HOLLYER BRADY LLP
ATTORNEYS AT LAW
60 EAST 42ND STREET, SUITE 1825
NEW YORK, NEW YORK 10165
PHONE: (212) 706-0248
FAX: (646) 652-5336

ORLEE GOLDFELD
GOLDFELD@HOLLYERBRADY.COM

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By email: terrence.tracy@doccs.ny.gov
Terrance X. Tracy, Esq.
Counsel, Board of Parole
Harriman State Campus, Building 2
1220 Washington Avenue
Albany, New York 12226-2050

Re: Comment on Proposed Rule Making

Dear Mr. Tracy:

I am writing to provide my comments to the Board of Parole's Notice of Proposed Rule Making, 9 NYCRR, Part 8001 and Sections 8002.1(a) and (b), 8002.2(a) and 8002.3.

As you know, the Board and I have litigated the issue of Executive Law 259-c(4)'s mandate that the Board establish written procedures/rules, and I am happy to see that the Board has finally taken the first steps toward establishing the procedures that should have been in place since October 2011. What troubles me, however, is that the proposed procedures do not comply with the Board's enabling legislation that requires that the written procedures established by the Board "incorporate risk and needs 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 release to parole supervision" (Executive Law § 259-c(4), L.2011, ch. 62, part C, subpart A). Nor do they comply with the position the Board has taken before the Appellate Division for the Third Department in the cases of *Matter of Montane v. Evans* (Case No. 517567) (pending) or *Matter of Mentor v. Evans* (Case No. 516918) (pending).

First and foremost, the proposed rules do nothing to actually incorporate risk and needs principles that measure the rehabilitation of persons appearing before the board or the person's likelihood of success upon release. Instead, the proposed rules just add a risk and needs assessment instrument (COMPAS) and the transitional accountability plan (TAP, now called case plan) as one of 12 factors to be supposedly considered, but more accurately stated ignored, by the Board. The proposed procedures simply bury the evidenced-based data of rehabilitation and risks and needs and lump them into the other factors that they Board can and does ignore (or fail to articulate when they render their decision, or pay lip service to at a parole hearing).

The State of New York has undoubtedly spent millions of tax payer dollars developing these instruments, yet the Board is proposing that they not be required to use them when

determining which inmates are to be released. The proposed language provides that the Board is only required to consider "the most current risk and needs assessment that **may have been prepared** by the Department of Corrections and Community Supervision; and the most current case plan that **may have been prepared** by DOCCS pursuant to section seventy-one-a of the Correction Law." (Proposed amendment to 9 N.Y.C.R.R. § 8002.3(a) (emphases added).)

This language does not mandate development of either a COMPAS or a TAP/case plan, which is counter to the Board's affirmative representation before the Appellate Division for the Third Department in the case of *Matter of Montane v. Evans*, Index No. 517567 (appeal pending), in which the Board stated:

> [The COMPAS] is but one factor among many that the Board **must weigh** when exercising its discretion.

(*Matter of Montane v. Evans*, Brief by the Board, dated October 1, 2013, at 14 (emphasis added)).

> It is true that the Board did not fully implement the use of the COMPAS instrument until early 2012, several months after the October 1, 2011 effective date of the amendment. That delay resulted in this Court's decision in *Matter of Garfield v. Evans*, 108 A.D.3d 830 (3d Dep't 2013), in which the Court annulled the Board's determination because the Board failed to use the COMPAS assessment instrument as described in the Evans Memorandum after the amendment's effective date. The Court thus effectively held that **since the Board has chosen to utilize the COMPAS as an element of its compliance with the statute, it must do so**.

(*Matter of Montane v. Evans*, Reply Brief by the Board, dated December 4, 2013, at 1; *see also Matter of Mentor v. Evans*, Reply Brief by the Board, dated December 11, 2013 (same)). Contrary to the Board's affirmative statement to an appellate court, it has now proposed procedures that do not mandate the use of either a COMPAS or a TAP/case plan.

As for the TAP/case plan, the Board and DOCCS have taken the position in various cases that a TAP/case plan does not have to prepare one for any inmate that was received into the State's custody prior to October 1, 2011. Given the fact that the Board is required to establish procedures that incorporate risk and needs, rehabilitation, and likelihood of success upon release for every inmate, and this information is to be garnered from a TAP/case plan, the procedures as proposed are inadequate because they do not require the Board to have in place a TAP/case plan for anyone, even those that were received into custody after October 1, 2011.

The proposed procedures also do not require that there be a current COMPAS or TAP/case plan on file. If we are to assume that a person is reappearing before the Board after being held for 24 months, surely there must have been some change in his/her COMPAS and/or TAP/case plan during those two years. Otherwise, what was the purpose of holding that person for 2 years if would be no change to his/her risk and needs upon release or their TAP/case plan in

all that time. The procedures should require a current COMPAS and TAP/case plan for each inmate.

Meaningful procedures should use an inmate's evidence-based risk and needs assessment as a starting point for consideration of whether that person should be granted parole. If the inmate presents as a person with low risk levels and a feasible plan for release, then there should be a presumption of release, only to be rebutted by actual grounds for denial (such as failure to participate or complete required programming, poor disciplinary history, etc.) The instant offense that happened years before cannot be the sole reason for parole denial. If that were the case, then no one would qualify for parole. New York's sentencing statutes are not written that way, and sentencing courts presume the possibility of parole when imposing indeterminate sentences. If the Board continues to ignore an inmate's successful program completion and the efforts made while incarcerated to maintain good disciplinary record and relationships with the outside world such that there is a parole plan that includes employments and/or a residence, then what motivation do inmates have to rehabilitate themselves, to maintain positive disciplinary records, and to educate themselves? And why are NY State tax payers continuing to pay for programming that the Board places no emphasis on. If nothing is achieved by continued incarceration – other than jobs at DOCCS/Parole – then inmates should be released to reintegrate into society and reunite with their families.

Clearly, one of the purposes of incarceration for everyone other than those with a life sentence without the possibility of parole is that the person use their time productively, not only to pay the penalty for their crime, but to improve themselves so that when they reintegrate into society, they are better citizens than when they entered the system.

The decision to deny parole cannot be based solely on the immutable instant offense, and that's why the Board's enabling legislation requires the Board to consider risks and needs, rehabilitation, and likelihood of success upon release. These are all forward-looking considerations. Parole denial cannot be based on criminal activity that occurred 5, 10, 15, 20, 25, 30, 35 years ago? Are you the same person you were 5, 10, 15, 20, 25, 30, 35 years ago? Shouldn't people be judged for who they are today, after having had the benefit of programming, counseling, education, and religious studies?

The Board knows and has research findings available to it that show that certain populations of inmates are less likely to reoffend. Yet, the Board seemingly ignores that data and orders inmates to be held for another 24 months. There is no apparent rationale for such findings, and this is leading to prolonged incarceration for people that are not likely to reoffend if at liberty, who have served the penalty provided by statute and imposed by the sentencing court, to the prolonged waste of taxpayer dollars, and to the prolonged separation of families, who themselves face socio-economic hardships based on the continued absence of their loved one/parent/income provider. If Board members wanted to be in charge of sentencing, they should seek to become judges. Absent that position, and given the governmental structure that is in place in the State of New York, it is not within the purview, authority, or discretion of the Board members to resentence inmates simply because they do not like their underlying crime, or they are afraid that there will be media scrutiny for granting parole.

Now is the opportunity for the Board to establish the procedures that should have been in place for more than two years. The Board should finally embrace modern, evidence-based data about recidivism risks. That data is incorporated into the risk and needs assessment instruments and should be used as the basis of whether an individual should be released from incarceration, not one of 12 factors to make passing reference to during a parole hearing.

The required procedures should be meaningful and substantive, and they should conform to the Board's enabling legislation. Board commissioners should be mandated to use an up-to-date COMPAS and TAP/case plan as the basis for making the parole decisions, with the other factors required to be considered by statute as aggravating or mitigating. To continue to deny parole based upon the instant offense is to ignore Executive Law § 259-c(4)'s requirement that the procedures incorporate risk and needs principles to measure the rehabilitation of inmates and their likelihood for success upon release.

Sincerely,

/s/ Orlee Goldfeld

Orlee Goldfeld

Cc by email:

JKoury@NYSenate.gov
John Koury, Director, ARRC
The New York State Capitol Building
Albany, New York 12247