so advise the court and the securing petition shall be dismissed.

(g) Within thirty days after the sex offender civil management petition is filed, or within such longer period as to which the respondent may consent, the supreme court or county court before which the petition is pending shall conduct a hearing without a jury to determine whether there is probable cause to believe that the respondent is a sex offender requiring civil management.

(h) If the respondent was released subsequent to notice under subdivision (b) of section 10.05 of this article, and is therefore at liberty when the petition is filed, the court shall order the respondent's return to confinement, observation, commitment, recommitment or retention, as applicable, for purposes of the probable cause hearing. When a court issues such an order, the hearing shall commence no later than seventy-two hours from the date of the respondent's return. If the respondent is not at liberty when the petition is filed, but becomes eligible to be released prior to the probable cause hearing, the court shall order the stay of such release pending the probable cause hearing. When a court issues such an order, the hearing shall commence no later than seventy-two hours from the date of the respondent's anticipated release date. In either case, the release of the respondent shall be in accordance with other provisions of law if the hearing does not commence within such period of seventy-two hours, unless: (i) the failure to commence the hearing was due to the respondent's request, action or condition, or occurred with his or her consent; or (ii) the court is satisfied that the attorney general has shown good cause why the hearing could not so commence. Any failure to commence the probable cause hearing within the time periods specified shall not result in the dismissal of the petition and shall not affect the validity of the hearing or the probable cause determination.

(i) The provisions of subdivision (g) of section 10.08 of this article shall be applicable to the hearing. The hearing should be completed in one session but, in the interest of justice, may be adjourned by the court.

(j) The respondent's commission of a sex offense shall be deemed established and shall not be relitigated at the probable cause hearing, whenever it appears that: (i) the respondent stands convicted of such offense; (ii) the respondent previously has been found not responsible by reason of mental disease or defect for the commission of such offense or for an act or acts constituting such offense; or (iii) the respondent was indicted for such offense by a grand jury but found to be incompetent to stand trial for such offense. Whenever the petition alleges the respondent's commission of a designated felony prior to the effective date of this article, the issue of whether there is probable cause to believe that the commission of such offense was sexually motivated shall be determined by the court.

(k) At the conclusion of the hearing, the court shall determine whether there is probable cause to believe that the respondent is a sex offender requiring civil management. If the court determines that probable cause has not been established, the court shall issue an order dismissing the petition, and the respondent's release shall be in accordance with other applicable provisions of law. If the court determines that probable cause has been established: (i) the court shall order that the respondent be committed to a secure treatment facility designated by the commissioner for care, treatment and control upon his or her release; (ii) the court shall set a date for trial in accordance with subdivision (a) of section 10.07 of this article; and (iii) the respondent shall not be released pending the completion of such trial.

§ 10.07 Trial

(a) Within sixty days after the court determines, pursuant to subdivision (k) of section 10.06 of this article, that there is probable cause to believe that the respondent is a sex offender requiring civil management, the court shall conduct a jury trial to determine whether the respondent is a detained sex offender who suffers from a mental abnormality. The trial shall be held before the same court that conducted the probable cause hearing unless either the attorney general or counsel for the respondent has moved for a change of venue and the motion has been granted by the court.

(b) The provisions of article forty-one of the civil practice law and rules shall apply to the formation and conduct of jury trial under this section, except that the provisions of the following sections of the criminal procedure law shall govern to the extent that the provisions of article forty-one of the civil practice law and rules are inconsistent therewith: sections 270.05, 270.10, 270.15, 270.20, subdivision one of section 270.25, and subdivision one of section 270.35 (except for the provisions thereof requiring consent for the replacement of a discharged juror with an alternate). Each side shall have ten peremptory challenges for the regular jurors and two for each alternate juror to be selected. The right to a trial by jury may be waived by the respondent, and upon such waiver, the court shall conduct a trial in accordance with article forty-two of the civil

practice law and rules, excluding provisions for decision-making by referees.

(c) The provisions of subdivision (g) of section 10.08 of this article and article forty-five of the civil practice law and rules shall be applicable to trials conducted pursuant to this section. The jury may hear evidence of the degree to which the respondent cooperated with the psychiatric examination. If the court finds that the respondent refused to submit to a psychiatric examination pursuant to this article, upon request it shall so instruct the jury. The respondent's commission of a sex offense shall be deemed established and shall not be relitigated at the trial, whenever it is shown that: (i) the respondent stands convicted of such offense; or (ii) the respondent previously has been found not responsible by reason of mental disease or defect for the commission of such offense or for an act or acts constituting such offense. Whenever the petition alleges the respondent's commission of a designated felony prior to the effective date of this article, the issue of whether such offense was sexually motivated shall be determined by the jury.

(d) The jury, or the court if a jury trial is waived, shall determine by clear and convincing evidence whether the respondent is a detained sex offender who suffers from a mental abnormality. The burden of proof shall be on the attorney general. A determination, if made by the jury, must be by unanimous verdict. In charging the jury, the court's instructions shall include the admonishment that the jury may not find solely on the basis of the respondent's commission of a sex offense that the respondent is a detained sex offender who suffers from a mental abnormality. In the case of a respondent committed pursuant to article seven hundred thirty of the criminal procedure law for a sex offense, the attorney general shall have the burden of proving by clear and convincing evidence that the respondent did engage in the conduct constituting such offense.

(e) If the jury unanimously, or the court if a jury trial is waived, determines that the attorney general has not sustained his or her burden of establishing that the respondent is a detained sex offender who suffers from a mental abnormality, the court shall dismiss the petition and the respondent shall be released if and as warranted by other provisions of law. If the jury is unable to render a unanimous verdict, the court shall continue any commitment order previously issued and schedule a second trial to be held within sixty days in accordance with the provisions of subdivision (a) of this section. If the jury in such second trial is unable to render a unanimous verdict as to whether the respondent is a detained sex offender who suffers from a mental abnormality, the court shall dismiss the petition.

(f) If the jury, or the court if a jury trial is waived, determines that the respondent is a detained sex offender who suffers from a mental abnormality, then the court shall consider whether the respondent is a dangerous sex offender requiring confinement or a sex offender requiring strict and intensive supervision. The parties may offer additional evidence, and the court shall hear argument, as to that issue. If the court finds by clear and convincing evidence that the respondent has a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the respondent is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility, then the court shall find the respondent to be a

dangerous sex offender requiring confinement. In such case, the respondent shall be committed to a secure treatment facility for care, treatment, and control until such time as he or she no longer requires confinement. If the court does not find that the respondent is a dangerous sex offender requiring confinement, then the court shall make a finding of disposition that the respondent is a sex offender requiring strict and intensive supervision, and the respondent shall be subject to a regimen of strict and intensive supervision and treatment in accordance with section 10.11 of this article. In making a finding of disposition, the court shall consider the conditions that would be imposed upon the respondent if subject to a regimen of strict and intensive supervision, and all available information about the prospects for the respondent's possible re-entry into the community.

§ 10.08 Procedures under this article

(a) When a respondent submits to an examination pursuant to an order issued in accordance with this article, any statement made by the respondent for the purpose of the examination shall be kept confidential in accordance with the provisions of section 33.13 of this chapter and shall be inadmissible in evidence against him or her in any criminal action or proceeding, provided that such statements may be used in proceedings under this article.

(b) A psychiatric examiner chosen by the attorney general shall have reasonable access to the respondent for the purpose of such examination, as well as to the respondent's relevant medical, clinical, criminal or other records and reports. A psychiatric examiner chosen by or appointed on behalf of the respondent shall have reasonable access to the respondent's relevant medical, clinical or criminal records and reports, except that such psychiatric examiner shall not have access without court order and for good cause shown to the name of, address of, or any other identifying information about the victim or victims. To the extent possible, such identifying information should be redacted so as to provide the examiner with access to the balance of the document. In conducting examinations under this article, psychiatric examiners may employ any method that is accepted by the medical profession for the examination of persons alleged to be suffering from a mental disability or mental abnormality.

(c) Notwithstanding any other provision of law, the commissioner, the case review panel and the attorney general shall be entitled to request from any agency, office, department or other entity of the state, and such entity shall be authorized to provide upon such request, any and all records and reports relating to the respondent's commission or alleged commission of a sex offense, the institutional adjustment and any treatment received by such respondent, and any medical, clinical or other information relevant to a determination of whether the respondent is a sex offender requiring civil management. Otherwise confidential materials obtained for purposes of proceedings pursuant to this article shall not be further disseminated or otherwise used except for such purposes. Nothing in this article shall be construed to restrict any right of a respondent to obtain his or her own records pursuant to other provisions of law.

(d) The attorney general shall make records in his or her possession and relevant to the respondent available for inspection or copying by counsel for the respondent for purposes of hearing, trial, and appeal provided, however, that counsel shall not have access to the name of, address of, or any other identifying information about the victim or victims, or to any investigative or other reports that relate to matters beyond the scope of the proceedings and are confidential or privileged from disclosure. To the extent possible, such identifying information should be redacted so as to provide counsel with access to the balance of the document.

(e) At any hearing or trial pursuant to the provisions of this article, the court may change the venue of the trial to any county for good cause, which may include considerations relating to the convenience of the parties or witnesses or the condition of the respondent.

(e-1) Records or reports provided to the respondent in accordance with this article shall be disclosed in the circumstances and in the same manner as records and reports disclosed pursuant to the provisions of section 33.16 of this chapter.

(f) Time periods specified by provisions of this article for actions by state agencies are goals that the agencies shall try to meet, but failure to act within such periods shall not invalidate later agency action except as explicitly provided by the provision in question. The court may extend any time period at the request, or on the consent, of the respondent. No provision of this article shall be interpreted so as to prevent a respondent, after opportunity to consult with counsel for respondent, from consenting to the relief which could be sought by an agency with jurisdiction by means of a court proceeding under this article.

(g) In preparing for or conducting any hearing or trial pursuant to the provisions of this article, and in preparing any petition under the provisions of this article, the respondent shall have the right to have counsel represent him or her, provided that the respondent shall not be entitled to appointment of counsel prior to the time provided in section 10.06 of this article. The attorney general shall represent the state. Any relevant written reports of psychiatric examiners shall be admissible, regardless of whether the author of the report is called to testify, so long as they are certified pursuant to subdivision (c) of rule forty-five hundred eighteen of the civil practice law and rules, in any proceeding or hearing held pursuant to subdivision (g) or (h) of section 10.06 of this article, paragraph two of subdivision (a), or paragraph four of subdivision (d), or subdivision (e), (g) or (h) of section 10.11 of this article. In all other proceedings or hearings held pursuant to this article, such admissibility shall require a showing of the author's unavailability to testify, or other good cause. All plea minutes and prior trial testimony from the underlying criminal proceeding, and records from previous proceedings under this article, shall be admissible. Each witness, whether called by the attorney general or the respondent, must, unless he or she would be authorized to give unsworn evidence at a trial, testify under oath, and may be cross-examined. The respondent may, as a matter of right, testify in his or her own behalf, call and examine other witnesses, and produce other evidence in his or her behalf. The respondent may not, however, cause a subpoena to be served on the person against whom the sex offense was committed or alleged to have been committed

by the respondent, except upon order of the court for good cause shown. Either party may request closure of the courtroom, or sealing of papers, for good cause shown.

(h) The procedures and standards set forth in this article governing the imposition of conditions upon the respondent are intended to be the minimum required to provide for the protection of the public and treatment of the respondent. Nothing in this article shall be construed to require the availability or imposition of forms of treatment or supervision other than those for which this article specifically provides.

§ 10.09 Annual examinations and petitions for discharge

(a) The commissioner shall provide the respondent and counsel for respondent with an annual written notice of the right to petition the court for discharge. The notice shall contain a form for the waiver of the right to petition for discharge.

(b) The commissioner shall also assure that each respondent committed under this article shall have an examination for evaluation of his or her mental condition made at least once every year by a psychiatric examiner who shall report to the commissioner his or her written findings as to whether the respondent is currently a dangerous sex offender requiring confinement. At such time, the respondent also shall have the right to be evaluated by an independent psychiatric examiner. If the respondent is financially unable to obtain an examiner, the court shall appoint an examiner of the respondent's choice to be paid within the limits prescribed by law. Following such evaluation, each psychiatric examiner shall report his or her findings in writing to the commissioner and to counsel for respondent. The commissioner shall review relevant records and reports, along with the findings of the psychiatric examiners, and shall make a determination in writing as to whether the respondent is currently a dangerous sex offender requiring confinement.

(c) The commissioner shall annually forward the notice and waiver form, along with a report including the commissioner's written determination and the findings of the psychiatric examination, to the supreme or county court where the respondent is located.

(d) The court shall hold an evidentiary hearing as to retention of the respondent within forty-five days if it appears from one of the annual submissions to the court under subdivision (c) of this section (i) that the respondent has petitioned, or has not affirmatively waived the right to petition, for discharge, or (ii) that even if the respondent has waived the right to petition, and the commissioner has determined that the respondent remains a dangerous sex offender requiring confinement, the court finds on the basis of the materials described in subdivision (b) of this section that there is a substantial issue as to whether the respondent remains a dangerous sex offender requiring confinement. At an evidentiary hearing on that issue under this subdivision, the attorney general shall have the burden of proof.

(e) If, at any time, the commissioner determines that the respondent no longer is a dangerous sex offender requiring confinement, the commissioner shall petition the court for discharge of the respondent or for the imposition of a regimen of strict and intensive

supervision and treatment. The petition shall be served upon the attorney general and the respondent, and filed in the supreme or county court where the person is located. The court, upon review of the petition, shall either order the requested relief or order that an evidentiary hearing be held.

(f) The respondent may at any time petition the court for discharge and/or release to the community under a regimen of strict and intensive supervision and treatment. Upon review of the respondent's petition, other than in connection with annual reviews as described in subdivisions (a), (b) and (d) of this section, the court may order that an evidentiary hearing be held, or may deny an evidentiary hearing and deny the petition upon a finding that the petition is frivolous or does not provide sufficient basis for reexamination prior to the next annual review. If the court orders an evidentiary hearing under this subdivision, the attorney general shall have the burden of proof as to whether the respondent is currently a dangerous sex offender requiring confinement.

(g) In connection with any evidentiary hearing held pursuant to subdivision (d), (e), or (f) of this section, upon the request of either party or upon its own motion, the court may direct the submission of evidence, and may order a psychiatric evaluation if the court finds that any available examination reports are not current or otherwise not sufficient.

(h) At the conclusion of an evidentiary hearing, if the court finds by clear and convincing evidence that the respondent is currently a dangerous sex offender requiring confinement, the court shall continue the respondent's confinement. Otherwise the court, unless it finds that the respondent no longer suffers from a mental abnormality, shall issue an order providing for the discharge of the respondent to a regimen of strict and intensive supervision and treatment pursuant to section 10.11 of this article.

§ 10.10 Treatment and confinement

(a) If the respondent is found to be a dangerous sex offender requiring confinement and committed to a secure treatment facility, that facility shall provide care, treatment, and control of the respondent until such time that a court discharges the respondent in accordance with the provisions of this article.

(b) The commissioner shall, for persons committed pursuant to this article, develop and implement a treatment plan in accordance with the provisions of section 29.13 of this chapter. The commissioner shall give due regard to any relevant standards, guidelines, and best practices recommended by the office of sex offender management.

(c) The commissioner, or the commissioner of the department of correctional services, or other government entity responsible for the care and custody of respondents, shall be authorized to employ appropriate safety and security measures, as he or she deems necessary to ensure the safety of the public, during court proceedings and in the transport of persons committed or undergoing any proceedings under this article. Such commissioner shall provide training in the use of safe and appropriate security interventions to employees responsible for transporting persons under this article.

(d) The commissioner shall have the discretion to enter into agreements with the department of correctional services for the provision of security services relating to this article.

(e) Persons in the custody of the commissioner pursuant to this article shall be kept separate from other persons in the care, custody and control of the commissioner, and shall be segregated from such other persons, provided, however, that persons committed or subject to proceedings under this article need not be segregated from other sex offenders committed or subject to proceedings under this article, article nine of this title, or section four hundred two of the correction law. If any dangerous sex offenders requiring confinement are committed to a secure treatment facility located on the grounds of a correctional facility, they shall be kept separate from persons in custody as a result of criminal cases, and shall be segregated from such persons. Occasional instances of supervised, incidental contact between persons required by this subdivision to be segregated shall not be considered a violation of such segregation requirements.

(f) In accordance with security procedures developed by the commissioner, a person committed under this article may be granted an escorted privilege by the director of the secure treatment facility in which he or she is receiving care and treatment but only for the purposes of allowing the person to receive medical or dental care or treatment not available at the facility, to visit a family member who is seriously ill or to attend the funeral of a family member. A person granted an escorted privilege shall be under the constant supervision of one or more facility employees who have been designated by the commissioner or other specially trained personnel approved by the commissioner to provide care and supervision of such persons.

(g) If a person is in the custody of the commissioner pursuant to an order issued under this article, and such person escapes from custody, notice of such escape shall be given as soon as the facility staff learns of such escape, and shall include such information as will adequately identify the escaped individual, any person or persons believed to be in danger, and the nature of the danger. Such notice shall be given by any means reasonably calculated to give prompt actual notice, and shall be given to:

(1) the district attorney of the county where the person was convicted, adjudicated, or charged; the attorney general; and counsel for respondent or the mental hygiene legal service;

(2) the superintendent of the state police;

(3) the sheriff of the county where the escape occurred;

(4) the police department having jurisdiction of the area where the escape occurred;

(5) any victim or victims who submitted the notification form described in subdivision four of section 380.50 of the criminal procedure law;

- (6) any person the facility staff reasonably believes could be in danger;
- (7) any law enforcement agency and any person the facility staff believes would be able to apprise such victim or victims that the person escaped from the facility; and
- (8) any other person the committing court may designate.
- (h) The person may be apprehended, restrained, transported, and returned to the facility from which he or she escaped by any police officer or peace officer, and it shall be the duty of such officer to assist any representative of the commissioner to take the person into custody upon the request of such representative.
- (i) The commissioner shall submit to the governor and the legislature no later than December first of each year, a report on the implementation of this article. Such report shall include, but not be limited to, the census of each existing treatment facility, the number of persons reviewed by the case review teams for proceedings under this article, the number of persons committed pursuant to this article, their crimes of conviction, and projected future capacity needs.

§ 10.11 Regimen of strict and intensive supervision and treatment

(a)(1) Before ordering the release of a person to a regimen of strict and intensive supervision and treatment pursuant to this article, the court shall order that the division of parole recommend supervision requirements to the court. These supervision requirements, which shall be developed in consultation with the commissioner, may include but need not be limited to, electronic monitoring or global positioning satellite tracking for an appropriate period of time, polygraph monitoring, specification of residence or type of residence, prohibition of contact with identified past or potential victims, strict and intensive supervision by a parole officer, and any other lawful and necessary conditions that may be imposed by a court. In addition, after consultation with the psychiatrist, psychologist or other professional primarily treating the respondent, the commissioner shall recommend a specific course of treatment. A copy of the recommended requirements for supervision and treatment shall be given to the attorney general and the respondent and his or her counsel a reasonable time before the court issues its written order pursuant to this section.

(2) Before issuing its written order, the court shall afford the parties an opportunity to be heard, and shall consider any additional submissions by the respondent and the attorney general concerning the proposed conditions of the regimen of strict and intensive supervision and treatment. The court shall issue an order specifying the conditions of the regimen of strict and intensive supervision and treatment, which shall include specified supervision requirements and compliance with a specified course of treatment. A written statement of the conditions of the regimen of strict and intensive supervision and treatment shall be given to the respondent and to his or her counsel, any designated service providers or treating professionals, the commissioner, the attorney general and the

supervising parole officer. The court shall require the division of parole to take appropriate actions to implement the supervision plan and assure compliance with the conditions of the regimen of strict and intensive supervision and treatment. A regimen of strict and intensive supervision does not toll the running of any form of supervision in criminal cases, including but not limited to post-release supervision and parole.

(b)(1) Persons ordered into a regimen of strict and intensive supervision and treatment pursuant to this article shall be subject to a minimum of six face-to-face supervision contacts and six collateral contacts per month. Such minimum contact requirements shall continue unless subsequently modified by the court or the division of parole.

(2) Any agency, organization, professional or service provider designated to provide treatment to the person shall, unless otherwise directed by the court, submit every four months to the court, the commissioner, the attorney general and the supervising parole officer a report describing the person's conduct while under a regimen of strict and intensive supervision and treatment.

(c) An order for a regimen of strict and intensive supervision and treatment places the person in the custody and control of the state division of parole. A person ordered to undergo a regimen of strict and intensive supervision and treatment pursuant to this article is subject to lawful conditions set by the court and the division of parole.

(d)(1) A person's regimen of strict and intensive supervision and treatment may be revoked if such a person violates a condition of strict and intensive supervision. If a parole officer has reasonable cause to believe that the person has violated a condition of the regimen of strict and intensive supervision and treatment or, if there is an oral or written evaluation or report by a treating professional indicating that the person may be a dangerous sex offender requiring confinement, a parole officer authorized in the same manner as provided in subparagraph (i) of paragraph (a) of subdivision three of section two hundred fifty-nine-i of the executive law may take the person into custody and transport the person for lodging in a secure treatment facility or a local correctional facility for an evaluation by a psychiatric examiner, which evaluation shall be conducted within five days. A parole officer may take the person, under custody, to a psychiatric center for prompt evaluation, and at the end of the examination, return the person to the place of lodging. A parole officer, as authorized by this paragraph, may direct a peace officer, acting pursuant to his or her special duties, or a police officer who is a member of an authorized police department or force or of a sheriff's department, to take the person into custody and transport the person as provided in this paragraph. It shall be the duty of such peace officer or police officer to take into custody and transport any such person upon receiving such direction. The division of parole shall promptly notify the attorney general and the mental hygiene legal service, when a person is taken into custody pursuant to this paragraph. No provision of this section shall preclude the division of parole from proceeding with a revocation hearing as authorized by subdivision three of section two hundred fifty-nine-i of the executive law.

(2) After the person is taken into custody for the evaluation, the attorney general may file:

(i) a petition for confinement pursuant to paragraph four of this subdivision and/or (ii) a petition pursuant to subdivision (e) of this section to modify the conditions of a regimen of strict and intensive supervision and treatment. Either petition shall be filed in the court that issued the order imposing the regimen of strict and intensive supervision and treatment. The attorney general shall seek to file the petition within five days after the person is taken into custody for evaluation. If no petition is filed within that time, the respondent shall be released immediately, subject to the terms of the previous order imposing the regimen of strict and intensive supervision, but failure to file a petition within such time shall not affect the validity of such petition or any subsequent action.

(3) A petition filed under paragraph two of this subdivision shall be served promptly on the respondent and the mental hygiene legal service. The court shall appoint legal counsel in accordance with subdivision (c) of section 10.06 of this article. Counsel for respondent shall be provided with a copy of the written report, if any, of the psychiatric examiner who conducted the evaluation pursuant to this section.

(4) A petition for confinement shall contain the parole officer's sworn allegations demonstrating reasonable cause to believe that the respondent violated a condition of his or her strict and intensive supervision, and shall be accompanied by any written evaluations or reports by a treating professional indicating that the respondent may be a dangerous sex offender requiring confinement. If a petition is filed within the five-day period seeking the respondent's confinement, then the court shall promptly review the petition and, based on the allegations in the petition and any accompanying papers, determine whether there is probable cause to believe that the respondent is a dangerous sex offender requiring confinement. Upon the finding of probable cause, the respondent may be retained in a local correctional facility or a secure treatment facility pending the conclusion of the proceeding. In the absence of such a finding, the respondent shall be released, but the court may impose revised conditions of supervision and treatment pending completion of the hearing. Within thirty days after a petition for confinement is filed under paragraph two of this subdivision, the court shall conduct a hearing to determine whether the respondent is a dangerous sex offender requiring confinement. Any failure to commence the hearing within the time period specified shall not result in the dismissal of the petition and shall not affect the validity of the hearing or the determination. The court shall make its determination of whether the respondent is a dangerous sex offender requiring confinement in accordance with the standards set forth in subdivision (f) of section 10.07 of this article. If the court finds that the attorney general has not met the burden of showing by clear and convincing evidence that the respondent is a dangerous sex offender requiring confinement, but finds that the respondent continues to be a sex offender requiring strict and intensive supervision, the court shall order the person to be released under the previous order imposing a regimen of strict and intensive supervision and treatment, unless it modifies the order imposing a regimen of strict and intensive supervision and treatment pursuant to subdivision (f) of this section. If the court determines that the attorney general has met the burden of showing by clear and convincing evidence that the respondent is a dangerous sex offender requiring confinement, the court shall order that the respondent be committed to a secure treatment facility immediately. The respondent shall not be released pending the

completion of the hearing.

(e) If the attorney general files only a petition for modification under paragraph two of subdivision (d) of this section, the respondent shall be released but the court may impose revised conditions of supervision and treatment pending completion of the hearing. Within five days after filing of the petition for modification, the court shall conduct a hearing to determine whether the respondent's conditions of treatment and supervision should be modified. The attorney general shall have the burden of showing that the modifications sought are warranted, and the court shall order such modifications to the extent that it finds that the attorney general has met that burden.

(f) The court may modify or terminate the conditions of the regimen of strict and intensive supervision and treatment on the petition of the supervising parole officer, the commissioner or the attorney general. Such petition shall be served on the respondent and the respondent's counsel. A person subject to a regimen of strict and intensive supervision and treatment pursuant to this article may petition every two years for modification or termination, commencing no sooner than two years after the regimen of strict and intensive supervision and treatment commenced, with service of such petition on the attorney general, the division of parole, and the commissioner. Upon receipt of a petition for modification or termination pursuant to this section, the court may require the division of parole and the commissioner to provide a report concerning the person's conduct while subject to a regimen of strict and intensive supervision and treatment. If more than one petition is filed, the petitions may be considered in a single hearing.

(g) Upon receipt of a petition for modification pursuant to this section, the court may hold a hearing on such petition. The party seeking modification shall have the burden of showing that those modifications are warranted, and the court shall order such modifications to the extent that it finds that the party has met that burden.

(h) Upon receipt of a petition for termination pursuant to this section, the court may hold a hearing on such petition. When the petition is filed by the respondent, the attorney general shall have the burden of showing by clear and convincing evidence that the respondent is currently a sex offender requiring civil management. If the court finds that the attorney general has not sustained that burden, it shall order the respondent's discharge from the regimen of strict and intensive supervision and treatment. Otherwise the court shall continue the regimen of strict and intensive supervision and treatment but may revise conditions of supervision and treatment as warranted.

§ 10.13 Appeals

(a) The attorney general may, in the appellate division of the supreme court, seek a stay of any order under this article releasing a person under this article.

(b) The attorney general may appeal as of right from an order entered pursuant to subdivision (k) of section 10.06 of this article dismissing the petition following a determination that probable cause to believe that the respondent is a sex offender

requiring civil management has not been established. No appeal may be taken from an order entered pursuant to subdivision (k) of section 10.06 of this article determining that probable cause has been established to believe the respondent is a sex offender requiring civil management. Both the respondent and the attorney general may appeal from any final order entered pursuant to this article. The provisions of articles fifty-five, fifty-six, and fifty-seven of the civil practice law and rules shall govern appeals taken from orders entered pursuant to this article.

(c) In connection with any appeal, a respondent who is or becomes financially unable to obtain counsel shall have the right to have appellate counsel appointed on his or her behalf. Such counsel shall be appointed by the court to which an appeal is taken. If possible, the court shall appoint the mental hygiene legal service. In the event that the court determines that the mental hygiene legal service cannot accept appointment, the court shall appoint an attorney eligible for appointment pursuant to article eighteen-B of the county law, or an entity, if any, that has contracted for the delivery of legal representation services under subdivision (c) of section 10.15 of this article.

§ 10.15 Compensation, fees and expenses

(a) Any compensation, fee or expense paid pursuant to the provisions of this article and article eighteen-B of the county law shall be a state charge payable on vouchers approved by the court which fixed the same, after audit by and on the warrant of the comptroller. Any compensation, fee or expense paid to such counsel so appointed shall be paid out of funds appropriated to the administrative office for the courts. Each claim for compensation and reimbursement shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source. The appropriate court shall review and determine the reasonableness of the claims, including the number of hours expended out of court by counsel and psychiatric examiners. When a court appoints counsel pursuant to article eighteen-B of the county law, such counsel shall be compensated in accordance with the provisions of that article. Notwithstanding any other provision of law, psychiatric examiners who are appointed by a court under this article, and who perform such examinations other than as government employees, shall be compensated at an hourly rate to be set by the administrative board of the judicial conference.

(b) Members of the case review panel established by subdivision (a) of section 10.05 of this article shall be entitled to reimbursement for expenses reasonably incurred for the performance of duties under this article.

(c) The state may contract with entities for the provision of legal representation services to respondents in proceedings under this article, within the amounts appropriated therefor.

§ 10.17 Release of information authorized

The commissioner is authorized to release information in accordance with subparagraph (vii) of paragraph nine of subdivision (c) of section 33.13 of this chapter to appropriate persons and entities when necessary to protect the public concerning a specific sex offender requiring civil management under this article, and to release information in accordance with subparagraph (viii) of paragraph nine of subdivision (c) of section 33.13 of this chapter to the attorney general and case review panel when such persons or entities request such information in the exercise of their statutory functions, powers, and duties under this article.

Current through L.2008, chapters 1 to 44, 51 and 52.