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January 23, 2014

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New York City Bar Association, Corrections and Community Reentry Committee Comments re: Notice of Proposed Rule Making, 9 NYCRR, Part 8001 and Sections 8002.1(a) and (b), 8002.2(a) and 8002.3

Dear Mr. Tracy:

Thank you for the opportunity to offer public comments on the Parole Board's proposed regulations, published in the New York State Register on December 18, 2013.

We write on behalf of the Corrections and Community Reentry Committee of the New York City Bar Association (the "Committee"). The City Bar Association is an independent, non-governmental organization of 24,000 lawyers, law professors, and government officials from the United States and 50 other countries. Our members have a long-standing interest in promoting the fair and effective administration of justice for individuals who are incarcerated or who were formerly incarcerated. Improving the procedures and decisions of the state's Parole Board (the "Board") is of critical importance to individuals who are incarcerated and their families,

members of the communities to which those individuals seek to return, and the coffers of our state.

A) The History of Parole in New York

The existing statutory scheme for the Board was enacted in 1978, at a time when it had the responsibility of not only making parole release decisions but also setting minimum sentences of incarceration, a function that necessarily involved strong consideration of a person's criminal history and the nature of the crime of conviction. Since 1980, trial court judges, rather than the Board, have determined minimum sentences.[1] But the statute dictating the factors the Board must consider remained the same until 2011.

In making a decision about parole release, the Board is required to consider each of the factors listed in Executive Law § 259-i,[2] including the person's institutional record and program achievements, the person's release plans, any victim impact statement, the seriousness of the instant offense, and the person's prior criminal record. In order to authorize release, the Board must determine whether "there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law." N.Y. Exec. Law § 259-i(s)(c). Courts have interpreted the statute to require that the Board consider each factor, but have held that it is within the Board's discretion to assign whatever weight it chooses to any factor.

During the past 30 years, the Board has continued to focus, often exclusively, on the nature of the instant offense and the individual's prior criminal history. In so doing, the Board

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[1] Philip Genty, *Changes to Parole Laws Signal Potentially Sweeping Policy Shift*, N.Y.L.J. (Sept. 1, 2011); *see also* Penal Law Section 70.00 (3).

[2] These factors are:

> (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates;
> (ii) performance, if any, as a participant in a temporary release program;
> (iii) release plans including community resources, employment, education and training and support services available to the inmate;
> (iv) any deportation order issued by the federal government against the inmate while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law;
> (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated;
> (vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law;
> (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the presentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and
> (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement.

N.Y. Exec. Law § 259-i (2)(c).

has frequently denied parole to individuals who present a very low risk to society and who have demonstrated their rehabilitation and readiness for return to their communities through program participation and self-transformation. Indeed, the Board consistently ignores or places insufficient weight on statutory and regulatory factors such as appropriate release plans and commendable institutional record. The Board denies parole even to individuals who successfully participate in temporary release programs,[3] and those with a certificate of earned eligibility.[4]

In light of these problems, the legislature amended the Executive Law in 2011 (the "2011 amendment"), intending to refocus the Board's decision-making on whether the individual was ready to reenter society. The 2011 amendment requires the Board to establish "written procedures for its use in making parole decisions" and provides that "[s]uch written procedures shall 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 inmate may be released to parole supervision." In addition, new Correction Law § 71-A requires the Department of Corrections and Community Supervision ("DOCCS") to develop a transitional accountability plan ("TAP") that is a "comprehensive, dynamic and individualized case management plan based on the programming and treatment needs of the inmate." The TAP's purpose is to "promote the rehabilitation of the inmate and their successful and productive reentry and reintegration into society upon release."

B) The Proposed Regulations

Despite these structural and statutory changes, since 2011, lawyers have noted virtually no change in the Board's focus on static factors, such as crime of conviction and prior criminal history, in making parole decisions.[5] It is in this context that the Board has now proposed regulations implementing the 2011 amendments. The Board added two factors that its members should consider in making parole decisions:

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

The regulations do not provide any procedures for how these new factors should be used.

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[3] *See* Written Testimony of Scott Paltrowitz, Correctional Association of NY, Before the New York State Standing Committee on Correction, December 4, 2013, *available at* http://www.correctionalassociation.org/wp-content/uploads/2013/12/CA-Parole-Testimony-12-4-13-Hearing-FINAL.pdf; Transcript of Hearing of New York State Standing Committee on Correction, December 4, 2013, at 158, *available at* http://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_fb550f4dc8b2cb99d203b3db32a36fb3.pdf&view=1 (Testimony of Orlee Goldfeld, Esq.)

[4] *See* Correction Law § 805.

[5] Transcript of Hearing of New York State Standing Committee on Correction, December 4, 2013, at 230, available at http://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassemblyfb550f4dc8b2cb99d203b3db32a36fb3.pdf&view=1 (Testimony of Scott Paltrowitz, Esq.)

Without a requirement that the Board meaningfully weigh these factors, it will be free to ignore them and continue denying parole based on static factors just as it has done for decades.

The following comments are offered to ensure that the regulations fully implement the statute, and guarantee that the Board's decisions are based primarily on individuals' ability to successfully reenter society.

C) The Board's Proposed Regulations Should Be Compatible with the Role of the Judiciary

In our system, the trial court judge determines the minimum sentence after consideration of the individual's criminal history and the nature of the crime committed, applying the sentences permitted by statute. The Board, by continuing to allow a focus on the static factors that the trial judge considered, is upsetting the separation of powers within the state criminal justice system and is effectively acting as another sentencing court.[6]

D) The Board's Proposed Regulations Do Not Implement the Statute

The Board's proposed language does not implement the intent and language of the 2011 amendments. The proposed regulations permit the Board to continue to deny rehabilitated individuals parole based exclusively on the nature of their instant offenses or past criminal histories, in violation of the 2011 amendments. In order to ensure that a risk and needs assessment is given adequate consideration in every parole decision, the Committee, in collaboration with numerous experts, proposes that the following language be added to the regulations:

> *A parole applicant's up-to-date risk and needs assessment instrument and TAP/case plan shall be the mechanisms for weighing the factors listed in Executive Law section 259-i(2)(C)(A) and for determining whether there is a reasonable probability that if a parole applicant is released, s/he will live and remain at liberty without violating the law and that his or her release is not incompatible with the welfare of society and will not so deprecate the seriousness of his or her crime as to undermine respect for the law.*

E) The Board's Regulations Should Create Evidence-Based Presumptions to Ensure that the Board's Decisions are Objective and Consistent Rather than Arbitrary and Inconsistent

In the 2011 amendment, the state legislature evinced a clear intention that the Board base its decisions on evidenced-based, forward-looking factors related to an individual's rehabilitation while incarcerated, current readiness for reentry, and assessed risk level. In light of that legislation, the implementing regulations should provide that an individual who has substantially participated in his or her TAP/case plan activities or who is determined to be at low risk of reoffending (by an evidence-based risk assessment) should generally be released, barring exceptional circumstances. To ensure that the TAP/case plan and the risk assessment are used

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[6] *See* Hammock and James F. Seelandt, *New York's Sentencing and Parole Law: An Unanticipated and Unacceptable Distortion of the Parole Board's Discretion*, 13 ST. JOHN'S J. LEGAL COMMENT 545-46 (Spring 1999).

consistently, the Committee, in collaboration with numerous experts, suggests that the following language be added to the regulations:

> *An applicant who has a low risk score or who has substantially participated in her or his TAP/case plan activities or who has a certificate of earned eligibility shall be released unless exceptional circumstances exist as to warrant denial of release. If an applicant is denied release because of exceptional circumstances, the Board must provide, in writing, substantial and compelling reasons why such exceptional circumstances warrant denial. An applicant's crime of conviction or past criminal history, in and of themselves, may not constitute the requisite exceptional circumstances, and may not form the predominant basis for release denial.*

Given evidence that elderly individuals and those who have served many years of incarceration have a lower risk of re-offending, the Board's regulations should ensure that these characteristics are given due weight in determining whether there is a reasonable probability that an individual will remain at liberty without violating the law. The Committee, in collaboration with numerous experts, suggests the following language:

> *Age of 50 at the time of application for parole release and 15 years of non-interrupted incarceration shall be given a weighted presumption of release. In addition, any applicant who has successfully participated in temporary work release shall be released at her or his next parole hearing date.*

Finally, for any people who are denied release, the regulations should require the Board to provide guidance to those individuals with specific, written instructions for steps to take in order to be released at the next hearing. The Committee, in collaboration with numerous experts, suggests the following language:

> *For any applicant who is denied release, the Board shall provide specific instructions as to the steps the applicant needs to take in order to obtain release. For any applicant with a presumptive right to release pursuant to a certificate of earned eligibility who is denied release, the Board shall specify the bases for rebutting the presumption of release.*

F) The Regulations Should Facilitate Adequate Judicial Oversight

An additional concern of the Committee is the current speed of Board determinations, particularly in the context of administrative appeals. Delays within the administrative appeal process make it difficult for courts to meaningfully review the decision-making of the Board. Because an individual who is denied parole is generally ordered to return before the Board in two years' time, and because the redress sought in Article 78 petitions is usually a new hearing before the Board, it is critical that an individual be able to receive their decision, prosecute their appeal within the agency, and litigate their Article 78 in less than two years. To guarantee the meaningful availability of court review, the Board's regulations should create firm timelines for each step of the process, including promptly responding to requests for transcripts of parole hearings and requests for information on the status of an appeal once perfected. Absent

exceptional circumstances, the Board should not request any extension of time to respond to an Article 78 petition, and should perfect any appeals it notices within two months.

The Board's thousands of annual parole decisions impact people's lives as well as the state budget. By improving the Board's regulations to focus upon an individual's accomplishments while incarcerated and evidence-based assessments of their re-entry risk, the Board will begin to release more individuals who will successfully reenter and contribute to society. By focusing on the individual as he or she stands before the Board, rather than the individual on the day he or she was convicted, the Board will serve its critical statutory function to determine whether an individual is ready to re-enter society successfully. By creating clear procedures and reasonable timelines, the Board will enable the judiciary to perform its necessary oversight function.

Thank you for your consideration of these comments. We would welcome the opportunity to discuss these comments or assist the Board further in its preparation of final regulations.

Sincerely,

Allegra Glashausser