Barbara C. Zeller, M.D.
[redacted]
New York, NY [redacted]

January 13, 2014

Sent Via E-Mail: MFarid@correctionalassociation.org

Mr. Farid
Correctional Association of NY
2090 Adam Clayton Powell Jr. Blvd#200
New York, NY 10027

Re: Public Comment, Notice of Proposed Rule Making, 9 NYCRR, Part 8001 and Sections 8002.1(a) and (b), 8002.2(a) and 8002.3

Dear Mr. Koury,

Please accept this public comment submitted pursuant to the State Administrative Procedure Act, in response to the Notice of Proposed Rule Making as published in the New York State Register on December 18, 2013.
The Parole Board ("Board") has historically denied release to far too many people in an arbitrary and inconsistent manner. The Board has often based its decisions primarily on people's crimes of conviction or past criminal history, static factors that can never change, rather than their risk to public safety, degree of rehabilitation, or readiness to return to their community. In 2011, the legislature attempted to remedy this situation by amending the Executive Law to direct the Board to focus on risk and needs principles and to measure rehabilitation and likelihood of success upon release. Despite these amendments, the Board has continued to ignore objective and evidence-based factors and deny people based on the static and unchangeable factors of the nature of their crimes of conviction or past criminal history. Unfortunately, the Board's proposed regulations of December 18 allow the current situation to continue, in violation of the language and intent of the 2011 amendments. This public comment will briefly outline a) the historical problems with Board decision-making; b) the failure of the proposed regulations to correct this failure; c) core principles that should be included in the new regulations; and d) examples of proposed provisions that could be incorporated in the new regulations.

A) The Parole Board has Historically Denied Parole Release to Far Too Many People in an Arbitrary and Inconsistent Manner

As intended by the 2011 amendments and traditionally understood to be the intent of a parole scheme, the role of the Board should be to evaluate whether a person who has served the minimum sentence deemed appropriate for their crime by the judiciary and legislature is ready to return to their community. Yet the Board repeatedly denies parole release based primarily or exclusively on the nature of applicants' instant offense or past criminal history, static factors that can never change. In a related manner, the Board often fails to release people who have demonstrated low risk to society according to evidence-based risk assessment scores. For example, people who have served long sentences for the most serious crimes and are released have a recidivism rate of 1.3%—lower than any other category of people released. Yet, the Board often denies these individuals release based on the nature of their crime. Similarly, the recidivism rates for new commitments are only 5.2% for people aged between 50 and 65 and .6% for those 65+; yet the elderly

population in NYS prisons has increased by over 73% in the past 12 years while the overall prison population has decreased by around 22%. Moreover, the Board often fails to release people 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 such positive accomplishments as supportive and appropriate release plans and commendable institutional record. As the most extreme examples, the Board often denies parole to applicants who successfully participate in temporary release programs and/or those who have obtained college degrees. Finally, the Board has not provided a meaningful or timely process for appealing parole, often leading people to come up for their next parole appearance (two years after their denial) before their appeal has been fully considered and decided.

B) The Board's Proposed Regulations Do Nothing to Correct the Board's Failures

Amended Executive Law § 259-c(4) mandated that the Board establish "written procedures for its use in making parole decisions" and "[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 required 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." Despite this clear mandate for the Board's regulations to focus the Board's decision-making on risk, rehabilitation, and readiness for reentry, the regulations do not implement the intent and language of these amendments. Simply listing the risk assessment and the case plan[1] as one of twelve factors for the Board to consider does not achieve the intention that a risk and needs assessment guide every parole decision. The regulations do not provide any direction as to what weight should be given to the risk assessment instrument or the TAP/case plan in making decisions. The regulations do not even mandate that the Board have an updated risk assessment and TAP/case plan for every parole decision. Ultimately, the proposed regulations would still allow the Board to maintain the status quo and deny people based primarily or exclusively on the nature of their instant offense or past criminal history. In other words, the regulations would still allow the Board to focus on static factors, rather than dynamic factors or the degree to which a person has demonstrated rehabilitation, readiness for reentry, or low risk.

1 The name "TAP" (transitional accountability plan), established by the 2011 legislation mandating DOCCS to develop a comprehensive, dynamic and individualized case management plan, and never repealed, has been abandoned, without explanation, by DOCCS, and by the Board in its proposed regulations, in favor of the name "case plan."

C) The Parole Board's Regulations Should Contain Provisions that Ensure that the Board's Decisions are Objective and Consistent Rather than Arbitrary and Inconsistent

The Board needs to come into the 21st century and use evidence, rather than gut reactions, to make parole release decisions. Board decisions should be based on evidenced-based, forward-looking factors related to people's rehabilitation while incarcerated, current readiness for reentry, and assessed risk level. People should not be denied release primarily based on the nature of their crime of conviction or past criminal history. More specifically, a person who has a low risk score in a risk assessment *or* who has substantially participated in her or his TAP/case plan activities should generally be released barring exceptional circumstances. Just as the Department of Corrections and Community Supervision requires there to be *substantial and compelling*

reasons to *override* a risk and needs assessment instrument in making decisions about parole supervision in the community, the Board should need substantial and compelling reasons to override a low risk score or TAP/case plan participation when making release decisions. Moreover, a person who is elderly or who has been incarcerated for a long period of time should have a presumption of release. 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.

D) Specific Language that could be Included in the Board's Regulations

In line with the above discussion, the following provisions could be included as part of the Board's new 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.

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.

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 that has successfully participated in temporary work release shall be released at her or his next parole hearing date.

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.

Thank you for your consideration of these comments.

Very Truly Yours,

Barbara C. Zeller, M.D.