



January 31, 2014

BY E-MAIL

Terrence X. Tracy
Counsel
Board of Parole
Department of Corrections and Community Supervision
The Harriman State Campus – Bldg. #2
1220 Washington Ave.
Albany, NY 12226-2050

**Re: Comment on Proposed Rule Making, “Parole Board Decision-Making”
I.D. No. CCS-51-13-00013-P**

Dear Mr. Tracy:

The Urban Justice Center’s Mental Health Project submits these comments regarding the proposed rulemaking governing “Parole Board Decision-Making.” We urge you to adopt regulations that provide parole candidates with mental disabilities a fair opportunity to receive discretionary release on parole.

The proposed regulations fail to satisfy the requirements of the 2011 amendment to the Executive Law governing parole decisions.

The 2011 amendment to the Executive Law directed the Board to “establish written procedures for its use in making parole decisions” and required that the procedures “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 released to parole supervision.” Exec. L. § 259-c.

The proposed regulations set forth twelve factors to be considered without providing guidance to the Board in how to weigh these factors. The most current risk and needs assessment that “may have been prepared” is simply included as one of the factors for consideration, along with the most current case plan that “may have been prepared by the Department of Corrections and Community Supervision.”

The proposed regulations do not accord with the legislative intent in amending the Executive Law. For far too long, the Parole Board has denied release based on the crime of conviction or past criminal history. The proposed regulations do nothing to change the status quo as they do not provide direction in *how* to weigh the factors to be considered and thus allow the Board to continue to focus on the static factors of crime of conviction and criminal history. The intent of

the amendment was to have risk and needs assessments guide parole decisions. The proposed regulations fail to carry out that intent.

Any risk and needs assessment instrument used to evaluate a person's readiness for release from incarceration must be validated for use with individuals with mental illness.

We are troubled by DOCCS's use of the COMPAS ReEntry Risk Assessment in evaluating risk and needs for people with mental disabilities. Independent verification and validation of a risk assessment tool is fundamental to its utility. No risk assessment tool is universally applicable; each must be validated in particular settings for particular purposes and particular populations.¹ Yet DOCCS, which has been administering the COMPAS ReEntry Risk Assessment on individuals eligible for parole since 2012, has never tested its reliability and validity on the population of parole candidates with mental illness.

Experts and scholars have questioned the indiscreet use of the COMPAS as it relates to people with mental illness. Indeed, Northpointe Institute for Public Management, Inc., the private consulting firm that developed COMPAS, itself acknowledges the limitations of the test when used on people with mental illness, warning state department of corrections systems and other users that "discretion may need to be used as to the appropriateness or accuracy of any assessment on a chronically mentally ill person. In some cases no standard assessments may be applicable and may need to rely on the clinical community."²

The discretion called for by designers of the COMPAS when assessing people with mental illness is entirely missing from the DOCCS process.³ While the COMPAS can be tailored to include parole candidate interviews and guided discussions, the standard practice of DOCCS seems to be to have an administrator fill out a questionnaire of 34 questions, to have the parole candidate fill out another questionnaire of 40 questions, to input the answers into the computer program, and to retrieve the risk score.

Other agencies' versions of the COMPAS include extensive inquiries about the mental health status of the person evaluated. For example, the COMPAS-Probation Risk and Needs Assessment, used by probation departments throughout New York State, is comprised of 95 questions, seven of which concern mental health. And even then, the probation departments use,

¹ Stephen J. Gottfredson & Laura J. Moriarty, *Statistical Risk Assessment: Old Problems and New Applications*, Crime & Delinquency (Jan. 2006); see generally Tracy. L. Fass et al., *The LSI-R and the COMPAS: Validation Data on Two Risk-Needs Tools*, Criminal Justice and Behavior (2008) (showing COMPAS has inconsistent predictive validity when used with different ethnic and racial populations).

² Northpointe Institute for Public Management Inc., *COMPAS Risk and Need Assessment System: Selected Questions Posed by Inquiring Agencies*, at 3 (Jan. 14, 2010).

³ Thus far, DOCCS has refused to provide information about its use of the COMPAS, such as how it was developed, information regarding scoring, instructions and training for administrators, and how it is used in practice. We submitted a FOIL request for this information on May 2, 2013, but have yet to receive any information about the design or validation of the COMPAS.

in conjunction with the COMPAS, a separate risk assessment tool specifically designed for offenders with mental health problems.⁴

We encourage DOCCS to ensure that the risk and needs assessment used to evaluate parole candidates with mental health issues is validated for assessing that population.

Any case plan/Transitional Accountability Plan prepared for a parole candidate with mental illness should include collaboration with the Office of Mental Health (OMH) staff.

For people with mental illness, the case plan/Transitional Accountability Plan should be a collaborative effort between DOCCS and OMH. An individual's mental health needs should be taken into consideration when developing such a plan.

In addition, individuals with mental illness should receive assistance from OMH in formulating their release plans *before* the parole interview. Currently OMH submits a mental status report in advance of the parole interview only at the request of parole staff, and the report does not set forth a plan for the individual to receive mental health treatment and services in the community. The OMH pre-release coordinators only begin developing a discharge plan *after* the individual has been approved for parole. The Board considers an individual's plan in its release determination. Therefore, individuals with disabilities should receive the necessary assistance to formulate such plans with the support of OMH and DOCCS.

DOCCS must adopt regulations that provide for reasonable modifications to the parole interview process to avoid discrimination on the basis of disability.

The current system for granting discretionary release of indeterminately sentenced individuals fails to accommodate the needs of parole candidates with mental disabilities. We encourage DOCCS to adopt regulations that set forth the process through which parole candidates with disabilities can request reasonable modifications to the Board's practices and procedures, pursuant to the Americans with Disabilities Act (ADA).

People with mental disabilities should be given the opportunity to request reasonable accommodations to the Board's interview practice and procedures so that they can have equal access to the parole process. The parole release interview is an opportunity for an individual to present reasons for parole release and allows the individual an opportunity to address the factors that the Board will consider in granting release, such as the person's institutional record and release plans. Many parole candidates with mental disabilities have symptoms which affect the manner in which they interact with other people. Symptoms of such disabilities can be misinterpreted to undercut an individual's credibility and level of remorse and limit one's ability to present reasons for release persuasively. In addition, individuals with mental illness may be unable to develop a release plan and present it to the Board without assistance.

⁴ See, Sharon Lansing, Division of Criminal Justice Services, *New York State COMPAS-Probation Risk and Need Assessment Study: Examining the Recidivism Scale's Effectiveness and Predictive Accuracy*, at 21-28 (2012).

Currently there are no procedures which afford an individual such needed accommodations or any policy whereby an individual could request an accommodation based on disability. The New York State Parole Handbook provides no guidance to individuals about requesting such needed accommodations. All parole candidates with mental illness should have the opportunity to obtain accommodations.

To prevent discrimination in the method of program administration, Board Members must be trained in providing equal access to parole release for candidates with mental disabilities.

In addition to regulations that provide for people with mental illness to be accommodated in the parole interview process, Board Members should receive training on the challenges that people with mental illness experience while in prison, specifically the limited mental health treatment options available to incarcerated people and the punitive response of DOCCS to symptoms of mental illness and behavioral issues. They also need training about how people with mental disabilities may be successfully integrated into the community.

People with mental disabilities often have difficulty adapting to the prison environment and end up charged with disciplinary infractions for alleged misbehaviors that are, in actuality, conduct that is a manifestation of their mental illness. Rather than providing a therapeutic response to people with mental illness, DOCCS routinely charges them with infractions and places them in solitary confinement (known as "Special Housing Units" (SHU)). Since the SHU Exclusion Law went into effect in July 2011, individuals with *serious* mental illness are diverted from SHU into residential mental health treatment units. However, an individual's disciplinary history does not necessarily reflect all of the circumstances of the misconduct, the outcome (including diversion), and the relationship of the conduct at issue with the presence of mental illness.

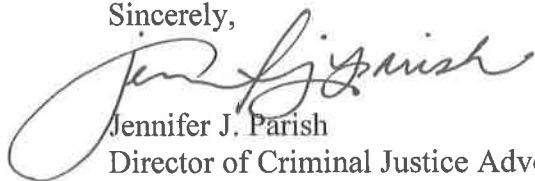
The Board must have the ability to consider accurately factors relative to the disciplinary history including whether the infractions were related to symptoms of mental illness, whether the individual was receiving treatment at the time of the incident, the circumstances of the infraction, whether the individual was able to improve conduct due to treatment (including in a residential mental health treatment unit diversion), or whether the individual was inappropriately sanctioned with SHU time only to be transferred later from SHU to a diversion unit (after psychiatric deterioration in SHU). When an individual with a mental disability successfully engages in treatment after a disciplinary sanction, the Board should not penalize the individual for his or her institutional conduct.

In addition, in evaluating a parole candidate's post-release plan, the Board should consider how an individual's disability may affect his or her life after release. Although many people with mental illness are able to obtain employment, others have mental disabilities that prevent them from working. These individuals can apply for Supplemental Security Income and Social Security Disability Insurance before release from prison so that they will be able to support themselves financially post-release. The Parole Board should not withhold discretionary release based upon the failure of an individual with a mental disability to secure employment.

Conclusion

DOCCS must adopt regulations that accord with the 2011 Amendments and guide the Board in considering risk and needs appropriately. In addition, DOCCS is required to comply with the ADA in its administration of the parole program. DOCCS should adopt regulations that ensure that people with disabilities are accommodated in all aspects of the parole process.

Sincerely,



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cc: New York Senate Administrative Regulations Review Committee