

803 CMR: DEPARTMENT OF CRIMINAL JUSTICE INFORMATION SERVICES

803 CMR 1.00: SEX OFFENDER REGISTRY BOARD, REGISTRATION, CLASSIFICATION AND DISSEMINATION

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1.01: Purpose

803 CMR 1.00 sets forth guidelines pertaining to the registration and classification of sex offenders, and the resulting dissemination of sex offender registry information in accordance with the law based on the offender's level of risk of reoffense and degree of dangerousness posed to the public. 803 CMR 1.00 additionally provides a process for the removal from the sex offender registry of those individuals not required to register. The Sex Offender Registry Board (the "Board") may from time to time and in its discretion develop, implement, and/or amend its policies, procedures, and protocols to this end. The Board will exercise sound judgment and apply its expertise when making any registration or classification determination as required in 803 CMR 1.00.

803 CMR 1.00 sets forth the registration and classification procedures and guidelines the Board uses to determine whether a convicted or adjudicated sex offender may be required to register as a sex offender and, if so, the offender's level of risk of reoffense and degree of dangerousness posed to the public.

1.02: Regulations Do Not Limit Statutory Authority, Cancellation

Nothing contained in 803 CMR 1.00 shall be interpreted to limit, contradict or override the authority granted to the Sex Offender Registry Board or others pursuant to M.G.L. c. 6, §§ 178C through 178Q and any other applicable provisions of the Massachusetts General Laws. 803 CMR 1.00 cancels all previous Sex Offender Registry Board policy statements, rules or regulations to the extent they are inconsistent with 803 CMR 1.00. The recommended classification of any offender who has not been finally classified prior to the effective date of 803 CMR 1.00 shall remain valid. Likewise, the Final Classification of any offender issued prior to the effective date of 803 CMR 1.00 shall also be deemed to remain valid.

1.03: Definitions

All words and phrases not defined in 803 CMR 1.00 shall be defined by M.G.L. c. 6, § 178C. Unless otherwise indicated in a specific factor enumerated in 803 CMR 1.33, the use of the male gender in 803 CMR 1.00 shall be deemed to include the female or neutral gender. The use of the singular includes the plural and *vice versa* where the context so permits.

As used in 803 CMR 1.00, the following words and phrases shall have the following meanings:

Authorized Representative. An appointed or privately retained attorney, legal guardian or any other person authorized by the sex offender to represent him or her during the hearing process. For appointment of counsel, *see* 803 CMR 1.09. If the authorized representative is not an attorney, he or she shall submit to the Board a written authorization signed and dated by the sex offender at least ten business days prior to the scheduled hearing date. The written authorization shall state the relationship between the authorized representative and the sex offender.

Classification File. The part of the sex offender's file maintained by the Board that contains the documentary evidence compiled by the Board to complete the recommendation process.

Classification Worksheet. A form developed and approved by the Board that reflects the recommendation process, shows the foundation for and indicates the Board's recommended registration and classification determination for each offender. The worksheet shall include a review of the factors enumerated in M.G.L. c. 6, § 178K(1)(a) through (l) and explained further in 803 CMR 1.33. The Board shall make a blank copy of the Classification Worksheet and related policies, procedures, protocols, and objective standards generally available and available upon request. The Hearing Examiner presiding over a classification hearing is not bound by the recommended classification or the means by which it was adduced.

Clear and Convincing Evidence. The standard applied at administrative hearings where the Hearing Examiner determines, based upon all of the evidence, there is a high degree of probability that the sex offender meets the standards specified for the duty to register and to be classified at a designated level. The Board shall bear the burden of proof at such hearings.

Documentary Evidence. Clear and legible records, data, reports, or letters submitted to the Board by the sex offender or on behalf of the sex offender relative to his or her risk of reoffense and the degree of dangerousness he or she poses to the public and his or her duty to register.

Employment. Any work that is full-time or part-time for a period of time exceeding 14 days or for an aggregate period of time exceeding 30 days during any calendar year, whether compensated or uncompensated, self-employed or working for an entity. To "work" shall mean to perform employment or work defined in 803 CMR 1.00.

Expert Witness. A licensed medical doctor or mental health professional, excluding employees of the Sex Offender Registry Board, whose testimony and report offering an opinion as to a sex offender's risk of reoffense and degree of dangerousness were prepared expressly for reliance by a Party at a hearing conducted pursuant to 803 CMR 1.10 through 1.20. Reports prepared by licensed mental health professionals that contain an opinion as to a sex offender's risk of reoffense and degree of dangerousness that were prepared for any other purpose will not qualify as Expert Witness opinions for a hearing conducted pursuant to 803 CMR 1.10 through 1.20.

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Factor(s). The descriptions and definitions as well as the principles and authorities enumerated in 803 CMR 1.33 which the Board uses in its registration and classification determinations.

Final Classification. A sex offender shall be deemed finally classified when the presiding Hearing Examiner determines that he or she is a Level 1, Level 2 or Level 3 Offender, except where a sex offender has declined to request a hearing, in which case the recommended classification accomplished pursuant to 803 CMR 1.06 will become the Final Classification.

Full Board. At least four members of the Sex Offender Registry Board. The full board may establish policies and procedures to implement the provisions of M.G.L. c. 6, §§ 178C through 178Q and 803 CMR 1.00.

Hearing Examiner. An individual employed by the Sex Offender Registry Board, a single member of the Sex Offender Registry Board, or a hearing panel, or the Chair's designee to conduct administrative hearings to determine by clear and convincing evidence a sex offender's duty to register and final classification level.

Jurisdiction. The Board has jurisdiction over a person who resides, has secondary addresses, works or attends an institution of higher learning in the Commonwealth and who has been convicted of a sex offense or who has been adjudicated as a youthful offender or as a delinquent juvenile by reason of a sex offense or a person released from incarceration or parole or probation supervision or custody with the department of youth services for such a conviction or adjudication or a person who has been adjudicated a sexually dangerous person under M.G.L. c. 123A, § 14 as in force at the time of adjudication, or a person released from civil commitment pursuant to M.G.L. c. 123A, § 9, whichever last occurs, on or after August 1, 1981.

Juvenile. An individual younger than 18 years old at the time of committing a sex offense. If the sex offender is a juvenile, all written notifications from the Board shall also be mailed to:

- (a) his or her legal guardian;
- (b) the Department of Children and Families or the Department of Youth Services if the Juvenile is receiving services from, or subject to proceedings initiated by, one or more of these agencies; and
- (c) his or her most recent attorney of record.

Level 1 Offender. The designation given to a sex offender when it has been determined his or her risk of reoffense is low and the degree of dangerousness posed to the public is not such that a public safety interest is served by public access to information pertaining to the offender.

Level 2 Offender. The designation given to a sex offender when it has been determined his or her risk of reoffense is moderate and the degree of dangerousness posed to the public is such that a public safety interest is served by public access to sex offender registry information.

Level 3 Offender. The designation given to a sex offender when it has been determined his or her risk of reoffense is high and the degree of dangerousness posed to the public is such that a substantial public safety interest is served by active dissemination (community notification) of sex offender registry information.

Party. The sex offender and the Sex Offender Registry Board. At the hearing, the sex offender may represent himself or herself or have an authorized representative. For representation at hearing *see* 803 CMR 1.09. The Board may have a representative responsible for presenting evidence and argument regarding the offender at any hearing held under 803 CMR 1.00. The Sex Offender Registry Board shall be identified by its name and not by its individual representatives' names.

Receipt. The delivery of mail. There shall be a rebuttable presumption that any notice or letter mailed by the Sex Offender Registry Board to the offender at the address(es) at which he or she is currently registered was received by the offender within three days of mailing.

1.03: continued

Recommendation. The Board's recommended classification, also referred to as preliminary classification level, made pursuant to the policies, procedures, protocols, and objective standards set forth in M.G.L. c. 6, § 178K(1)(a) through (l) and explained in 803 CMR 1.33 to base its recommended classifications. The Board shall make its policies, procedures, protocols, and objective standards for the recommendation process generally available and available upon request.

School. Any public or private educational institution, including any secondary school, trade, vocational or professional institution, or a post-secondary institution of higher learning.

Second and Subsequent Adjudication or Conviction for Open and Gross Lewdness and Lascivious Behavior. The later of two or more separate convictions pursuant to M.G.L. c. 272, § 16. Multiple convictions resulting from a single act shall be treated as a single conviction, but arraignments occurring on the same date and resulting in multiple convictions shall be presumed to be the result of separate acts and treated as separate convictions.

Sex Offender Number (SON). The unique identification number assigned to every sex offender by the Sex Offender Registry Board. The offender must include his or her SON on all written communications with the Sex Offender Registry Board.

Sex Offender Registry. The central computerized database of all sex offenders required to register pursuant to M.G.L. c. 6, §§ 178C through 178Q.

Sex Offender Registry Board (Board or SORB). The administrative agency of the Commonwealth consisting of the members, as set forth in M.G.L. c. 6, § 178K, and its staff.

Student. Any person who is enrolled on a full-time or part-time basis, in any school.

1.04: Registration and Classification Process

(1) Preamble. Pursuant to M.G.L. c. 6, § 178K(1), the Board is required to publish guidelines for determining each sex offender's level of risk of reoffense and degree of dangerousness posed to the public, or for relief from the obligation of registration. Pursuant to M.G.L. c. 6, § 178K(1) and (2), these guidelines shall provide for three levels of notification based on a sex offender's risk of reoffense and degree of dangerousness. The offender's final classification level determines the amount of information that can be disseminated about him or her to the public through the notification procedures, pursuant to M.G.L. c. 6, §§ 178C through 178Q. The registration and classification process is a two stage process.

(2) In the first stage, the Board makes a recommendation regarding each sex offender's duty to register and classification level pursuant to M.G.L. c. 6, § 178L. During the recommendation process, the sex offender is entitled to present documentary evidence for the Board to consider. The sex offender will be notified in writing of the Board's recommendation. The sex offender may either accept or reject the recommendation. The recommendation process is set forth at 803 CMR 1.06 through 1.08. If the sex offender accepts the Board's recommendation, then the recommended classification level shall become final and is not subject to judicial review, pursuant to M.G.L. c. 30A.

(3) If the sex offender rejects the Board's recommendation, the process moves into the second stage which is set forth at 803 CMR 1.09 through 1.22. The sex offender is provided with a *de novo* hearing at which all relevant evidence is evaluated by a Hearing Examiner to reach a final decision regarding the sex offender's duty to register and final classification level. The Hearing Examiner shall base his or her decision on the totality of all the relevant evidence introduced at the sex offender's individualized hearing. The final agency decision issued by the Hearing Examiner is subject to judicial review in the Superior Court, pursuant to M.G. L. c. 30A.

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(4) Factors. M.G.L. c. 6, §§ 178K(2) and 178L(1), sets forth criteria to be considered by the Board in determining risk of reoffense and degree of dangerousness and authorize the Board to identify and utilize additional risk factors and criteria not specifically listed in the statute. Based on this statutory authority, the Board created 803 CMR 1.33 which describes and defines the factors that the Board shall consider in making all registration and classification decisions. In determining the final classification, the Hearing Examiner shall be guided by the definitions, explanations, principles, and authorities contained in the Factors set forth in 803 CMR 1.33 and shall not be bound by the Board's recommendations.

1.05: Registration

(1) A sex offender, as defined in M.G.L. c. 6, § 178C, shall register with the Sex Offender Registry Board, by mail, on a registration form provided by the Board. Additionally, the Board shall accept the registration form it receives from any nonresident person who has employment or is enrolled in school in the Commonwealth if such person is required to register as a sex offender in the state in which he or she resides.

(2) Registration Form. The registration form shall require the sex offender to provide the following information:

- (a) name of the sex offender;
- (b) date of birth;
- (c) Social Security number (optional);
- (d) home address or intended home address;
- (e) secondary address or intended secondary address;
- (f) location for homeless offenders;
- (g) work address or intended work address;
- (h) name and address of any school at which the offender works, intends to work, is enrolled as a student, and/or intends to enroll as a student; and
- (i) signature of the sex offender, signed under the pains and penalties of perjury.

(3) The information obtained from the registration form shall be used by the Board to notify the sex offender of his or her right to submit documentary evidence during the recommendation process, as set forth in 803 CMR 1.06 through 1.08, as well as to offer him or her the opportunity to request a hearing in accordance with the procedures established in 803 CMR 1.00. It is the sex offender's obligation to provide the Board with accurate information during the recommendation process.

(4) Sex Offenders in the Community.

- (a) For sex offenders who have been released from all custody and supervision, the Board shall mail the registration form and notification of the requirements of M.G.L. c. 6, §§ 178C through 178Q to the last known address of all sex offenders residing in the Commonwealth. The registration form must be completed by the offender and mailed to the Board within ten calendar days of receipt.
- (b) For sex offenders who have been convicted or adjudicated for a sex offense but have not been sentenced to confinement for 90 days or more to be served immediately, the registration form must be completed by the sex offender and mailed to the Board within two calendar days of receiving notification by the court of the duty to register or within two calendar days of release from confinement, whichever is later.

(5) Sex Offenders Subject to Community Supervision. For sex offenders who are currently on probation or parole, the registration form must be completed by the offender and mailed to the Board within two calendar days of receiving notification of the duty to register.

(6) Incarcerated Sex Offenders. For sex offenders who are currently incarcerated, the registration form must be completed by the sex offender and mailed to the Board not later than two calendar days before release from custody. No sex offender shall be released from custody unless such registration form has been filled out, signed and mailed to the Board.

If the Board finally classified an incarcerated sex offender as either a Level 2 or Level 3 Offender before or during the sex offender's incarceration:

1.05: continued

- (a) not later than two days before his or her release, the offender shall complete and mail the registration form to the Board; and
- (b) the Board shall notify the local police department in the city or town in which the offender intends to live, or if he or she does not intend to reside in the Commonwealth, in the city or town in which he or she intends to work or in which he or she intends to attend a school in the Commonwealth.

(7) For sex offenders who have been afforded the opportunity for a hearing and who have been finally classified, registration shall be in accordance with M.G.L. c. 6, §§ 178F through 178F½. Registration information shall be available to the public on those offenders finally classified as a Level 2 or a Level 3 Offender.

(8) Sex offenders are responsible for complying with all of the registration duties and obligations as set forth in M.G.L. c. 6, §§ 178C through 178Q. These registration duties and obligations shall be enforced to the extent permissible pursuant to the law.

(9) Upon receiving a sex offender's registration information or change in registration information, the Board shall transmit the registration information to:

- (a) police departments in municipalities where the sex offender lives and works, or where the sex offender intends to live and work upon release and where the offense was committed;
- (b) police departments in municipalities, including campus police departments or other state recognized law enforcement agencies at a school, where the sex offender works and/or attends a school or where the sex offender intends to work and/or attend a school upon release; and
- (c) the Federal Bureau of Investigation.

Registration information received by the Board and disseminated to law enforcement pursuant to 803 CMR 1.05(9) shall not be disseminated to the public except in accordance with M.G.L. c. 6, §§ 178I, 178J and 178K.

1.06: Duty to Register and Recommended Classification Level

(1) Duty to Register. Pursuant to M.G.L. c. 6, §§ 178C, 178K(2) and 178L(1), the Board shall determine whether a sex offender has a duty to register and, if so, shall then prepare a recommended classification of the sex offender as a Level 1, Level 2, or Level 3 offender.

(2) No Duty to Register. If the Board determines that the offender does not have a duty to register, it shall notify the offender in writing. The Board shall promptly remove information pertaining to the offender from the sex offender registry.

(3) Recommended Classification. If the Board determines that the offender does have a duty to register, the Board shall prepare a recommended classification level based on the factors enumerated in M.G.L. c. 6, § 178K(1)(a) through (l) and further explained at 803 CMR 1.33. Pursuant to M.G.L. c. 6, § 178L(1), in preparing the recommended classification level, the Board shall consider any relevant materials, including documentary evidence submitted by the sex offender. A staff member of the Board shall complete the classification worksheet based on this information.

(4) Written Approval by Board Member. Pursuant to M.G.L. c. 6, § 178L(1), the classification worksheet shall be reviewed by one Board member, who shall enter written findings and determine the recommended classification level. The Board member who made the recommendation shall not be subject to a subpoena nor shall his or her mental process in reaching the recommended classification level be otherwise probed, as the recommendation may be appealed at a *de novo* hearing.

(5) Juvenile Recommendations.

- (a) If the sex offender was a juvenile at the time of the sex offense, the written findings and recommended classification level made pursuant to 803 CMR 1.06(4) shall be completed by the Board member who is a licensed psychologist or psychiatrist with special expertise in the assessment and evaluation of juvenile sex offenders.

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(b) To prepare a recommended classification for a juvenile or an adult whose only sex offense(s) was committed as a juvenile, the Board may meet with the juvenile sex offender. If the Board chooses to meet with the juvenile sex offender, he or she is permitted to be represented by his or her authorized representative. The Board shall not draw any adverse inferences from an offender's refusal or failure to meet with the Board.

(6) A Board member shall not preside at the classification hearing in a case where he or she made written findings and determined the recommended classification level pursuant to 803 CMR 1.06(4), except in the case of a juvenile sex offender or an adult sex offender whose only sex offense(s) was committed as a juvenile. In these circumstances, the Board member who is a licensed psychologist or psychiatrist with expertise in juvenile sex offenders may complete the recommended classification pursuant to 803 CMR 1.06(4) and also preside at the classification hearing with the consent of the juvenile.

(7) The Board member who made the written findings and determined the recommended classification level pursuant to 803 CMR 1.06(4) shall not be prohibited from participating in any sexually violent predator recommendation made pursuant to M.G.L. c. 6, § 178K(2)(c), or any motion to terminate registration obligation pursuant to 803 CMR 1.30, or any request to reclassify pursuant to 803 CMR 1.31.

1.07: Right to Submit Documentary Evidence During the Recommendation Process

(1) Notification. Pursuant to M.G.L. c. 6, § 178L(1)(a), the Board shall notify the sex offender of his or her right to submit documentary evidence relative to his or her duty to register, risk of reoffense, and degree of dangerousness posed to the public. Any documents submitted by the offender shall become part of his or her classification file. The offender shall submit any documentary evidence to the Board within 30 calendar days of receiving his or her notification.

(2) Extending the Time to Respond. Pursuant to M.G.L. c. 6, § 178L(1)(a), the Board may extend the timeframe for a sex offender to submit documentary evidence. The sex offender shall send a written request to the Board seeking an extension. In evaluating the request, the Board may consider such claims as insufficient notification, the offender's inability to secure records or documents from a sex offender treatment provider, or other unforeseen circumstances.

1.08: Right to Request a Hearing to Challenge Recommendations

(1) Notification. Pursuant to M.G.L. c. 6, § 178L(1)(a), upon completion of the process set forth in 803 CMR 1.06 and 1.07, the Board shall notify the sex offender, in writing, of his or her duty to register, the recommended classification level, and his or her right to request a hearing to challenge the Board's recommendations.

(2) Request for a Classification Hearing. At the same time the Board provides the notification pursuant to 803 CMR 1.08(1), the Board shall also provide each sex offender with a form to request a hearing. The completed form must be returned to the Board within 20 calendar days of receipt of the notice sent pursuant to 803 CMR 1.08(1). By requesting a hearing, the sex offender shall be deemed to have expressly rejected the Board's recommendation, and will have thereby agreed to be finally classified pursuant to 803 CMR 1.20 and 1.21.

(3) Failure to Request a Classification Hearing. Pursuant to M.G.L. c. 6, § 178L(1)(a), the failure to timely request a hearing shall result in a waiver of the right to a hearing. The recommended registration and classification level shall become the final decision of the Sex Offender Registry Board and shall not be subject to judicial review pursuant to M.G.L. c. 30A. Notification of this final decision shall be accomplished in accordance with 803 CMR 1.23. In addition, law enforcement shall be notified in accordance with 803 CMR 1.25.

(4) Sex Offender's Withdrawal of Request for Hearing. A sex offender who has requested a hearing may withdraw his or her request by:

(a) providing written notice to the Board at any time prior to the date of his or her scheduled classification hearing; or

1.08: continued

(b) stating his or her intent to withdraw on the record at the classification hearing prior to any testimony being presented. An offender may not thereafter withdraw his or her request for a hearing except upon approval by the presiding Hearing Examiner.

Any withdrawal by the sex offender will be deemed an acceptance of the Board's recommended classification and shall result in a waiver of the right to a hearing. The registration determination and the recommended classification level shall become the final classification of the Sex Offender Registry Board and shall not be subject to judicial review pursuant to M.G.L. c. 30A. Notification of the sex offender's final classification level shall be accomplished in accordance with 803 CMR 1.23. In addition, law enforcement shall be notified in accordance with 803 CMR 1.25.

(5) Board's Withdrawal of Recommended Classification. At any time prior to the date of the scheduled classification hearing, the Board may withdraw its recommended classification of a sex offender upon the receipt of new information of a significant event that occurred after the initial recommended classification that may change the recommended classification level. A "significant event" includes, but is not limited to, such things as:

- (a) the sex offender was charged or convicted of a new sex offense;
- (b) the sex offender was charged or convicted of a violent crime;
- (c) the sex offender violated the terms or conditions of community supervision;
- (d) the sex offender becomes the subject of a sexually dangerous person petition or has been adjudicated a sexually dangerous person, pursuant to M.G.L. c. 123A; or
- (e) any judicial determinations that may affect the nature of his or her sex offense history.

If the Board withdraws its recommended classification, it must provide written notification to the sex offender that the recommended classification will be re-evaluated based on the new information. The Board shall follow the procedures set forth in 803 CMR 1.06 through 1.08.

1.09: Representation at Classification Hearing

(1) Notification. Pursuant to M.G.L. c. 6, § 178L(1)(a), the Board shall notify the sex offender that at the classification hearing he or she has the right to represent himself or herself; the right to retain private counsel to represent him or her at his or her hearing; the right to have an authorized representative, other than an attorney, represent him or her at the hearing; and the right to have counsel appointed for him or her if he or she is found indigent, as determined by the Board pursuant to M.G.L. c. 211D.

(2) Right to Counsel if Indigent. At the same time the Board provides notice pursuant to 803 CMR 1.09(1), the Board shall also provide the sex offender with the requisite forms to be completed if the sex offender claims to be indigent and requests the appointment of counsel. All forms must be completed and mailed to the Board within 20 calendar days of receipt.

- (a) If the Board has determined that the sex offender is indigent and thus entitled to the appointment of counsel pursuant to M.G.L. c. 211D, the sex offender and CPCS shall be notified in writing that he or she has satisfied the requirements to have an attorney represent him or her at the hearing.
- (b) If the Board has determined that the sex offender is not entitled to the appointment of counsel pursuant to M.G.L. c. 211D, the sex offender shall be notified in writing that he or she will not have an attorney appointed to represent him or her. The sex offender shall further be notified that he or she may retain private counsel; that he or she may have an authorized representative; or he or she may represent himself or herself at the hearing.

(3) Juvenile Offenders. All sex offenders who are juveniles at the time of notification of the hearing shall be represented by counsel at the hearing. Any offender who is a juvenile at the time of the notification and who has not retained counsel is entitled to appointment of counsel.

(4) Notice of Appearance. A written notice of appearance must be submitted to the Board at least ten calendar days prior to the scheduled hearing date. The notice must include the name, address, telephone number, Board of Bar Overseers number, if applicable, and signature of the authorized representative, as well as the name and sex offender number of the offender he or she will be representing. If the authorized representative is not an attorney, he or she shall also submit a written authorization signed and dated by the sex offender.

1.09: continued

(5) Self-representation. The sex offender may represent himself or herself at the hearing. The Hearing Examiner shall require the offender to sign a statement, or affirm under oath in the case of video-conference hearings, that he or she has been informed of his or her right to have representation and that he or she has knowingly and voluntarily waived that right. The sex offender representing himself or herself shall be placed under oath by the Hearing Examiner at the beginning of the hearing.

(6) Notice of Withdrawal. If an authorized representative is no longer representing the sex offender, the authorized representative must file a written notice of withdrawal with the Board. An authorized representative who is an attorney shall not be permitted to withdraw his or her appearance on the day of the scheduled hearing unless successor counsel is present and prepared to proceed with the hearing or the offender is prepared to proceed by representing himself or herself, or another authorized representative is present and prepared to proceed with the hearing.

(7) An authorized representative may not testify as a witness at the hearing.

(8) The Board may have a staff person or an attorney represent it at the hearing. These individuals shall have the status of a party.

1.10: Scheduling of the Classification Hearing

(1) In General. The Board shall arrange the date, time and place of the classification hearing.

(2) Notification. Not less than 30 calendar days prior to the date of the classification hearing, the Board shall notify the sex offender or his or her representative, if a notice of appearance has been filed pursuant to 803 CMR 1.09(4), of the date, time and place of the hearing. At such time, the sex offender or his or her authorized representative shall also be provided with a copy of his or her classification file.

1.11: Rescheduling the Classification Hearing

(1) Rescheduling by the Board. The Board may change the date, time, or place of the classification hearing. The Board shall send written notification of any changes to the parties.

(2) Sex Offender's Request to Reschedule Prior to the Hearing Date.

(a) No later than three business days before a scheduled hearing, the offender may request, in writing, that his or her hearing be rescheduled. The written request must include an affidavit and supporting documentation explaining the reason(s) for the request to reschedule the hearing. A request to reschedule a hearing filed without a supporting affidavit or documentation will be denied.

(b) The Director of the Hearings Unit, or his or her designee, shall rule on all requests to reschedule hearings.

(c) In evaluating a sex offender's request to reschedule the hearing, the Board may consider such reasons as the following:

1. The amount of advance notice the sex offender had of the hearing date;
2. The reasons or circumstances provided in the affidavit;
3. The sex offender or his or her authorized representative's ability to anticipate the circumstances which resulted in the request to reschedule his or her hearing;
4. Delay by the sex offender in notifying the Board of his or her inability to attend the hearing; and
5. The number of previous requests to reschedule the hearing and the reasons provided in those previous requests.

(d) A request to reschedule a hearing based on a scheduling conflict of the sex offender's attorney will not be granted unless the attorney provides an affidavit identifying the following: case name, court and docket number, and the date the court issued its order requiring the attorney to appear.

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(e) A request to reschedule a hearing based on the unavailability of a witness will not be granted unless the witness's absence was unforeseeable and the offender or his or her authorized representative demonstrates that his testimony is necessary for a fair hearing. Except as provided for in 803 CMR 1.17, the Hearing Examiner may grant leave to allow the witness, within a reasonable time, to submit written documents in *lieu* of live testimony.

(3) Incarcerated and Civilly Committed Sex Offenders. In addition to the reasons provided in 803 CMR 1.11(2) in evaluating the sex offender's request to reschedule hearing, the Board shall also consider the following:

- (a) The sex offender's anticipated release date;
- (b) Whether the sex offender has sought parole and status of his or her parole hearing;
- (c) Whether the sex offender has filed a petition for discharge pursuant to M.G. L. c. 123A, § 9 and status of that petition; or
- (d) Any other information relevant to the sex offender's anticipated release.

(4) Allowance of the Request to Reschedule the Hearing. If the Board approves the request to reschedule the hearing, the sex offender shall be notified in writing of the new date, time, and location of the hearing. The Board may provide this notice less than 30 calendar days before the rescheduled hearing date.

(5) Denial of the Request to Reschedule the Hearing. In denying the sex offender's request to reschedule, the Board shall provide, in writing, its reason for denying the motion. The hearing will go forward as scheduled pursuant to 803 CMR. 1.10.

1.12: Failure of Sex Offender to Appear at the Classification Hearing

(1) Voluntary Waiver. Failure of the sex offender to appear at the scheduled hearing without good cause shown will be deemed a voluntary waiver of his or her attendance at the hearing. The hearing shall proceed as scheduled, without the offender present. The Hearing Examiner shall make a final classification decision, pursuant to 803 CMR 1.20.

(2) Good Cause to Reschedule Hearing. If the sex offender fails to appear at the scheduled hearing, he or she shall have ten calendar days following the close of the hearing to file a request to reschedule the hearing for good cause. The written request must include an affidavit and supporting documentation explaining the reason(s) for the request to reschedule the hearing. A request to reschedule a hearing filed without a supporting affidavit or documentation will be denied.

To determine good cause, the presiding Hearing Examiner may consider such things as:

- (a) The amount of advance notice the sex offender had of the hearing date;
- (b) The reasons or circumstances that resulted in his or her inability to appear at the hearing; and
- (c) The timing of the sex offender's notification to the Board that he or she was unable to appear at the scheduled hearing.

(3) If the Hearing Examiner determines that the offender has provided good cause for failing to appear at the scheduled hearing, the Board shall reschedule the hearing to the earliest possible date. The sex offender shall be notified in writing of the new date, time, and location of the hearing. The Board may provide this notice less than 30 calendar days before the rescheduled hearing date.

(4) If the Hearing Examiner does not find that the sex offender had good cause for failing to appear at the hearing, the Hearing Examiner shall make a final classification decision pursuant to 803 CMR 1.20 and include, as part of the final decision, an order with his or her reasoning for denying the request to reschedule the hearing.

1.13: Ex Parte Communications

(1) General Provisions.

(a) No party to a classification proceeding before the Board shall submit to the Hearing Examiner or any employee of the agency who is or may reasonably be expected to be involved in the final decision making process any information, evidence, argument or advice, whether written or oral, regarding any matter at issue, unless such submission is offered openly during the course of the hearing or in writing after the hearing, if allowed pursuant to 803 CMR 1.18. A copy of any written submissions shall be offered immediately to all parties.

(b) 803 CMR 1.13(1) will apply from the time the sex offender requests a hearing to challenge his or her recommended classification under 803 CMR 1.08 until the final classification is issued pursuant to 803 CMR 1.20.

(2) Exceptions.

(a) 803 CMR 1.13(1) does not apply to the process set forth in 803 CMR 1.06(5) for juvenile sex offenders and adult sex offenders whose only sex offense(s) was committed as a juvenile.

(b) 803 CMR 1.13(1) does not apply to consultation among Board employees concerning the internal administrative functions or procedures of the Board.

1.14: Classification Hearings

(1) Scope of the Classification Hearing. The hearing shall be a *de novo* review of the evidence and be limited to determining, by clear and convincing evidence, the sex offender's duty to register and, if applicable, his or her final classification level. The Board shall bear the burden of proof.

(2) Closed to Public. Hearings held by the Board are not open to the public. For purposes of 803 CMR 1.14(2), correctional staff required by the facility to be present at the hearing shall not be considered members of the public.

(3) The hearing may be conducted *via* video conference.

(4) Conduct of the Hearing. The Hearing Examiner shall govern the conduct of every phase of the hearing, including, but not limited to, the interpretation and construction of 803 CMR 1.00 and the conduct of all parties. All parties, authorized representatives, witnesses and other persons present shall conduct themselves in a professional manner consistent with the standards of decorum commonly observed in the courts of the Commonwealth. If a party's conduct interferes with the orderly presentation of the evidence, the Hearing Examiner may take any appropriate action, including, but not limited to, continuing the hearing in the absence of the offending participant and rendering a decision based on the evidence admitted.

(5) Order of Presentation. Unless otherwise determined by the Hearing Examiner, the Board proceeds first at all stages in the hearing, except that the Board proceeds last with its closing argument.

(6) Swearing in of Witnesses. A witness's testimony shall be under oath or affirmation, administered by the Hearing Examiner.

1.15: Subpoenas

(1) Any party to the classification hearing shall have the right to subpoena witnesses and documents in accordance with M.G.L. c. 30A, § 12.

(2) Petition to Modify or Vacate Subpoena. Pursuant to M.G.L. c. 30A, § 12(3) and (4), a subpoena may be modified or vacated by the presiding Hearing Examiner at the request of the subpoenaed witness. If a witness petitions the Board to modify or vacate a subpoena, the presiding Hearing Examiner shall promptly notify the parties.

In acting upon such a request, the presiding Hearing Examiner may grant a petition, in whole or in part, after considering whether:

1.15: continued

- (a) the testimony or evidence sought is relevant or reasonably related to the classification hearing;
- (b) the subpoena adequately describes the evidence required;
- (c) compliance with the subpoena poses an unreasonable burden on the witness; or
- (d) the testimony or documents requested fall within a constitutional or statutory privilege.

(3) Failure to Comply with Subpoena. Pursuant to M.G.L. c. 30A, § 12(6), if a witness fails to comply with a subpoena issued in the name of the Board that has not been revoked or modified pursuant to 803 CMR 1.15(2), the Board or the party who requested the subpoena be issued may apply to the Superior Court for an order directing the witness to comply.

(4) Timing to Request Subpoena from the Board. A subpoena request must be made in writing and directed to the presiding Hearing Examiner. The written request must set forth the name, address and date of birth of the witness and additionally, the substance of the witness's expected testimony. All subpoena requests must be filed no later than 21 business days prior to the hearing date.

1.16: Motions

(1) General Provisions. All motions, unless made during the classification hearing, shall be in writing. All motions and rulings will be included in the administrative record of the hearing. The Hearing Examiner shall have the discretion to rule on any motion at the time it is made or to reserve ruling until a later time, including as part of the final decision issued pursuant to 803 CMR 1.20.

Motions to reschedule hearings are addressed exclusively in 803 CMR 1.11.

(2) Written Motions.

(a) Grounds and Affidavit. All written motions shall state the specific grounds for the motion and shall set forth the action or order that is sought. Affidavits and other documents in support of the motion must be attached to the motion upon filing.

(b) Oral Argument. The Hearing Examiner may hear oral argument on motions at the hearing.

(c) Timely Filing. Parties shall file all written motions no later than ten calendar days prior to the scheduled hearing date.

(d) Service and Notice. A copy of any motion, including all supporting affidavits and documents, must be served on the other party at the same time the originals are filed with the Board's Hearings Unit.

(e) Opposition to Motion. Oppositions to any motion may be submitted in writing or argued orally at the hearing.

(f) Record. All written motions and rulings will be included in the administrative record of the hearing.

(3) Oral Motions. If a motion is made orally at the hearing, the Hearing Examiner may request that the motion and any opposition be reduced to writing.

(4) Motion for Expert Funds. An offender who has been deemed indigent pursuant to 803 CMR 1.09 may file a written motion for expert funds at least ten calendar days before the scheduled hearing.

(a) The written motion for expert funds must:

1. identify a condition or circumstance special to the sex offender and explain how that condition is connected to his or her risk of reoffense or level of dangerousness;
2. identify the particular type of Expert Witness who would provide testimony to assist the Hearing Examiner in his or her understanding and analysis; and
3. include supporting documentation or affidavits verifying the specific condition or circumstance that the offender suffers from.

Any motion that fails to meet the criteria in 803 CMR 1.16(4) may be denied prior to the hearing.

(b) Motions for funds for the purpose of an expert to provide a general opinion on the sex offender's risk to reoffend and degree of dangerousness will be deemed insufficient and denied prior to the hearing.

1.16: continued

(c) When a motion for expert funds is allowed, the presiding Hearing Examiner shall issue an order requiring the sex offender to provide an affidavit from the proposed Expert Witness. At minimum, the affidavit must include the following:

1. identification of the expert's area of expertise, including a copy of the expert's *curriculum vitae*;
2. summary of the anticipated opinion and testimony of the Expert Witness paying particular attention to the condition or circumstance identified by the sex offender in his or her motion for expert funds with an explanation as to how that condition or circumstance correlates to the sex offender's risk to reoffend or degree of dangerousness; and
3. the Expert Witness's hourly fee and estimated number of hours that the Expert Witness expects will be required to conduct an evaluation, prepare a written report to be admitted as evidence at the hearing, and testify at the hearing.

(d) As part of the order allowing the motion for expert funds, the Hearing Examiner shall include deadlines for:

1. the sex offender to submit to the Board the Expert Witness's affidavit and a copy of the expert's written report that will be submitted as evidence at the hearing; and
2. scheduling the hearing for the expert testimony.

(e) If the sex offender fails to comply with the Hearing Examiner's order, the Hearing Examiner may withdraw the order and deny the motion for expert funds.

(5) Motion to Reopen the Record. At any time after the close of evidence and prior to the issuance of the final decision pursuant to 803 CMR 1.20, a party may move to reopen the record to submit new evidence.

(a) For purposes of this motion, "new evidence" consists of newly discovered evidence which, by due diligence, could not have been discovered prior to the close of the evidence at the hearing by the party seeking to offer it.

(b) The moving party shall include a copy of the newly discovered evidence and provide the reason(s) explaining why the evidence was not discovered prior to the close of evidence at the hearing and how the evidence is relevant to the Hearing Examiner's analysis.

(c) The non-moving party shall have ten calendar days to oppose the motion.

(d) The presiding Hearing Examiner may rule on this motion as part of the written final classification decision.

(6) Motion for Reconsideration. After the final decision has been issued pursuant to 803 CMR 1.20 and before the expiration of the time for filing a complaint for judicial review pursuant to M.G.L. c. 30A, a party may move for reconsideration. The motion must clearly identify at least one of the following criteria:

(a) a clerical or mechanical error in the final decision;

(b) a significant factor that the Hearing Examiner overlooked in making the final classification level; or

(c) a material change in the sex offender's circumstances that was not foreseeable at the time of the hearing.

A properly filed motion for reconsideration shall be deemed a motion for rehearing pursuant to M.G.L. c. 30A, § 14(1) for the purposes of tolling the time to file a complaint for judicial review. The filing of this motion will not alter the final classification level or stay dissemination of registration information.

1.17: Discovery Obligations and Witness Disclosures

(1) Board's Discovery Obligations.

(a) At the same time the Board notifies the sex offender of the arrangements for his or her classification hearing pursuant to 803 CMR 1.10, the Board shall also provide him or her with a copy of his or her classification file.

(b) No later than ten calendar days before the scheduled hearing, the Board shall send to the sex offender, or his or her authorized representative, a copy of any additional documents the Board intends to introduce into evidence at the classification hearing.

1.17: continued

(c) A Board employee shall redact data from Board's discovery documents that are deemed to be privileged, confidential, investigatory, intelligence information, or information that identifies a victim. Such redacted data shall not: be introduced into evidence; be communicated to the Hearing Examiner; or become part of the record.

(2) Sex Offender's Discovery Obligations. No later than ten calendar days before the scheduled hearing, the offender shall provide the Board with copies of all documents he or she intends to introduce as evidence at the classification hearing.

(3) Witnesses. No later than ten calendar days before the scheduled hearing, each party shall provide the Board's Hearings Unit with a complete witness list. A witness list is not complete unless it includes all of the following information for each witness: the name, address, date of birth, and relationship to the offender (*e.g.*, family member, therapist, Expert Witness, *etc.*). The Hearing Examiner shall exclude the testimony of any witness not properly identified on the witness list. The failure to provide sufficient information may result in a witness being denied entry into correctional facilities.

(4) The Hearing Examiner may permit a party to supplement or amend a witness list no later than five calendar days prior to the scheduled hearing date only if the moving party provides good cause for the additional time.

(5) Expert Witnesses.

(a) If a party intends to rely on the opinion of an Expert Witness at the classification hearing, a report or a written substantive summary of the Expert Witness's anticipated testimony must be provided to the other party at least ten calendar days prior to the scheduled hearing date. This report or summary must include the name of each Expert Witness who is anticipated to testify, the subject matter of such testimony, and the substance of the facts and opinions of the anticipated testimony. The party intending to rely on an Expert Witness shall also provide the curriculum *vitae* of the Expert Witness.

(b) Failure to comply with 803 CMR 1.17(5)(a) will result in the exclusion of an Expert Witness's report and testimony from evidence.

(c) At the classification hearing, a party shall be permitted to introduce into evidence an Expert Witness's written report, including his or her opinion as to the offender's risk of reoffense and/or dangerousness, only if the author of the report is called to testify at the hearing and is otherwise qualified as an expert in the area that he or she is being called to testify. The failure to call the Expert Witness to testify at the hearing will result in the exclusion of so much of the report as expresses the Expert Witness's opinion as to the sex offender's risk of reoffense or degree of dangerousness.

(d) Board's Intention to Rely on Expert Witness at Hearing. Pursuant to M.G.L. c. 6, § 178L, in any case where the Board intends to rely on the testimony or report of an Expert Witness, as defined in 803 CMR 1.03, the Board shall notify the sex offender or his or her authorized representative of this intention. In the event that the Board intends to rely on an Expert Witness and the sex offender has been found to be indigent, the Board shall notify the offender or his or her authorized representative that he or she may apply for and the Board may grant the payment of fees for an Expert Witness.

1.18: Evidence

(1) General. Pursuant to M.G.L. c. 30A, § 11(2), the rules of evidence observed by courts shall not apply to classification hearings, but the rules of privilege recognized by law shall be observed. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely on in the conduct of serious affairs. The Hearing Examiner may exclude irrelevant, unreliable, and repetitive evidence.

(2) Presentation at Hearing. Evidence will not be considered unless it is presented at the hearing or accepted by the Hearing Examiner in conjunction with a motion to reopen the record under 803 CMR 1.16(5). The Hearing Examiner may, upon request of a party for good cause shown, hold the record open to receive additional evidence for a specified period of time after the hearing. When additional evidence is admitted post-hearing, the other party must be granted a specific period of time to review the evidence and submit a written response.

1.18: continued

(3) Oral Testimony. Each witness shall testify under oath or affirmation. Each witness shall be available for direct examination and cross-examination.

(4) Stipulations. The parties may, by written stipulation filed with the Hearing Examiner at any stage of the proceeding or by oral stipulation made at the hearing, agree as to the truth of any fact pertinent to the proceedings.

1.19: Duties and Powers of the Hearing Examiner

(1) The duties of a presiding Hearing Examiner shall include, but are not limited to, the following:

- (a) to maintain a list of the names and addresses of all individuals who are in attendance at the hearing;
- (b) to administer the oath or affirmation to each witness prior to his or her testimony;
- (c) to assist all witnesses in making a full and free statement of the facts in order to bring out all the information necessary to decide the issues involved;
- (d) to ensure orderly presentation of the evidence;
- (e) to ensure that all parties have a full opportunity to present their claims at the scheduled hearing;
- (f) to receive, rule on, exclude, or limit evidence;
- (g) to receive and rule on all motions; and
- (h) to assess the reliability of the exhibits introduced into evidence and credibility of witnesses; draw all reasonable inferences therefrom; and render a fair, independent and impartial decision based on the issues and evidence presented and in accordance with the law.

(2) The powers of the presiding Hearing Examiner shall include, but are not limited to, the following:

- (a) to limit attendance or assign seating, or both, at the hearing in consideration of security, space availability, privacy and confidentiality;
- (b) to request that parties produce additional evidence;
- (c) to examine witnesses;
- (d) to rule on any motions or requests made during the hearing;
- (e) to regulate the presentation of evidence and the participation of the parties for the purposes of ensuring an adequate and comprehensive record of the hearing;
- (f) to change the date, time or place of the hearing on his or her own motion or at the request of any Party, upon due notice to all parties;
- (g) to continue a hearing that is in progress. All parties shall be notified of the date, time and place of the continued hearing;
- (h) to request that parties submit post-hearing briefs and/or proposed findings; and
- (i) to take notice of any fact which may be judicially noticed by courts, as well as general, technical or scientific facts within the Board's specialized knowledge, pursuant to M.G.L. c. 30A, § 11(5).

1.20: Hearing Examiner's Final Decision

(1) Written Decision. Pursuant to M.G.L. c. 30A, § 11(7) and (8), after the classification hearing the Hearing Examiner shall issue a final written decision containing the following:

- (a) statement of the issues involved in the hearing;
- (b) summary and analysis of the evidence, including credibility and reliability determinations, as needed;
- (c) specific findings of fact on all relevant disputed factual matters;
- (d) rulings of law on all relevant disputed legal issues;
- (e) conclusions drawn from the findings of fact and rulings of law which form the basis of the final registration determination and classification level; and
- (f) final registration determination and classification level.

For purposes of judicial review, pursuant to M.G.L. c. 30A and M.G.L. c. 6, § 178M, the Hearing Examiner's final written decision shall be considered the final agency action.

1.20: continued

(2) The Hearing Examiner may maintain, decrease, or increase the Board's recommended classification level in reaching his or her final decision. The Hearing Examiner shall consider the relevant and credible evidence and reasonable inferences derived therefrom to determine:

- (a) the offender's risk of reoffense;
- (b) the offender's dangerousness as a function of the severity and extent of harm the offender would present to the public in the event of reoffense; and
- (c) in consideration of the foregoing, whether and to what degree public access to the offender's personal and sex offender information, pursuant to M.G.L. c. 6, § 178K, is in the interest of public safety.

(3) Relief from Registration. In a manner consistent with M.G.L. c. 6, § 178K(2)(d) and 803 CMR 1.29, the Hearing Examiner may find that the offender has no obligation to register as a sex offender. The Hearing Examiner shall make written findings providing reasons for relieving the sex offender from his or her duty to register.

(4) Unavailable Hearing Examiner. If the Hearing Examiner becomes unavailable before completing his or her decision, the Chair or the Chair's designee shall appoint a successor to assume the case and render the decision. If the presentation of evidence has been completed and the record is closed, the successor shall decide the case on the basis of the record, unless testimony was taken. In those cases, the hearing shall be reconvened before the successor examiner for taking of the testimony again. If the evidence portion of the hearing has not been completed when the successor is assigned, the successor may either proceed with the hearing where it left off or require the presentation of evidence from the beginning. If the successor proceeds with the hearing where it left off, the Board shall provide the successor and the parties with a copy of the transcript, or completed portions thereof, without cost.

1.21: Hearing Examiner's Decision as the Final Sex Offender Registry Board Decision

(1) The Hearing Examiner's decision shall be the final Sex Offender Registry Board decision, except as expressly provided in 803 CMR 1.16(6) and (7) and 1.21.

(2) Judicial review, pursuant to M.G.L. c. 30A, § 14, is not available to the Board to correct errors in a Hearing Examiner's decision. Pursuant to 803 CMR 1.21, the Board shall be authorized to review a Hearing Examiner's final decision or any finding or ruling within the final decision on its own initiative or upon request by the Board's General Counsel, when any of the following grounds are presented:

- (a) the decision is based upon an error of law;
- (b) the decision is not in conformity with procedural due process standards;
- (c) the decision is unsupported by substantial evidence;
- (d) the decision is the result of arbitrary or capricious conduct;
- (e) the decision is the result of an abuse of discretion; or
- (f) the decision is not in conformity with the law.

(3) To request a review of a Hearing Examiner's decision, the Board's General Counsel or the General Counsel's designee shall file a written request for review.

(a) The written request shall state the grounds for seeking review, as outlined in 803 CMR 1.21(2)(a) through (f), and the reason that review is appropriate, and cite to the information from the hearing record which supports the review requested. The written request for review shall be filed with the Chair or the Chair's designee within ten days of the issuance date of the Hearing Examiner's decision. Notice of the submission of a written request for review shall be made pursuant to 803 CMR 1.23(1). The offender or his or her authorized representative may file a response to the written request for review within ten days of receipt, addressing any of the matters contained in the request. The filing of a written request for review shall stay the effect of the Hearing Examiner's decision for purposes of judicial review, registration and dissemination.

(b) The majority of the Board's sitting members shall determine whether to grant the written request for review. Notice of the Board's determination on whether to grant the written request for review shall be made pursuant to 803 CMR 1.23(1). If the Board grants the written request for review, the Hearing Examiner's decision shall continue to be stayed for purposes of judicial review, registration and dissemination.

1.21: continued

(4) If the Board grants review, the classification hearing shall be deemed re-opened. The Board may decide the issue based solely on the written request for review and the offender's response, if any, or may direct the parties to file additional memoranda of law before deciding the issue or issues before it. The majority of the Board's sitting members shall determine whether the Hearing Examiner's final decision was in error. The Board shall issue a written decision and shall notify the parties of its decision pursuant to 803 CMR 1.23(1). If the Board finds no error, the Hearing Examiner's decision shall become final. Notice of the Board's finding shall be made pursuant to 803 CMR 1.23(1). The date that the notice is received by the offender or his or her authorized representative shall govern the time for filing a petition for judicial review, the time for registration and the dissemination of offender information as mandated by the sex offender registry laws.

(5) If the Board determines that the Hearing Examiner's decision was in error, in whole or in part, the Board shall proceed in one of two ways:

(a) The Board may issue a decision setting aside a portion or portions of the Hearing Examiner's decision. In such cases, the Board shall issue a decision stating with specificity the portion or portions that it is setting aside and its reasons for setting them aside. The Board's decision shall incorporate by reference the portions of the original Hearing Examiner's decision that it intends to uphold. The Board's revised decision shall be the final agency decision. Notice of the Board's revised decision shall be made pursuant to 803 CMR 1.23(1). The date that the revised decision is received by the offender or his or her authorized representative, shall govern the time for filing a petition for judicial review, the time for registration and the dissemination of offender information as mandated by the sex offender registry laws.

(b) The Board may issue a decision setting aside the Hearing Examiner's decision in its entirety. In such cases, the Board shall issue a decision stating with specificity the reasons for its action and remand the case back to the Hearing Examiner. Notice of the Board's decision shall be made pursuant to 803 CMR 1.23 (1). The Hearing Examiner's new decision shall be the final agency decision. Notice of the Hearing Examiner's new decision shall be made pursuant to 803 CMR 1.23(1). The date that the new decision is received by the offender or his or her authorized representative, shall govern the time for filing a petition for judicial review, the time for registration and the dissemination of offender information as mandated by the sex offender registry laws.

(6) The Board's General Counsel or General Counsel's designee may file a written request for Board review of the Hearing Examiner's new decision if, in the opinion of the General Counsel or the General Counsel's designee, the Hearing Examiner's new decision fails to correct the error or errors that caused the decision to be remanded or if the new decision contains additional errors that meet the criteria of 803 CMR 1.21(2). The same process set forth in 803 CMR 1.21(3) shall apply if a written request for review is submitted by the General Counsel or General Counsel's designee at this stage.

(7) All documents considered by the Board during the review process described in 803 CMR 1.20 shall be included in the record that is filed by the Board's attorney in any judicial review case initiated pursuant to M.G.L. c. 30A, § 14.

1.22: Administrative Record

(1) General Principles. Pursuant to M.G.L. c. 30A, § 11(4), all documents, testimony and other evidence offered and accepted into evidence by the Hearing Examiner shall become part of the administrative record. For purposes of judicial review, the record shall include the Hearing Examiner's final decision issued pursuant to 803 CMR 1.20.

(2) Excluded Evidence. Any evidence offered at the hearing, but not accepted by the Hearing Examiner will be marked for identification purposes only and be included in the record.

1.22: continued

(3) Transcript of Hearing.

(a) All evidence and testimony at the hearing will be recorded electronically, digitally, stenographically, or by any other recording device deemed necessary or appropriate by the Board, in its discretion. The Board shall incur the cost of recording. Pursuant to M.G.L. c. 30A, § 11(6), transcripts will be made and supplied to the sex offender or his or her authorized representative, upon written request, at the offender's expense, and in accordance with any procedures the Board may establish. Upon written request, a sex offender who has been determined to be indigent for the classification hearing shall receive a transcript at no cost.

(b) Corrections to the transcript are permitted at the discretion of the Hearing Examiner. The Hearing Examiner may accept corrections by agreement of the parties, or if the parties cannot agree, the Hearing Examiner may accept recommended corrections from each party to determine what corrections, if any, are necessary.

(4) The administrative record is not available to the public.

1.23: Notification of the Final Decision

(1) Notification of the final decision made pursuant to 803 CMR 1.20 will be mailed to the sex offender and his or her authorized representative as soon as practicable. The sex offender or his or her authorized representative may request in writing, at the time of his or her administrative hearing, that the final decision made pursuant to 803 CMR 1.20 be sent to him or her *via* facsimile.

(2) Relief from Registration. If the final decision is to relieve the sex offender from his or her obligation to register as set forth in M.G.L. c. 6, § 178K and 803 CMR 1.20(3), the Board shall promptly remove information pertaining to the offender from the Sex Offender Registry.

(3) Duty to Register and Final Classification Level. If the final decision requires the sex offender to register and a final classification level is assigned, pursuant to M.G.L. c. 6, §§ 178K and 178L, the notification shall also inform the sex offender of his or her registration obligations as set forth in M.G.L. c. 6, §§ 178F or 178F½, and 178Q.

1.24: Judicial Review

(1) Notification. The written notifications of the final decision sent pursuant to 803 CMR 1.23 must inform the sex offender or his or her authorized representative of his or her right to seek judicial review of the final decision, pursuant to M.G.L. c. 30A and M.G.L. c. 6, § 178M.

(2) Pursuant to M.G.L. c. 30A, § 14, the sex offender has the right to pursue judicial review within 30 calendar days from the date of receipt of the final Sex Offender Registry Board decision.

(3) Pursuant to M.G.L. c. 6, § 178M and M.G.L. c. 30A, § 14, the filing of a complaint for judicial review will not alter the final classification level or stay the sex offender's registration requirements or the dissemination of registration information.

1.25: Transmission of the Final Decision to Law Enforcement

(1) General Principles. Pursuant to M.G.L. c. 6, § 178K(2)(a) through (c), the Board shall transmit all final registration and classification information to law enforcement.

(2) No Duty to Register. If the Board's final decision is to relieve or terminate a sex offender's duty to register, the Board shall promptly remove the sex offender's information from the sex offender registry and notify:

(a) police departments in municipalities where such sex offender lives and works, or where the sex offender intends to live and work upon release and where the offense was committed;

(b) police departments in municipalities, including campus police departments or other state recognized law enforcement agencies at any school, where the sex offender works and/or attends an Institution of Higher Learning or where the sex offender intends to work and/or attend an Institution of Higher Learning upon release; and

1.25: continued

(c) the Federal Bureau of Investigation.

(3) Duty to Register and Final Classification. If the Board's final decision is that the sex offender has a duty to register and a final classification level is assigned, the Board shall, within three business days of reaching the decision, transmit the final registration and classification information to:

- (a) police departments in municipalities where such sex offender lives and works, or where the sex offender intends to live and work upon release and where the offense was committed;
- (b) police departments in municipalities, including campus police departments or other state recognized law enforcement agencies at an Institution of Higher Learning, where the sex offender works and/or attends an Institution of Higher Learning or where the sex offender intends to work and/or attend an Institution of Higher Learning upon release; and
- (c) the Federal Bureau of Investigation.

1.26: Registration Requirements and Dissemination of Information

(1) A sex offender who has not been finally classified or is finally classified as a Level 1 sex offender shall register annually in accordance with the requirements in M.G.L. c. 6, §§ 178E, 178F and 178Q. The general public shall not have access to this sex offender information, pursuant to M.G.L. c. 6, §§ 178D, 178I, 178J and 178K(2)(a).

(2) A sex offender who is finally classified as a Level 2 or Level 3 sex offender shall register in accordance with the requirements in M.G.L. c. 6, §§ 178E, 178F½ and 178Q. The public shall have access to this sex offender information, pursuant to M.G.L. c. 6, §§ 178D, 178I, 178J and 178K(2)(b) and (c).

(3) A Level 3 sex offender designated as a sexually violent predator, pursuant to M.G.L. c. 6, § 178K(1)(c) shall register in accordance with the requirements in M.G.L. c. 6, §§ 178E, 178F½ and 178Q. The public shall have access to this sex offender information, pursuant to M.G.L. c. 6, §§ 178D, 178I, 178J and 178K(2)(b) and (c),

(4) Dissemination of Information to Victims. Upon the request of a victim who has enrolled with the Board's Victim Services Unit, the Board may inform that victim of the sex offender's final registration and classification determination.

(5) Updating Information. Pursuant to M.G.L. c. 6, § 178D, the Board is required to keep the registry up-to-date and accurate. Pursuant to M.G.L. c. 6, §§ 178E, 178F and 178F½, the sex offender is required to verify that his or her registration data is current and accurate. Upon verifying registration data or giving notice of a change of address or intended change of address, the sex offender shall provide independent written verification of the address at which he or she is registered or, if changing address, will be registered. For purposes of 803 CMR 1.26(5), independent written verification shall include:

Any two types of the following five types of unaltered original documents bearing the name of the sex offender and his or her present address:

- (a) rent or mortgage receipt;
- (b) utility bill;
- (c) bank or credit card statement;
- (d) passport, driver's license or official photo identification issued by the Registry of Motor Vehicles; and
- (e) any other current written document the Sex Offender Registry Board deems sufficient.

With the exception of a passport, driver's license or official photo identification issued by the Registry of Motor Vehicles, all other documentation must be dated within 45 days of presentation to the Sex Offender Registry Board or the police department.

(6) Sex Offender Registration Fee.

- (a) Pursuant to M.G.L. c. 6, § 178Q, the sex offender shall pay an annual sex offender registration fee to the Board.

## 1.26: continued

(b) Waiver. The sex offender may request that the Board waive payment of the sex offender registry fee. The request must be made on a form approved by the Board and submitted to the Board at the time the sex offender submits his or her registration form to the Board. The Board may waive the fee if it determines that payment would constitute an undue hardship on the offender or his or her family due to limited income, employment status, or any other relevant factor. The Board shall use the indigency standards developed pursuant to M.G.L. c. 211D to determine whether the payment of the fee constitutes an undue hardship on the offender. If the Board determines that payment of the fee is not an undue hardship, the Board shall notify the offender informing the offender that he or she must pay the fee within ten days of receiving the notice. If the Board determines that payment of the fee is an undue hardship, it shall waive the fee for the offender for one year. The offender may renew his or her request for a waiver when payment of his next annual fee is due.

1.27: Sex Offender Internet Database

(1) The information contained in the Sex Offender Internet Database, or website, pursuant to M.G.L. c. 6 §§ 178D and 178K(2), will be created and updated on a regular basis from the Sex Offender Registry, but must be kept physically separate from the Sex Offender Registry.

(2) The information contained in the Sex Offender Internet Database must not include the following information:

- (a) pertaining to unclassified or Level 1 sex offenders and any Level 2 sex offender finally classified prior to July 12, 2013;
- (b) identifying victims' names, addresses or relation to Level 2 and Level 3 sex offenders; and
- (c) relating to requests for registration data under sections M.G.L. c. 6, §§ 178I and 178J.

(3) Pursuant to M.G.L. c. 6, § 178N, the Sex Offender Internet Database shall include a warning explaining the criminal penalties for use of sex offender registry information to commit a crime or to engage in illegal discrimination or harassment of a sex offender and the punishment for threatening to commit a crime under M.G.L. c. 275, § 4.

(4) The Board shall develop and implement policies, procedures, and protocols to update and maintain the Sex Offender Internet Database in order to:

- (a) validate the accuracy, integrity, and security of information contained in the Sex Offender Internet Database;
- (b) ensure the prompt and complete removal from the Sex Offender Internet Database of registration data for sex offenders whose duty to register has terminated or expired under M.G.L. c. 6, §§ 178G, 178L, or 178M or any other law or order of any Court; and
- (c) protect against the inaccurate, improper, or inadvertent publication of registration information on the Internet.

1.28: Community Notification

(1) Pursuant to M.G.L. c. 6, § 178K(2)(c), the police department shall actively notify organizations and individual members of the public in the community that are likely to encounter a finally classified Level 3 sex offender or a sexually violent predator through a community notification plan. The community notification plan shall require notification by the police department to all schools in the community. The chief of the police department may notify day care centers, youth programs, recreational programs, organizations providing elder services, and other organizations as deemed necessary to protect the public safety.

(2) The method of community notification may include, but is not limited to:

- (a) publication of the information in local newspapers;
- (b) public announcement *via* local cable television; and
- (c) posting the information in the local town or city hall, libraries, and similar publicly accessible areas, as determined by the chief of police.

## 1.28: continued

(3) As part of a community notification plan, the chief of the police department may put the registration information for Level 3 sex offenders who live, work, or attend school in the community on the police department's website. The police department's website must comply with M.G.L. c. 6, § 178D and 803 CMR 1.27 and must be regularly updated with information from the Sex Offender Registry. The chief shall develop and implement policies, procedures, and protocols such as those described in 803 CMR 1.27 for the department's website. The chief may include, on the department's website, a link to the Sex Offender Internet Database as described in 803 CMR 1.27.

(4) Police departments shall, at least once annually, actively disseminate Level 3 sex offender information. If a Level 3 offender has been designated a sexually violent predator, community notification shall occur every 90 calendar days. Community notification shall also occur each time a Level 3 sex offender changes his or her home address, secondary address, or work address, or enrolls as a student. Pursuant to M.G.L. c. 6, § 178K(c)(2), the Board and police may require or facilitate additional active dissemination if deemed necessary to protect the public.

1.29: Motion for Relief from Registration Obligation Prior to Final Classification

(1) General Principles. Pursuant to M.G.L. c. 6, § 178K(2)(d), a sex offender may submit to the Board a written motion seeking relief from a registration obligation. The burden of proof will be on the sex offender to show that he or she does not qualify as a sex offender as defined by M.G.L. c. 6, § 178C or does not pose a risk to reoffend or a danger to the public.

(2) Filing. A motion for relief from registration may be in the form of a letter or petition and must be filed with the Board:

- (a) prior to or upon submitting the registration form pursuant to 803 CMR 1.05;
- (b) upon submitting documentary evidence pursuant to 803 CMR 1.06 and 1.07; or
- (c) at least ten business days before the date of a scheduled classification hearing, pursuant to 803 CMR 1.10.

(3) Any motion for relief from registration filed after the Board makes a final decision pursuant to 803 CMR 1.20 will be treated as a motion for termination pursuant to 803 CMR 1.30 or as a motion for reclassification pursuant to 803 CMR 1.31.

(4) Pursuant to M.G.L. c. 6, § 178K(2)(d), a sex offender is not eligible for relief from his or her duty to register if the offender:

- (a) has been determined to be a sexually violent predator pursuant to M.G.L. c. 6, § 178K(2)(c);
- (b) has been convicted of two or more sex offenses involving a child, as defined by M.G.L. c. 6, § 178C, committed on different occasions;
- (c) has been convicted of a sexually violent offense, as defined by M.G.L. c. 6, § 178C; or
- (d) has been convicted of a sex offense involving a child, and has not already registered for at least ten years.

(5) Motions Filed During Recommendation Process.

- (a) If the Board allows the motion for relief from registration during the recommendation process pursuant to 803 CMR 1.06 through 1.08, the Board shall make specific findings and provide written notification to the sex offender. The Board shall promptly remove information pertaining to the offender from the sex offender registry.
- (b) If the Board notifies the sex offender that he or she has a duty to register pursuant to 803 CMR 1.08, the motion for relief shall be deemed denied. The sex offender may file a new motion for relief prior to the hearing, pursuant to 803 CMR 1.29(2)(c), to be decided as part of the classification process, pursuant to 803 CMR 1.29(6).

(6) Motions Filed During Classification Process.

- (a) If the Board denies the sex offender's motion for relief during the recommendation process and the offender has requested a hearing, or if the sex offender has applied for relief pursuant to 803 CMR 1.29(2)(c) the classification hearing shall proceed.

1.29: continued

(b) At the hearing, the sex offender shall have the burden to prove by clear and convincing evidence that he or she is eligible for relief and that the circumstances of the sex offender's offense in conjunction with the offender's criminal history do not indicate a risk of reoffense or a danger to the public.

(c) If the Hearing Examiner allows the motion for relief from registration after the classification hearing, the Hearing Examiner shall make specific findings and provide written notification to the sex offender, pursuant to M.G.L. c. 6, § 178K(2)(d) and 803 CMR 1.20. The Board shall promptly remove information pertaining to the offender from the sex offender registry.

1.30: Motion to Terminate Registration Obligation

(1) General Principles. Pursuant to M.G.L. c. 6, § 178G, a sex offender whose registration and classification determination has become final pursuant to M.G.L. c. 6, § 178L(2) and 803 CMR 1.08 and 1.20, may file a written motion with the Board to terminate his or her obligation to register. The burden of proof will be on the sex offender to show by clear and convincing evidence that he or she has not committed a sex offense within ten years following conviction, adjudication or release from all custody or supervision, whichever last occurs, and that he or she does not pose a risk to reoffend or a danger to the public.

(2) Filing and Form of the Motion.

(a) In his or her motion, the sex offender shall include his full name, date of birth, address, sex offender number (SON), name and address of legal representative (if applicable), and name and address of legal guardian (if applicable).

(b) In his or her motion, the sex offender shall include proof, by clear and convincing evidence, that he or she has not committed a sex offense within ten years following the date of conviction, adjudication or release from all custody or supervision, whichever last occurs. In addition, the sex offender shall provide clear and convincing evidence that he or she is not likely to pose a risk to reoffend or a danger to the safety of others.

(c) Any motion for termination filed before a sex offender's registration and classification determination has become final will be treated as motion for relief from registration pursuant to 803 CMR 1.29.

(d) The Board may summarily deny, without a hearing, an offenders motion for termination if:

1. the offender is incarcerated;
2. the offender has pending criminal charges;
3. the offender's last classification decision is currently under Judicial Review pursuant to M.G.L. c. 30A, § 14 or on appeal, or on review by the Board as a result of an order by a court of the Commonwealth or a federal court.

The Board will notify the offender, in writing, the substantive reasons for summarily denying the motion for termination. The denial of a motion for termination under 803 CMR 1.30(2) is not subject to Judicial Review. 803 CMR 1.30(2)(d) does not apply to offenders whose only sex offense was a result of an adjudication as a youthful offender or as a delinquent juvenile.

(3) Pursuant to M.G.L. c. 6, § 178G, a sex offender is not eligible for termination if the offender:

- (a) has been determined to be a sexually violent predator pursuant to M.G.L. c. 6, § 178K(2)(c);
- (b) has been convicted of two or more sex offenses involving a child, as defined by M.G.L. c. 6, § 178C, committed on different occasions;
- (c) has been convicted of a sexually violent offense, as defined by M.G.L. c. 6, § 178C; or
- (d) has been convicted of a sex offense involving a child and has not already registered for at least ten years.

(4) A sex offender whose only sex offense was the result of an adjudication as a youthful offender or as a delinquent juvenile may file a motion to terminate at any time after he or she is finally classified notwithstanding the provisions in 803 CMR 1.30(1).

1.30: continued

(5) By filing a motion for termination, the offender authorizes the Board to obtain any information accessible under M.G.L. c. 6, §§ 178E and 178K(3) to assist in its review of the offender's motion.

(6) Termination Hearing Process. The Chair may appoint a panel of Hearing Examiners or a single Hearing Examiner to conduct the hearing on the sex offender's motion for termination.

(a) The Board will notify the sex offender in writing of the date, time and location of the termination hearing. An offender may waive his or her right to appear at the hearing before the Board. If an offender does not appear at his or her hearing, the Board shall treat the offender's failure to appear as a waiver of his or her appearance and shall proceed to rule on the offender's motion, unless the offender presents good cause within three calendar days of the hearing.

(b) No later than five calendar days before the scheduled hearing date, the sex offender may submit a written request to reschedule the hearing for good cause.

(c) No later than 20 calendar days before the scheduled hearing date, the Board and offender shall exchange all additional information intended to be submitted to the panel or Hearing Examiner.

(d) The sex offender may be represented at the hearing by privately retained counsel or an authorized representative.

(e) Motions for termination shall be decided on new and updated information not available at the time of the original classification. This does not foreclose the panel or Hearing Examiner from considering the information relied on by the Board to determine the sex offender's classification levels, including any prior written decisions issued by the Board.

(7) Decision on Motion for Termination. The panel or Hearing Examiner shall determine whether the sex offender has met his or her burden by clear and convincing evidence that he or she is not likely to pose a risk to reoffend or a danger to the safety of others. Pursuant to M.G.L. c. 30A, § 11(7) and (8), the panel or Hearing Examiner shall make specific written findings detailing the reasons for its decision after the hearing. For purposes of judicial review, pursuant to M.G.L. c. 30A, § 14 and M.G.L. c. 6, § 178M, these written findings shall be considered the final agency action.

(8) Notification of Decision.

(a) Notification of the decision on a motion for termination made pursuant to 803 CMR 1.30(7) will be mailed to the sex offender and his or her authorized representative, if applicable, as soon as practicable. The sex offender or his or her authorized representative may request in writing, at the time of his administrative hearing, that the final decision made pursuant to 803 CMR 1.20 be sent to him or her *via* facsimile.

(b) The decision will inform the sex offender of his or her right to seek judicial review of the final decision, pursuant to M.G.L. c. 30A § 14 and M.G.L. c. 6, § 178M. Pursuant to M.G.L. c. 30A, § 14, the sex offender has right to pursue judicial review within 30 calendar days from the date of receipt of the final Sex Offender Registry Board decision. The filing of a complaint for judicial review will not alter the final agency decision or stay the sex offender's registration requirements or the dissemination of registration information.

(9) A sex offender may re-apply for termination, following the same procedures, three years after the date the Board denied the motion or after the final disposition in court, whichever is later.

1.31: Sex Offender's Request for Reclassification

(1) General Principles. The Board recognizes the risk to reoffend and the degree of dangerousness posed by a sex offender may decrease over time. The burden of proof shall be on the sex offender to show that his or her risk of reoffense and degree of dangerousness posed to the public have decreased following his or her final classification.

(2) Requirements for Motion for Reclassification.

(a) No sooner than three years after the date of his final classification pursuant to 803 CMR 1.08, or 803 CMR 1.20, a sex offender who is finally classified as a Level 2 or 3 sex offender may file a written motion with the Board to re-examine his or her classification level. Sex offenders who have been convicted of a new sex offense may not seek reclassification sooner than ten years from the date of the last classification decision.

## 1.31: continued

(b) In his or her motion, the sex offender shall include his or her full name, date of birth, address, sex offender number (SON), name and address of legal representative (if applicable), name and address of legal guardian (if applicable), the classification level sought, and grounds for seeking reclassification.

(c) In his or her motion, the sex offender shall include proof, by clear and convincing evidence, that his or her risk of reoffense and the degree of dangerousness he or she poses to the public have decreased since his or her final classification. In support of his or her motion, the sex offender shall attach documentation that supports his or her request for reclassification, including information pertaining to:

1. participation or completion of sex offender treatment (Factor 32);
2. stability of current environment and support systems (Factors 33 and 34);
3. successful completion of probation (Factor 28);
4. physical condition (Factor 31);
5. psychological or psychiatric profiles indicating his or her risk to reoffend (Factor 35); and
6. substance-free and offense-free lifestyle in the community (Factors 9 and 29).

The offender may include with his or her motion any other additional information that may be relevant to his or her request.

(d) The sex offender shall also include an affidavit that provides an overview of his or her behavior and lifestyle during the three years prior to the filing of his or her motion for reclassification.

(e) The Board may summarily deny, without a hearing, an offenders motion for reclassification if:

1. the offender is incarcerated;
2. the offender has pending criminal charges;
3. the offender has not remained offense free for more than three continuous years since his or her last classification; or
4. the offender's last classification decision is currently under Judicial Review pursuant to M.G.L. c. 30A, § 14 or on appeal, or on review by the Board as a result of an order by a court of the Commonwealth or a federal court.

The Board will notify the offender, in writing, the substantive reasons for summarily denying the motion for reclassification. The denial of a motion for reclassification under 803 CMR 1.31(2)(e) is not subject to Judicial Review.

(3) Material Change in Medical Circumstances. If a sex offender has experienced a material change in circumstances related to a medical condition, he or she may file a motion for reclassification sooner than three years after the date of his or her prior classification. In addition to the requirements listed in 803 CMR 1.31(2), the sex offender shall also include an affidavit from the treating medical provider for his or her stated condition. The affidavit, at a minimum, shall identify and include the following information:

- (a) the type of medical condition;
- (b) the onset or date of diagnosis of the medical condition;
- (c) a detailed description of the limitations the medical condition has caused; and
- (d) a summary of the offender's treatment and prognosis.

(4) By filing a motion for reclassification, the offender authorizes the Board to obtain any information accessible under M.G.L. c. 6, §§ 178E and 178K(3) to assist in its review of the offender's motion.

(5) Reclassification Hearing Process. The Chair may appoint a panel of Hearing Examiners or a single Hearing Examiner to conduct the hearing on the sex offender's motion for reclassification.

(a) The Board will notify the sex offender in writing of the date, time and location of the reclassification hearing. An offender may waive his or her right to appear at the hearing before the Board. If an offender does not appear at his or her hearing, the Board shall treat the offender's failure to appear as a waiver of his or her appearance and shall proceed to rule on the offender's motion for reclassification, unless the offender presents good cause within three calendar days of the hearing.

(b) No later than five calendar days before the scheduled hearing date, the sex offender may submit a written request to reschedule the hearing for good cause.

1.31: continued

(c) No later than 20 calendar days before the scheduled hearing date, the Board and offender shall exchange all additional information intended to be submitted to the panel or Hearing Examiner.

(d) The sex offender may be represented at the hearing by privately retained counsel or an authorized representative.

(e) Motions for reclassification shall be decided on new and updated information not available at the time of the original classification. This does not foreclose the panel or Hearing Examiner from considering the information relied on by the Board to determine the sex offender's prior classification levels, including any prior written decisions issued by the Board.

(6) Reclassification Decision. The panel or Hearing Examiner shall determine whether the sex offender has met his or her burden to reduce his or her classification level. Pursuant to M.G.L. c. 30A, § 11(7) and (8), the panel or Hearing Examiner shall make specific written findings detailing the reasons for its decision after the reclassification hearing. For purposes of judicial review, pursuant to M.G.L. c. 30A, § 14 and M.G.L. c. 6, § 178M, these written findings shall be considered the final agency action.

(7) Notification of Reclassification Decision.

(a) Notification of the final reclassification decision made pursuant to 803 CMR 1.31(6) will be mailed to the sex offender and his or her authorized representative, if applicable, as soon as practicable. The sex offender or his or her authorized representative may request in writing, at the time of his or her administrative hearing, that the final decision made pursuant to 803 CMR 1.20 be sent to him *via* facsimile.

(b) The Board will notify the sex offender of his or her new classification level and the offender shall be required to comply with registration requirements as set forth in M.G.L. c. 6, §§ 178E, 178F, 178F½ and 178Q. In addition, the Board shall update the information pertaining to the offender in the sex offender registry.

(c) The decision will inform the sex offender of his or her right to seek judicial review of the final decision, pursuant to M.G.L. c. 30A, § 14 and M.G.L. c. 6, § 178M. Pursuant to M.G.L. c. 30A, § 14, the sex offender has the right to pursue judicial review within 30 calendar days from the date of receipt of the final Sex Offender Registry Board decision. The filing of a complaint for judicial review will not alter the final reclassification level or stay the sex offender's registration requirements or the dissemination of registration information.

(8) A sex offender may re-apply for reclassification no sooner than three years from the date of the last classification decision. Subsequent motions for reclassification shall be based on additional information not available during prior classifications.

1.32: Board's Reclassification of Sex Offender

(1) General Principles. Pursuant to M.G.L. c. 6, § 178L(3), the Board may reclassify any finally classified sex offender upon receipt of information that indicates the offender may present an increased risk to reoffend or degree of dangerousness.

(2) Reclassification may be based on, but is not limited to, information indicating the sex offender has:

(a) Been investigated for or charged with committing a new sex offense;

(b) Been convicted of a new sex offense;

(c) Been adjudicated a sexually dangerous person, pursuant to M.G.L. c. 123A;

(d) Been terminated from a sex offender treatment program;

(e) Violated the terms or conditions of community supervision;

(f) Been incarcerated for more than 60 consecutive days at any time following final classification by the Board;

(g) Failed to comply with the provisions of M.G.L. c. 6, §§ 178C through 178Q; or

(h) Demonstrated a lack of stability in the community.

## 1.32: continued

(3) If a majority of the Full Board determines that the offender may present an increased risk to reoffend or increased degree of dangerousness, it shall authorize a review of the offender's current classification level. The Board shall notify the offender that his or her classification level is being reevaluated.

(4) During the reclassification process, the Board shall follow the same procedures as used in the classification process as set forth in M.G.L. c. 6, §§ 178C through 178Q and 803 CMR 1.06 through 1.24.

1.33: Risk Factors

Pursuant to M.G.L. c. 6, §§ 178K(1)(a) through (l) and 178L, the Board shall use the following factors to determine each sex offender's level of risk of reoffense and degree of dangerousness posed to the public in reaching a final classification decision.

Research supports that the strongest predictors of sexual recidivism for all sex offenders are variables related to antisocial orientation and sexual deviance. (*Cortoni, 2010; Hanson and Morton-Bourgon, 2004; Prescott 2006*)

These factors may be present to varying degrees in any individual case. The final classification level is not based on a cumulative analysis of the applicable factors, but rather a qualitative analysis of the individual sex offender's history and personal circumstances. Factors that are not specifically referenced in a final classification decision are deemed inapplicable.

Some factors apply to adult male offenders, adult female offenders and juvenile offenders in different ways. These differences are reflected in each factor. Juvenile females are classified using juvenile factors. (*Frey, 2010; Hunter et al., 2006; Kubick et al. 2002; Matthews et al., 1997; Van der Put, 2013*)

The Board recognizes that adult female sex offenders generally have lower recidivism rates than adult male sex offenders. (*Cortoni et al., 2010*). The Board shall apply mitigating weight to this lower recidivism rate, along with the other relevant regulatory factors, in determining the final classification level.

**HIGH-RISK FACTORS:**

Pursuant to M.G. L. c. 6, §178K(1)(a)(i) through (vi), the presence of Factors 1 through 6, is indicative of a high risk of reoffense and degree of dangerousness. The absence of Factors 1 through 6 does not reduce an offender's risk of reoffense or lower his degree of dangerousness.

(1) Factor 1: Mental Abnormality.

(a) Adult Male. The presence of a statutorily defined mental abnormality specifically related to sexual deviance is significantly associated with an increased risk of reoffense.

The Board shall consider documentation from a licensed mental health professional that indicates that the offender has been diagnosed with a paraphilic disorder related to sexual fantasies, urges, and behaviors.

In the case of pedophilic disorder, this would only be applicable to offenders who are 16 years of age or older at the time of diagnosis. (*Doren, 2002; Hanson and Morton-Bourgon, 2004; Hanson and Morton-Bourgon, 2005; and Mann et al. 2010*)

(b) Adult Female. Factor 1 applies in the same manner to female offenders. (*Ford and Cortoni, 2008; Hart et al., 2003; Rousseau and Cortoni, 2010*)

(c) Juvenile. Factor 1 applies in the same manner to juvenile offenders. (*Prescott, 2006; Worling and Curwen, 2001; Worling and Langstrom, 2006*)

(2) Factor 2: Repetitive and Compulsive Behavior.

(a) Adult Male. Repetitive and compulsive behavior is associated with a high risk of reoffense. Factor 2 is applied when a sex offender engages in two or more separate episodes of sexual misconduct. To be considered separate episodes there must be time or opportunity, between the episodes, for the offender to reflect on the wrongfulness of his conduct.

The Board may give increased weight to offenders who have been discovered and confronted (by someone other than the victim) or investigated by an authority for sexual misconduct and, nonetheless, commit a subsequent act of sexual misconduct. The most weight shall be given to an offender who engages in sexual misconduct after having been charged with or convicted of a sex offense. (*Harris et al., 2003; Harris and Hanson, 2004*)

## 1.33: continued

(b) Adult Female. Factor 2 applies in the same manner to female offenders. (*Cortoni, et al., 2010; Vandiver and Kercher, 2004*)

(c) Juvenile. Factor 2 applies only to juvenile offenders who continue to commit sex offenses after they have been detected for prior sexual misconduct. Detection includes: being cautioned, warned, disciplined, criminally charged, or otherwise sanctioned by an adult authority (*e.g. police, parent, or teacher*).

An offender who engages in sexual misconduct after having been charged with or convicted of a prior sex offense presents an even higher risk to reoffend.

803 CMR 1.33(2)(c) includes adults whose only sex offense(s) were committed as a juvenile. (*ATSA, 2012; Curwen and Costin, 2007; Epperson et al., 2009; Nisbet, et al., 2004; Powers-Sawyer and Miner, 2009; Prentky and Righthand, 2003; Stetson School, 2012; Worling and Curwen, 2001; Worling and Langstrom, 2003 and 2006*)

(3) Factor 3: Adult Offender with a Child Victim.

(a) Adult Male. Adult offenders who target children pose a heightened risk to public safety because children normally lack the physical and mental strength to resist an offender. In addition, children can be lured into dangerous situations more easily than most adults. For purposes of factor 3, the Board shall consider any victim younger than 16 years old as a "child victim".

Offenders who target prepubescent children, generally younger than 13 years old, are more likely to have a deviant sexual interest and, therefore, pose an even higher risk of reoffense and degree of dangerousness and are given greater weight.

If the difference in age between the offender and the victim is five years or less and there is evidence of a consensual, although statutorily criminal, sexual act, the Board shall give limited weight to factor 3. (*Hanson & Bourgon, 2005; Hanson et al. 2007, Levinson et al., 2008; Mann et al., 2010*)

(b) Adult Female. Factor 3 will apply in the same manner to adult female offenders.

(c) Juvenile. Factor 3 does not apply to juvenile offenders. Factor 27 addresses juvenile offenders who target child victims, including adults whose only sex offense(s) were committed as a juvenile.

(4) Factor 4: Age at First Offense.

(a) Adult Male. Age at first offense is an important variable related to risk of reoffense and degree of sexual deviance. Offenders who manifest an early onset and persistence of deviant sexual interests or behaviors are at a higher risk to reoffend sexually.

Factor 4 applies to offenders convicted as adults who committed their first detected sexual misconduct as a juvenile and continued to engage in sexual misconduct after the age of 21. (*Hanson and Harris, 2000; Skelton and Vess, 2008*)

(b) Adult Female. Factor 4 will apply in the same manner to adult female offenders.

(c) Juvenile. Factor 4 applies to juvenile offenders who committed their first act of sexual misconduct when they were younger than 13 years old, were detected, and then continued to engage in sexual misconduct after 14 years of age or older.

803 CMR 1.33(4)(c) includes adults whose only sex offense(s) were committed as juveniles. (*Prentky, et al., 2010; Prescott, 2006*)

(5) Factor 5: Adjudicated Sexually Dangerous Person or Released from Civil Commitment.

(a) Adult Male. Pursuant to M.G.L. c. 6, § 178K(1)(a)(v), the Board views any offender who has been adjudicated as a sexually dangerous person, pursuant to M.G.L. c. 123A or the equivalent in another state, whether he has been released or not, to present a substantial risk to reoffend and degree of dangerousness.

Because of the statutory differences between the criteria and legal process for civilly committing sexually dangerous persons and classifying sex offenders living in the community, the Board uses criteria to determine an offender's risk of reoffending and degree of dangerousness that are different from those used by the courts in a sexually dangerous person proceeding.

(b) Adult Female. Factor 5 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 5 applies in the same manner to juvenile offenders.

1.33: continued

(6) Factor 6: Maximum Term of Incarceration.

(a) Adult Male. Pursuant to M.G.L. c. 6, § 178K(1)(a)(vi), the Board considers the offender who declines early release, specifically to avoid community supervision or due to his own concerns of reoffending, to present an increased risk of reoffense and degree of dangerousness.

803 CMR 1.33(6)(a) includes adults whose only sex offense(s) were committed as a juvenile, but who were incarcerated for other offenses as an adult.

(b) Adult Female. Factor 6 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 6 does not apply to juvenile offenders.

**RISK-ELEVATING FACTORS:**

(7) Factor 7: Relationship between Offender and Victim. The relationship between an offender and the victim is an important variable in determining risk of reoffense and degree of dangerousness.

(a) Adult Male. For purposes of Factor 7, the following relationship categories are relevant:

1. Intrafamilial Victim includes the following:

- a. Any persons whose marriage to the offender would be prohibited pursuant to M.G.L., c. 207, §§ 1 through 3;
- b. Legally married spouses;
- c. Adoptive children, first cousins, brothers- and sisters-in-law; and
- d. Any persons who are family member substitutes (*e.g.*, foster, step-relatives, or any other type of familial household "live-in" relationship) who lived in the same household with the offender for two or more years prior to the offending behavior.

Offenders who only target intrafamilial victims may be at a lower risk to reoffend as compared to offenders who target unrelated victims. However, having an intrafamilial victim is not a risk mitigating, nor a risk elevating, factor. It is included for definitional purposes only.

2. Extrafamilial Victim includes the following:

- a. Any person who has a recognizable non-intrafamilial relationship with the offender, such as a friend, co-worker, or acquaintance; and
- b. Any persons who are family member substitutes (*e.g.* foster, step-relatives, or any other type of familial household "live-in" relationship) who lived in the same household with the offender for less than two years prior to the offending behavior.

Having victims outside the family relationship is empirically related to an increased risk of reoffense. The number of potential victims substantially increases when offenders choose to sexually offend against extrafamilial victims.

Position of Trust. The Board gives special consideration to offenders who commit a sex offense while in a position of trust as established by their profession or role with the victim. These offenders present an increased degree of dangerousness because they violate the victim's and the public's sense of trust, safety, and security.

3. Stranger Victim includes the following:

- a. Any person who has known the offender for less than 24 hours prior to the offense;
- b. Any person who has had no memorable interaction with the offender prior to the offense;
- c. There are cases where the offender and victim relationship is established via electronic communications. To consider an adult victim a stranger, the contact sex offense would have to occur within 24 hours of the initial contact. To consider a child victim a stranger, the offender would have to transmit sexually explicit materials or make sexually explicit comments within 24 hours of first electronic contact.

Sex offenders who have sexually offended against a stranger victim have a higher risk of reoffense than offenders who target victims known to them. (*Hanson and Bussiere, 1998; Hanson and Harris, 2000; Harris et al., 2003; Knight and Thornton, 2007*)

(b) Adult Female. Factor 7 applies in the same manner to adult female offenders. (*Poels, 2007; Williams and Nicholaichuk, 2001*)

## 1.33: continued

(c) Juvenile. Factor 7 applies in the following manner for juvenile offenders:

1. Intrafamilial Victim includes the following:

- a. Any persons whose marriage to the offender would be prohibited pursuant to M.G.L., c. 207, §§ 1 through 3;
- b. Any other siblings or cousins, whether biological, step or adoptive; and
- c. Any persons who are family member substitutes (*e.g.*, foster, or any other type of familial household "live-in" relationship) and who lived in the same household with the offender for more than one year prior to the offending behavior.

Offenders who only target intrafamilial victims may be at a lower risk to reoffend as compared to offenders who target unrelated victims. However, having an intrafamilial victim is not a risk mitigating, nor a risk elevating, factor. It is included for definitional purposes only.

2. Extrafamilial Victim includes the following:

- a. Any person who has a relationship with the offender, but is not related, such as: friends, schoolmates, co-workers, neighbors, family friends; and
- b. Any persons who are family member substitutes (*e.g.* foster or any other type of familial household "live-in" relationship) and who lived in the same household with the offender for less than one year prior to the offending behavior.

Juvenile offenders who target extrafamilial victims pose an increased danger to the community.

Position of Trust: The Board gives special consideration to offenders who commit a sex offense while in a position of trust as established by their jobs. These offenders may present an increased level of dangerousness because they violate the victim's and the public's sense of trust, safety, and security.

3. Stranger Victim includes the following:

- a. Any person who has known the offender for less than 24 hours prior to the offense;
- b. Any person who has had no memorable interaction with the offender prior to the offense;
- c. There are cases where the offender and victim relationship is established within electronic communications. If the offender transmits sexually explicit materials or makes sexually explicit communication within 24 hours of first electronic contact, this counts as a stranger relationship, even if the actual offense occurred on a later date.

Juvenile offenders who have sexually offended against a stranger victim have an increased risk of reoffense and present a greater degree of dangerousness to the safety and welfare of the public than offenders who target victims known to them.

803 CMR 1.33(7)(c) includes adults whose only sex offense(s) were committed as a juvenile. (*Gerhold, et al., 2007; Heilbrun, et al., 2005; Hendriks and Bijleveld, 2008; McCann and Lussier, 2008; Miccio-Fonseca and Rasmusen, 2009; Powers-Sawyer and Miner, 2009; Stetson School, 2012; Worling and Curwen, 2001; Worling and Langstrom, 2006*)

(8) Factor 8: Weapon, Violence or Infliction of Bodily Injury.

(a) Adult Male. All sex offenses are inherently violent, but not necessarily in a physical sense. Offenders who use or threaten to use violence or weapons or cause bodily injury during the commission of a sexual assault are more likely to reoffend and present an increased degree of dangerousness. These behaviors may be indicative of sexual arousal to violence or an antisocial orientation.

Any force or threat of force beyond that necessary to commit the sexual offense shall constitute violence. Any object used to injure, incapacitate, penetrate, force, or threaten the victim during the course of the sexual assault shall be considered a weapon. Any injury, including but not limited to bruises, abrasions, and cuts, or any injury requiring medical attention other than for investigative purposes that is sustained by the victim during a sexual offense shall be deemed bodily injury. (*Boer et al., 1997; Epperson et al., 1998; Harris et al., 2003; Knight and Thornton, 2007; Mann et al., 2010; Mokres et al., 2012*)

(b) Adult Female. Factor 8 applies in the same manner to adult female offenders. (*Poels, 2007*)

(c) Juvenile. Factor 8 applies in the same manner to juvenile offenders. (*ATSA, 2012; Curwen and Costin, 2007; McCann and Lussier, 2008; Prentky and Righthand, 2003; Stetson School, 2012; Worling and Curwen, 2001; Worling and Langstrom, 2006*)

## 1.33: continued

(9) Factor 9: Alcohol and Substance Abuse.

(a) Adult Male. Drugs and alcohol are behavioral disinhibitors. Substance abuse may increase an offender's risk of reoffense. Factor 9 applies when the sex offender has a history of substance abuse, demonstrates active substance abuse, or when the offender's substance use was a contributing factor in the sexual misconduct. An offender's history of drug and alcohol use and history of treatment, abstinence and relapse should be considered in determining the weight given to factor 9.

803 CMR 1.33(9)(a) includes adults whose only sex offense(s) were committed as a juvenile, unless the substance misuse was time-limited experimentation during adolescence. (*Bonta and Andrews, 2007; Douglas and Skeem, 2005; Hanson and Harris, 2000; Hanson et al., 2007*)

(b) Adult Female. Factor 9 applies in the same manner to adult female offenders. (*Cortoni, 2010; Ford, 2010; Giguere and Bumby, 2007; Hanson et al., 2007; Hart et al., 2003; Rousseau and Cortoni, 2010; Sandler and Freeman, 2009; Vandiver and Kercher, 2004*).

(c) Juvenile. Factor 9 applies in the same manner to juvenile offenders. (*Heilbrun, et al., 2005; Stetson School, 2012*)

(10) Factor 10: Contact with Criminal Justice System.

(a) Adult Male. Individuals are expected to comply with the law. Lawlessness and antisocial behavior correlate with risk of reoffense and degree of dangerousness. For the purposes of factor 10, the Board shall consider evidence of a persistent disregard for rules, laws, and the violation of the rights of others.

Ongoing criminal behavior weighs heavily in the application of factor 10. Analysis under factor 10 shall include the consideration of the number and type of criminal charges, dispositions on the charges, dates of the criminal conduct, and number of abuse prevention or harassment prevention orders.

When classifying adults whose only sex offense(s) were committed as a juvenile, the Board shall consider their entire criminal history. (*Duwe and Freske, 2012; Hanson and Bussière, 1998; Hanson and Bourgon, 2005; and Harris et al., 2003*)

(b) Adult Female. Factor 10 applies in the same manner to adult female offenders. (*Cortoni, 2010; Hanson et al., 2007; Hart et al., 2003; Sandler and Freeman, 2007, 2009; Vandiver and Kercher, 2004; Vandiver, 2006*)

(c) Juvenile. Juveniles with a history of multiple charges or adjudications, including non-sexual crimes, are at increased risk of reoffense. Analysis under factor 10 shall include consideration of the number and severity of criminal charges, abuse prevention orders, harassment prevention orders, and Child Requiring Assistance proceedings, dispositions on the charges, and dates of the criminal conduct. (*Carpentier et al., 2011; Epperson et al., 2009; Gerhold et al. 2007; McCann & Lussier, 2008; Nisbet et al., 2004; Prentky and Righthand, 2003; Zimring et al., 2007; Zimring et al., 2009*).

(11) Factor 11: Violence Unrelated to Sexual Assaults.

(a) Adult Male. An offender is more likely to reoffend and present a greater danger if he has previously demonstrated that he can act violently and with no regard to the safety of others. Analysis under factor 11 shall include the consideration of the severity and frequency of violence towards other persons or animals. (*Harris et al., 2003; Hanson & Bourgon, 2005*)

(b) Adult Female. Factor 11 applies in the same manner to adult female offenders. (*Hanson and Cortoni, 2005; Poels, 2007*)

(c) Juvenile. Factor 11 applies in the same manner to juvenile offenders. (*Curwen and Costin, 2007; Knight et al., 2009; Prentky and Righthand, 2003; Stetson School, 2012; Worling and Curwen, 2001; and Worling et al., 2012*)

(12) Factor 12: Behavior While Incarcerated or Civilly Committed.

(a) Adult Male. Offenders are expected to comply with the rules of the institutional setting. Poor behavior while incarcerated or civilly committed is an indicator of antisocial behavior. An offender who unsatisfactorily adjusts to the rigors of confinement by violating rules in a highly structured environment presents an increased degree of dangerousness. Unsatisfactory adjustment is evidenced by violations of the rules. In determining the potential risk of reoffense and dangerousness of an offender, the Board may consider such elements as:

## 1.33: continued

1. the number of poor behavioral reports or disciplinary reports the offender received while confined;
2. the seriousness of the violation; and
3. the length of time that has elapsed between the offender's last report and his release.

803 CMR 1.33(12)(a) includes adults whose only sex offense(s) were committed as a juvenile and who also have a history of adult incarcerations or commitment. (*Doren, 2002; and Epperson et al., 2003*)

(b) Adult Female. Factor 12 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 12 does not apply to juvenile offenders. Factor 13 addresses juvenile offenders in custody.

(13) Factor 13: Non-compliance with Community Supervision.

(a) Adult Male. Offenders are expected to comply with the terms of community supervision. Non-compliance with the rules of community supervision is an indicator of antisocial behavior. An offender who unsatisfactorily adjusts to the external controls inherent to community supervision poses a significant risk when those controls are removed. Unsatisfactory adjustment is evidenced by violations of the rules of the supervising agency or the conditions of release. In determining the potential risk and dangerousness of an offender, the Board may consider such elements as:

1. the number of violations the offender received during his period of supervision;
2. the seriousness of the violation reported in the violation notice or report; and
3. the length of time that has elapsed between the offender's last violation notice or report and his release from supervision.

The Board shall consider the offender who engages in sexual misconduct while on community supervision to pose a greater risk of reoffense and a greater degree of danger to the public.

When classifying adults whose only sex offense(s) were committed as a juvenile, the Board shall consider the offender's entire history of community supervision. (*Hanson and Harris, 2000; Knight and Thornton, 2007; Mann et al., 2010*).

(b) Adult Female. Factor 13 applies in the same manner to adult female offenders. (*Hanson et al., 2007; Hart et al., 2003; Stuart and Brice-Baker, 2004*)

(c) Juvenile. For purposes of factor 13, juvenile offenders are considered to be under "community supervision" when they are supervised in the community by probation or the Department of Youth Services (DYS), or when they are in a residential treatment program or a DYS detention center or program.

A juvenile who unsatisfactorily adjusts to the external controls inherent to supervision may pose a significant risk when those controls are removed. Unsatisfactory adjustment is evidenced by a pattern of violations of rules and regulations of the supervising agency or program. In determining the potential risk and dangerousness of an offender, the Board may consider such elements as:

1. the number of disciplinary issues or rule violations;
2. their seriousness; and
3. the length of time that has elapsed since the offender's last disciplinary issue or violation.

While not sufficient by itself to invoke factor 13, a juvenile's history of suspension and expulsion from school may be considered in assessing a pattern of behavior while in a supervised setting.

The Board shall consider juvenile offenders who engage in sexual misconduct while under community supervision to pose a heightened risk of reoffense and a greater degree of danger to the public. (*Epperson et al., 2009; Prentky and Righthand, 2003*)

(14) Factor 14: Recent Threats.

(a) Adult Male. The Board shall consider the offender who expresses threats or intent to sexually assault another person to be at an increased risk of reoffense and degree of dangerousness.

803 CMR 1.33(14)(a) includes adults whose only sex offense(s) were committed as a juvenile. (*Hanson and Harris, 2000; Hanson et al., 2007; Harris et al., 2003*)

(b) Adult Female. Factor 14 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 14 applies in the same manner to juvenile offenders.

## 1.33: continued

(15) Factor 15: Hostility Towards Women.

(a) Adult Male. Hostile attitudes and behavior towards women are predictive of sexual reoffense and increased dangerousness. Factor 15 is applied when an offender has a pervasive pattern of conflicts with women, physical aggression toward women, and using derogatory and demeaning language towards women, or has multiple abuse prevention orders or harassment prevention orders taken out by different women at different times.

803 CMR 1.33(15)(a) includes adults whose only sex offense(s) were committed as a juvenile and who evidence a recent pattern of hostility toward women. (*Allan et al. 2000; Hanson et al., 2007; Mann et al., 2010*)

(b) Adult Female. Factor 15 does not apply to adult female offenders.

(c) Juvenile. Factor 15 does not apply to juvenile offenders.

(16) Factor 16: Public Place.

(a) Adult Male. The commission of a sex offense or engaging in sexual misconduct in a place where detection is likely reflects the offender's lack of impulse control. The Board may apply less weight to factor 16 if there is evidence that the offender made a clear and concerted effort to conceal his offending behavior from others. For purposes of factor 16, a "public place" includes any area maintained for or used by the public and any place that is open to the scrutiny of others or where there is no expectation of privacy. (*Epperson et al., 2000*)

(b) Adult Female. Factor 16 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 16 applies in the same manner to juvenile offenders. (*Langstrom, 2001*)

(17) Factor 17: Male Offender against Male Victim.

(a) Adult Male. Male offenders who have engaged in sexual misconduct against a male victim reoffend at a higher rate. Factor 17 applies when a male offender commits any sexual misconduct against a non-consenting male or a male child younger than 16 years old. (*Hanson et al., 2003; Harris et al., 2003; Harris and Hanson, 2004; Knight and Thornton, 2007*)

(b) Adult Female. Factor 17 does not apply to adult female offenders.

(c) Juvenile. Factor 17 applies only to juvenile offenders who were 13 years of age or older at the time of the sexual misconduct.

There are two circumstances when juvenile sex offenders who have male victims are at a higher risk to reoffend. Factor 17 only applies:

1. when the male victim is younger than 13 years old and is at least five years younger than the offender at the time of the sexual misconduct; or
2. if there is penetration and physical force in the sexual assault, regardless of the age of the victim.

803 CMR 1.33(17)(c) includes adults whose only sex offense(s) were committed as a juvenile. (*McCann and Lussier, 2008; Prescott, 2006; Prentky and Righthand, 2003; Worling and Curwen, 2001*).

(18) Factor 18: Extravulnerable Victim.

(a) Adult Male. Offenders who engage in sexual misconduct against an extravulnerable victim pose a greater danger to public safety. For purposes of factor 18 "extravulnerable" includes any condition or circumstance that:

1. renders a victim more susceptible to sexual assault or unable to effectively defend himself or herself; or
2. compromises his or her ability to effectively report the abuse or provide testimony in court.

The Board considers victims who are younger than eight years old or 60 years of age or older to be extravulnerable by virtue of their age. (*Levinson, et al., 2001; McGrath, 1991*)

(b) Adult Female. Factor 18 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 18 applies in the same manner to juvenile offenders.

## 1.33: continued

(19) Factor 19: Level of Physical Contact.

(a) Adult Male. Sexual assault involving penetration has been shown to cause increased psychological harm to the victim. The offender who engages in penetration, especially penile penetration, as part of the sexual assault poses an increased degree of dangerousness. In the case of an adult with a child victim, if the difference in age between the offender and the victim is five years or less and there is evidence of a consensual, although statutorily criminal sexual act, the Board shall give limited weight to factor 19. (*Lesserman et al., 1997*)

(b) Adult Female. Factor 19 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 19 applies in the same manner to juvenile offenders. However, when determining the weight to apply to factor 19, the Board should consider: age difference between offender and victim; whether there is evidence of an ongoing dating type relationship; whether the victim consented; and whether there was force or coercion.

803 CMR 1.33(19)(c) includes adults whose only sex offense(s) were committed as a juvenile. (*Stetson School, 2012*)

(20) Factor 20: Diverse Sexual Behavior.

(a) Adult Male. Diverse sexual behavior may reflect sexual preoccupation, elevated sex drive, or sexual deviance. Offenders who have a history of engaging in different types of inappropriate sexual behaviors, in separate episodes, are at an increased risk to reoffend. Diverse sexual behaviors include, but are not limited to: voyeurism, exhibitionism, possession of pornography, contact sexual assaults, stealing of a person's belongings for sexual arousal, frottage, stalking, photographing or videotaping a partially nude or nude person or the intimate parts of a person without their consent, and engaging in sexual harassment. In determining the weight applied to factor 20, the Board shall consider the number, types, and frequency of the diverse sexual behaviors. (*Hanson and Harris, 2000; Hanson et al., 2007; Harris et al., 2003; and Mann et al., 2010*)

(b) Adult Female. Factor 20 applies in the same manner to adult female offenders. (*Hart et al., 2003*)

(c) Juvenile. Factor 20 applies in the same manner to juvenile offenders. (*Curwen and Costin, 2007; Prentky and Righthand, 2003; Worling and Curwen, 2001*)

(21) Factor 21: Diverse Victim Type.

(a) Adult Male. Offenders whose acts of sexual misconduct traverse victim types, such as multiple ages, gender, or relationship categories, present a greater risk of reoffense and danger to public safety because they have a broader victim pool. (*Hanson and Harris 2000; Heil et al., 2003; Kleban et al., 2012*)

(b) Adult Female. Factor 21 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 21 applies in the same manner to juvenile offenders. (*Curwen and Costin, 2007; Epperson et al., 2009; Stetson School, 2012; Worling and Curwen, 2001; Parks and Bard, 2006*)

(22) Factor 22: Number of Victims.

(a) Adult Male. Offenders who have committed acts of sexual misconduct against two or more victims present an increased risk of reoffense and degree of dangerousness.

(b) Adult Female. Factor 22 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 22 applies in the same manner to juvenile offenders. (*Epperson et al., 2009; Gerhold et al., 2007; Miccio-Fonseca, 2009; Prentky and Righthand, 2003; Powers-Sawyer and Miner, 2009; Stetson School, 2012; Worling and Curwen, 2001; Worling and Langstrom, 2006*)

(23) Factor 23: Victim Access.

(a) Adult Male. An offender's risk of reoffense increases when he has frequent and easy access to potential victims from his preferred victim pool.

The Board may consider such things as:

1. whether the offender has regular and ongoing opportunities for interaction with potential victims through such things as coaching, teaching, or volunteering, or through his living, employment, or relationship settings; or
2. whether the offender appears to be intentionally seeking circumstances that put him in contact with his preferred victims.

## 1.33: continued

For offenders who target stranger victims, factor 23 applies when the offender's conduct suggests an intentional seeking out of circumstances similar to his prior offending behavior.

803 CMR 1.33(23)(a) includes adults whose only sex offense(s) were committed as juveniles. (*Hanson and Harris, 2000; Hanson et al., 2007*)

(b) Adult Female. Factor 23 applies in the same manner to adult female offenders.

(c) Juvenile. The risk of reoffense increases when juveniles have frequent, unsupervised access to potential victims from their preferred victim pool or appear to be intentionally seeking circumstances that allow such access. (*Carpentier and Proulx, 2011; Spice, et al., 2013; Worling and Langstrom, 2006*)

(24) Factor 24: Less than Satisfactory Participation in Sex Offender Treatment.

(a) Adult Male. Offenders who refuse to participate in, dropped out of, or are terminated by their treatment provider from sex offender treatment present an increased risk of reoffense.

The Board shall consider the offender who, during his most recent opportunity to participate in treatment while in custody or when required by community supervision, refused to participate in a sex offender treatment program or dropped out or was involuntarily terminated to be at an increased risk of reoffense and degree of dangerousness. (*Hanson and Harris, 2000; Hanson et al., 2002; Lösel and Schmucker, 2005*)

(b) Adult Female. Factor 24 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 24 applies in the same manner to juvenile offenders. (*Curwen and Costin, 2007; Epperson et al., 2009; Gerhold, et al., 2007; Powers-Sawyer and Miner, 2009; Vitacco et al., 2009; Worling and Curwen, 2001; Worling and Langstrom, 2006*)

(25) Factor 25: Prostitution of Children.

(a) Adult Male. Factor 25 does not apply to male offenders.

(b) Adult Female. Female offenders convicted of offenses related to either promoting or patronizing prostitution of a child have an increased risk of reoffense. (*Sandler and Freeman, 2009*)

(c) Juvenile. Factor 25 does not apply to juvenile offenders.

(26) Factor 26: History of Abusing Children.

(a) Adult Male. Factor 26 does not apply to male offenders.

(b) Adult Female. Female offenders with a history of engaging in any type of non-sexual child abuse have an increased risk of reoffense. The Board shall consider evidence of prior child abuse, including charges, investigations, and convictions. (*Cortoni and Gannon, 2011; Sandler and Freeman, 2009; Wijkman and Bijleveld, 2013*)

(c) Juvenile. Factor 26 does not apply to juvenile offenders.

(27) Factor 27: Age of Victim.

(a) Adult Male. Factor 27 does not apply to male offenders.

(b) Adult Female. Factor 27 does not apply to female offenders.

(c) Juvenile. Factor 27 only applies to juvenile offenders who were 13 years of age or older at the time of the sex offense.

1. Child Victims. Juvenile offenders who target younger child victims outside of their peer age group present an increased risk of reoffense and degree of dangerousness. For purposes of factor 27, the Board shall consider "child victim" as younger than 13 years old and at least five years younger than the offender at the time of the offense.

2. Adult Victims. Juvenile offenders who target adult victims present an increased risk of reoffense and degree of dangerousness. For purposes of factor 27, the Board shall consider "adult victim" as 18 years of age or older and at least five years older than the offender at the time of offense.

803 CMR 1.33(27)(c) includes adults whose only sex offense(s) were committed as a juvenile. (*ATSA, 2012; McCann and Lussier, 2008; Nisbet, et al, 2004; Stetson School, 2012; Worling and Curwen, 2001; Worling and Langstrom, 2006*)

1.33: continued

**RISK-MITIGATING FACTORS:**(28) Factor 28: Supervision by Probation or Parole.

(a) Adult Male. Supervision of sex offenders released into the community increases public safety. An offender's risk of reoffense and degree of dangerousness are reduced while he is serving a term of community supervision. Factor 28 also applies to offenders who are incarcerated at the time of the classification hearing and will be under community supervision upon release. Factor 28 may be given less weight if there is a history of probation violations.

803 CMR 1.33(28)(a) includes adults whose only sex offense(s) were committed as a juvenile. (*English et al., 1995; Vries Robbé and Vogel, 2013*)

(b) Adult Female. Factor 28 applies in the same manner to female offenders.

(c) Juvenile. Community supervision reduces a juvenile sex offender's risk of reoffense and degree of dangerousness. For purposes of factor 28, juvenile offenders are under "community supervision" when they are serving a probation sentence or are being monitored by DYS while in the community. (*Stetson School, 2012*)

(29) Factor 29: Offense-Free Time in the Community.

(a) Adult Male. The likelihood of sexual recidivism decreases the longer the sex offender has had access to the community without committing any new sex offense or non-sexual violent offense. The risk of reoffense decreases for most offenders after living in the community offense-free for five to ten years. The risk of reoffense lowers substantially after ten years of offense-free time in the community.

For purposes of factor 29, the offense-free time begins on the date of an offender's most recent release from custody for a sex offense or non-sexual violent offense. In the case of an offender who was not committed, the offense-free time begins on the most recent date of conviction or adjudication of a sex offense or non-sexual violent offense.

803 CMR 1.33(29)(a) includes adults whose only sex offense(s) were committed as a juvenile. (*Hanson et al., 2013; Harris & Hanson, 2004*)

(b) Adult Female. Factor 29 applies in the same manner to female offenders.

(c) Juvenile. Adolescence is a time of rapid social, sexual, physical, cognitive, and emotional developmental changes. The likelihood of recidivism decreases for most juvenile sexual offenders after living in the community offense-free for three years. The risk of re-offense continues to lower over time and by ten years of offense-free time the risk of reoffense has substantially decreased.

For purposes of factor 29, the offense-free time begins on the most recent date the juvenile offender is released from DYS detention for a sex offense or non-sexual violent offense. In the case of an offender who is not in detention, the offense-free time begins on the most recent date of adjudication in the juvenile court for a sex offense or non-sexual violent offense. (*Prentky et al., 2010; Worling and Langstrom, 2006; Worling, et al., 2010*)

(30) Factor 30: Advanced Age.

(a) Adult Male. Recidivism rates incrementally decline as sex offenders get older, especially as offenders move into their later years. While advanced age alone does not outweigh other risk-elevating factors present in an individual offender, advancing age has a mitigating effect on risk of reoffense.

Factor 30 does not apply uniformly to all sex offenders. Although risk of reoffense gradually declines when an offender is in his forties, the Board considers advanced age to have a significant mitigating effect when the offender is 50 years of age or older or, for those with child victims, when the offender is 60 years of age or older. For purposes of factor 30, the Board will consider the offender's age at the time of the classification hearing.

Factor 30 should be given less weight when an offender continues to demonstrate an active sex drive or general criminality.

803 CMR 1.33(30)(a) includes adults whose only sex offense(s) were committed as a juvenile. (*Barbaree and Blanchard, 2008; Hanson, 2002; Hanson, 2006; Fazel et al., 2006; Lussier and Healy, 2009; Nicholaichuk et al., 2014; Prentky and Lee, 2007; Skelton and Vess, 2008; Thornton, 2006*)

(b) Adult Female. Factor 30 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 30 does not apply to juvenile offenders.

1.33: continued

(31) Factor 31: Physical Condition.

(a) Adult Male. Pursuant to M.G.L. c. 6, § 178K(1)(d), the Board shall give consideration to the offender who has a physical condition that is documented by a treating medical provider. Factor 31 seeks to identify those offenders who have a decreased risk of reoffense or degree of dangerousness due to a physical condition, including a debilitating illness. At minimum, the medical documentation must:

1. Identify the physical condition;
2. Indicate the onset or date of diagnosis of the physical condition;
3. Provide a detailed description of the offender's limitations connected to the physical condition; and
4. Provide a summary of the offender's treatment and prognosis relative to the physical condition.

(b) Adult Female. Factor 31 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 31 applies in the same manner to juvenile offenders.

(32) Factor 32: Sex Offender Treatment.

In order for factor 32 to apply, it shall be the responsibility of the offender to provide documentation from a treatment provider verifying his treatment participation or completion. This documentation must, at minimum, include: the name and license number of the offender's treatment provider; the treatment provider's description of the treatment program's milieu, methodology, goals, and objectives; and a record of the offender's attendance, level of participation, and degree of progress.

(a) Adult Male. The Board has determined that participation in or successful completion of sex offense-specific treatment, specifically in a program utilizing a cognitive-behavioral modality, such as Relapse Prevention, Risk-Needs-Responsivity, or Good Lives, is a risk-reducing factor. The Board may also consider pharmacological treatment for paraphilic disorders as risk reducing.

The risk-mitigating weight applied to factor 32 varies in degrees based on the following:

1. Completion of Treatment. In general, offenders who have successfully completed a treatment program have lower rates of reoffense than those who have not. Participation in treatment through the end of a term of incarceration or community supervision is not considered "completion of treatment" unless there is documentation that the offender met all the goals of the program.
2. Currently Participating in Treatment. The Legislature has identified current participation in treatment as a risk mitigating factor. Offenders who voluntarily participate in treatment in the community, not solely as a condition of supervised release, and offenders who continue to participate in treatment after their treatment providers have determined that they have completed the program, may receive more weight under factor 32.
3. Past Participation in Treatment. The Board shall consider an offender's past participation in treatment. Offenders who participated in treatment while incarcerated or under community supervision, but did not complete the sex offender treatment program, may receive less weight under factor 32.
4. Denial. One of the primary goals of successful sex offender treatment is accepting responsibility for engaging in harmful sexual offending behavior. While some individuals who deny committing their sex offense can benefit from treatment, their lack of responsibility or degree of minimization for their behaviors may diminish the weight assigned to factor 32.

When classifying adults whose only sex offense(s) were committed as a juvenile, the Board shall consider their past participation in treatment as a juvenile and participation in sex offender treatment as an adult. (*Hanson et al., 2009; Levenson, 2011; Lösel and Schmucker, 2005; Marques, 2005; Olver et al., 2013; Saleh and Guidry, 2003*)

(b) Adult Female. Many female sex offenders have treatment needs that may not be addressed in traditional treatment programs created for male sex offenders. The Board shall give mitigating weight to participation in or successful completion in a program utilizing a cognitive-behavioral modality such as Relapse Prevention, Risk-Needs-Responsivity, and Good Lives or general psychological therapy. The Board shall consider the degree of participation in treatment and denial in the same manner as adult males. (*Blanchette and Brown, 2006; Blanchette and Taylor, 2010; Ford, 2010*)

## 1.33: continued

(c) Juvenile. Juvenile offenders may have broader treatment needs than their adult counterparts. Because juveniles are still maturing and developing, they may be more amenable to treatment.

The Board has determined that participation in any psychological therapy that addresses various areas of the offender's life, including family, school, emotional, and social domains, or sex offense specific treatment is a risk-reducing factor. The amount of weight assigned to factor 32 increases with the offender's progress and level of participation, family involvement, level of accountability, amount of focus on sex offending behavior, or whether the offender completed a treatment program. (*ATSA, 2012; Borduin et al., 2009; Reitzel and Carbonell, 2006; Worling et al., 2010*)

(33) Factor 33: Home Situation and Support Systems.

(a) Adult Male. Factor 33 is applied to an offender who is currently residing in a positive and supportive environment. The likelihood of reoffense is reduced when an offender is supported by family, friends, and acquaintances.

The Board shall give greater mitigating consideration to evidence of a support network that is aware of the offender's sex offense history and provides guidance, supervision, and support of rehabilitation.

803 CMR 1.33(33)(a) includes adults whose only sex offense(s) were committed as a juvenile. (*Tabachnick and Klein, 2011; de Vries Robbé and Vogel, 2013; de Vries Robbé et al., 2014*)

(b) Adult Female. Factor 33 applies in the same manner to adult female offenders. (*Gannon and Rose, 2008*)

(c) Juvenile. A juvenile who is currently residing in a positive and supportive environment is less likely to reoffend. Factor 33 is applied when there is evidence of stable relationships with family, stable and therapeutically supportive family, pro-social friends and acquaintances, or positive engagement with social services, teachers or other adults.

The Board shall give greater mitigating consideration to evidence of a positive support network that is aware of the offender's sex offense history and provides guidance, supervision, and support of rehabilitation. (*Bremer, 2006; Prentky and Righthand, 2003; Prentky et al., 2010; Worling and Curwen, 2001*)

(34) Factor 34: Materials Submitted by the Sex Offender Regarding Stability in the Community.

(a) Adult Male. Pursuant to M.G.L. c. 6, § 178K(1)(l), the Board shall give mitigating consideration to materials submitted by the offender that demonstrate stability in the community. The Board shall consider evidence that directly addresses the offender's recent behavior and lifestyle including, but not limited to: his residential stability, sustained sobriety, education or employment stability, type of employment, and non-work related activities. (*Tabachnick and Klein, 2011; de Vries Robbé and Vogel, 2013; de Vries Robbé et al., 2014*)

(b) Adult Female. Factor 34 applies in the same manner to adult female offenders. (*Gannon and Rose, 2008*)

(c) Juvenile. Factor 34 applies in the same manner to juvenile offenders. (*Bremer, 2006; Prentky et al., 2010*)

**ADDITIONAL FACTORS:**(35) Factor 35: Psychological or Psychiatric Profiles Indicating Risk to Reoffend.

(a) Adult Male. The Board shall consider evaluative reports, empirically-based risk assessment instruments, or testimony from a licensed mental health professional that discuss psychological and psychiatric issues, including major mental illness, as they relate to the offender's risk of reoffense.

The Board may give appropriate evidentiary weight to documentary reports and risk assessment, but the ultimate risk opinion, if any, will be excluded from consideration unless the mental health professional testifies as an expert witness at the classification hearing. (*Abracen and Looman, 2012; Fazel et al. 2007; Hanson and Bussière, 1998; Hanson and Harris, 2000; Kafka, 2012*)

(b) Adult Female. Factor 35 applies in the same manner to adult female offenders. (*Cortoni, 2010; Gannon, et al., 2014; Hart et al., 2003; Rousseau and Cortoni, 2010; Vandiver and Kercher, 2004*)

## 1.33: continued

(c) Juvenile. Factor 35 applies in the same manner to juvenile offenders. (*Kafka, 2012*).

(36) Factor 36: Online Offending Behavior.

(a) Adult Male. The presence of other regulatory factors must also be considered in assessing the risk of reoffense and degree of dangerousness posed by online offenders. The Board categorizes online offending behavior in the following ways:

1. Child Pornography. Sex offenders who limit their offending to possessing child pornography, in the absence of other factors, generally pose a lower risk of reoffense and degree of dangerousness than sex offenders who commit contact offenses.

Evidence of sexual deviance may demonstrate an increase in risk to commit contact sex offenses. Useful indicators of sexual deviance include, but are not limited to: evidence of actively searching for images of prepubescent children; collecting larger amounts of prepubescent pornography relative to adolescent or adult pornography; collecting larger amounts of child pornography relative to adult pornography; sorting and organizing files versus random downloading; and primarily focusing on child pornography depicting boys or a higher boy to girl ratio in a collection. (*Kim, 2004; Seto et al., 2011; Seto & Eke, 2015*)

2. Online Communicating. Sex offenders who engage in sexually explicit communications or exchange pornographic photos with minors or persons they believe to be minors by any electronic means present a danger to the public.

These offenders generally pose a higher degree of dangerousness than those who limit their offending behavior to child pornography as described in 803 CMR 1.33(36)(a)1.

3. Solicitation Offending. Sex offenders who communicate with minors or persons they believe to be minors by any electronic means for the purpose of enticing or meeting in-person to engage in sexual misconduct present the greatest danger among online offenders. (*Seto & Eke, 2005; Babchishin et al., 2011; Briggs et al, 2011; Seto et al., 2011; Eke et al., 2011*)

(b) Adult Female. Factor 36 applies in the same manner to adult female offenders.

(c) Juvenile. The categories of online offending apply to juveniles in the same manner as adults.

Juveniles whose online offending targets similarly aged peers may present a lower degree of risk and dangerousness than adults who target juveniles. (*Saleh et al., 2014*)

(37) Factor 37: Other Information Related to the Nature of the Sexual Behavior.

(a) Adult Male. Pursuant to M.G.L. c. 6, § 178L(1), the Board shall consider any information that it deems useful in determining risk of reoffense and degree of dangerousness posed by any offender.

(b) Adult Female. Factor 37 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 37 applies in the same manner to juvenile offenders.

(38) Factor 38: Victim Impact Statement.

(a) Adult Male. The Board recognizes the substantial impact sex offenses have on victims. Pursuant to M.G.L. c. 6, § 178K(1)(k), the Board shall consider any written statement authored by the victim, the parent or guardian of a minor victim or a deceased victim, or the guardian of an adult victim of a sex offense that resulted in a conviction or adjudication.

(b) Adult Female. Factor 38 applies in the same manner to adult female offenders.

(c) Juveniles. Factor 38 applies in the same manner to juvenile offenders.

1.34: Information Sharing

(1) Pursuant to M.G.L. c. 6, § 178K(4) any agency as defined by M.G.L. c. 6, § 178C, shall provide to the Board, within 15 business days of request, any information that is relevant to the Board's classification and/or reclassification of a sex offender's level. Such information includes but is not limited to:

(a) Any information associated with a conviction for a sex offense, including but not limited to, any narratives describing the offending behavior, victim statements and all investigative reports;

(b) Any documentation demonstrating the offender has been investigated for or charged with committing a new sex offense;

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- (c) Any documentation demonstrating the offender has been non-compliant with community supervision along with any reports generated as a result of non-compliance;
- (d) Any documentation demonstrating the offender has been non-compliant with required programming;
- (e) Any evaluation, risk assessment or discharge summary;
- (f) Any documentation demonstrating the offender has received any disciplinary reports for non-compliance with institutional rules and regulations;
- (g) Any restraining or harassment orders that have been issued;
- (h) Any new arrest or report generated as a result of violent or assaultive behavior; and
- (i) Any new arrest or report involving drugs or alcohol.

(2) Upon receipt and review of the information that has been provided to the Board, if the Board determines that additional information is necessary such agencies shall comply with the Board's request for additional information within ten business days.

1.35: Severability

If any regulation or section, sub-section, sentence, phrase or portion thereof is found to be invalid by a court of competent jurisdiction for any reason, said portion shall be deemed a separate, distinct, and independent provision, and the validity of the other regulations shall not be affected.

REGULATORY AUTHORITY

803 CMR 1.00: M.G.L. c. 6, §§ 178C through 178Q and St. 2003, c. 77, § 23.