THE ASSEMBLY
STATE OF NEW YORK
ALBANY

Terrence X. Tracy, Counsel
New York State Board of Parole
NYS Department of Corrections and Community Alternatives
1220 Washington Avenue, Building 2
Albany, NY 12226-2050

January 21, 2014

Re: Proposed Rule on Parole Decision-Making
I.D. No. CCS-51-13-00013-P

Dear Mr. Tracy:

We are writing this letter in response to the Notice of Proposed Rule Making issued by the Department of Corrections and Community Supervision in December 2013, concerning modifications to 7 NYCRR §§8001 and 8002 in order to implement statutory amendments enacted during the 2011 legislative session. We were extremely disappointed to see that the proposed rules contain no substantive change to the working requirements of the Parole Board. Indeed, they fail to achieve *any* change in the status quo, much less the significant change envisioned at the time we negotiated the amendments.

The proposed rules treat the requirements of §259-c (4) of the Executive Law and §71-a of the Correction Law as mere additional factors for consideration by the Parole Board. Had the Legislature wished to add additional factors we would have done so. The amended statutes of 2011 do not authorize or suggest additional factors but instead require a change of procedure and a change of perspective on the part of the Board. Risk and needs assessments and TAP instruments are not new factors; instead they provide an independent, evidence-based, objective evaluation of whether or not an inmate is likely to live and remain at liberty after release without violating the law and whether or not his or her release is compatible with the welfare of society. An inmate's risk and needs assessment and case management plan should inform the Board's analysis of his or her suitability for release, not be tacked on as an afterthought to the end of the list of required factors for consideration.

As you know, the courts have long held that while consideration of statutory factors is mandatory, the value and weight placed upon any one factor is wholly discretionary. The creation of more regulatory factors alone cannot possibly be said to implement an evidence-based protocol for parole release. We believe the intent of the Legislature was to modernize and make more objective a parole process that has been overly subjective in the past. The proposed rules do not do that.

First, §259-c (4) of the Executive Law was amended to read as follows:

4. Establish written [guidelines] procedures for its use in making parole decisions as required by law. [, including the fixing of minimum periods of imprisonment or ranges thereof for different categories of offenders]. Such written [guidelines may consider the use of a] procedures shall incorporate risk and needs [assessment instrument] principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision;

In contrast, to implement the statute above the proposed rules add an eleventh factor for consideration in 9 NYCRR §8002.3 as follows:

"(a) In making any parole release decision, the following factors shall be considered:

(11) the most current risk and needs assessment that may have been prepared by the Department of Corrections and Community Supervision;"

Clearly, the proposed rule is insufficient to carry out the intent evinced in the language of the amended statute. The Board must do better than this. Where the law had previously required guidelines, Executive Law §259-c (4) was updated to require new procedures for the Board to follow in applying objective principles in their decision-making process. The proposed rules neither reflect such principles nor specify an evidence-based procedure, as called for in the statute.

Second, a new §71-a of the Correction Law was enacted to read as follows:

§ 71-a. Transitional accountability plan. Upon admission of an inmate committed to the custody of the department under an indeterminate or determinate sentence of imprisonment, the department shall develop a transitional accountability plan. Such plan shall be a comprehensive, dynamic and individualized case management plan based on the programming and treatment needs of the inmate. The purpose of such plan shall be to promote the rehabilitation of the inmate and their successful and productive reentry and reintegration into society upon release. To that end, such plan shall be used to prioritize programming and treatment services for the inmate during incarceration and any period of community supervision. The commissioner may consult with the office of mental health, the office of alcoholism and substance abuse services, the board of parole, the department of health, and other appropriate agencies in the development of transitional case management plans.

In an attempt to implement this statute, the proposed rules add a twelfth factor for consideration in 9 NYCRR §8002.3 as follows:

"(a) In making any parole release decision, the following factors shall be considered:

(12)the most current case plan that may have been prepared by the Department of Corrections and Community Supervision pursuant to section seventy-one-a of the Correction Law;"

While we are sympathetic to the fact that the Board of Parole is not responsible for the actions of the Department, the Board's rules should require the consideration of such a case plan, and where such plan is absent the regulation should require an inmate to be remanded for a *de novo* hearing once the case plan has been developed.

The importance of transition accountability plans envisioned by the Legislature is made clear in the first paragraph of the legislative intent that accompanied this legislation as follows:

> *Legislative intent. In 1996, the legislature changed the penal law to include as an express purpose of imprisonment, the promotion of inmates' successful and productive reentry into society. Toward this end, many new responsibilities have been placed on both corrections officials and parole officials to ready inmates for their release into the community such as: obtaining their birth certificates and social security cards prior to release, preparing Medicaid applications as warranted, securing identification cards from the department of motor vehicles, and providing them with voter registration forms. In addition, transitional services programs have now become mandatory for all inmates. Transition accountability plans will be developed for each inmate, starting with their time in general confinement and culminating with the inmate's successful reintegration into the community. Furthermore, direct linkages with local agencies have been greatly enhanced with the creation of Re-entry Task Forces throughout the state.[emphasis added]*

We request that the Board redraft the proposed rules in an effort to reflect both the content and the spirit of the amended statutes.

Finally, we have no disagreement with the proposed changes to delete Part 8001 of 9 NYCRR in its entirety. Similarly, we are in agreement with the proposed amendments to §§8002.1 and 8002.2 reflecting technical changes resulting from the merger of the former Department of Correctional Services and the Division of Parole into the new Department of Corrections and Community Supervision.

Sincerely,

Daniel O'Donnell
Chairperson
Assembly Standing Committee on Correction

Kenneth P. Zebrowski
Assembly Chair
Administrative Regulations
Review Commission