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

CENTER FOR COMMUNITY ALTERNATIVES
INNOVATIVE SOLUTIONS FOR JUSTICE

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January 3, 2014

Sent Via E-Mail: terrence.tracy@doccs.ny.gov

Tina M. Stanford, Chairwoman, and
Board of Parole
Harriman State Campus, Building #2
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Albany, NY 12226-2060

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 Chairwoman and Members of the Board of Parole:

Please accept this letter as public comment submitted on behalf of the Center for Community Alternatives 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.

Below, we address the following four issues:

1) The proposed regulations do no comport with the authorizing statute, Executive Law § 259-c(4), and the intent of the Legislature.

As proposed in 9 NYCRR § 8002.3, the risk and needs assessment instrument is reduced to merely one of twelve factors to be considered by the Board of Parole. Since the Board of Parole has previously taken the position that it can give as much or as little weight as it so chooses to any "factor," the risk and needs principles contemplated in the statute may be *de minimus* in any given case. By enacting Executive Law § 259-c(4) to specifically reference risk and needs principles, and not simply adding the risk and needs assessment into Executive Law § 259-i where the other factors are referenced, it is clear that the Legislature intended that the risk and needs assessment guide and give structure to every Board of Parole decision and not be treated merely as one of twelve factors. Such an interpretation is consistent with the plain meaning of Executive Law 259-c(4) which requires that the risk and needs assessment instrument be used to measure "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

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www.communityalternatives.org

supervision." If the instrument is relegated to a mere factor, the structure and guidance contemplated by the amended statute is thwarted.

2) The procedures should provide for an override process.

For a risk and needs assessment instrument to give structure and guidance to decision-making by the Board of Parole it must be utilized in every case as the rule and not the exception. Therefore, in order for the Board of Parole to reject a parole applicant's risk level score on the risk assessment instrument and substitute its own judgment that there is a "reasonable probability" that such person will or will not live and remain at liberty without violating the law, there must be rules to justify an "override" of the risk and needs instrument. This is consistent with the process that the Department of Corrections and Community Supervision (DOCCS) established for overriding the risk and needs assessment for supervision status levels (Directive No. 8500). That is, the instrument controls the supervision status level unless there are substantial and compelling reasons, consistent with the specific policies and procedures DOCCS has established, to override it. In the context of parole release decisions, there should be no override of the risk and needs instrument without substantial and compelling reasons to do so. Thus, like DOCCS, the Board of Parole should set forth written policies and procedures to establish the standard that must be met before it can override the risk and needs instrument. Without such a process the statute [Executive Law § 259-c(4)] is rendered meaningless.

3) The use of the risk and needs assessment instrument and TAP for parole decision-making are mandatory yet the language of the proposed regulations makes them discretionary.

Proposed regulation 9 NYCRR § 8002.3 factors "11" and "12" use the word "may" with regard to the use of the risk and needs assessment instrument and TAP, indicating that use of these instruments is discretionary. To comply with Executive Law § 259-c(4), the procedures must indicate that use of these two instruments, as set forth in factors "11" and "12," is mandatory, and that a parole release decision cannot be made without a risk and needs assessment instrument and a TAP being provided to the Board of Parole.

4) The sentencing court sets the minimum.

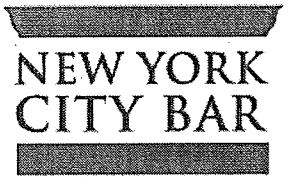
The minimum period of imprisonment is set by the court. The proposed amendment of 9 NYCRR § 8002.2 (a) makes it sound as if the minimum is fixed by the Department of Corrections and Community Supervision as it was under the old, and much outdated, regulation.

Thank you for your consideration of these comments.

Very truly yours,

Alan Rosenthal, Co-Director of Justice Strategies

Patricia Warth, Co-Director of Justice Strategies



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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,
>
> (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

New York State Defenders Association, Inc.

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January 28, 2014

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Board of Parole
Harriman State Campus, Bldg. 2
1220 Washington Ave.
Albany, New York 12226-2050

Dear Mr. Tracy and Board of Parole members:

Please accept this letter as the New York State Defenders Association's comments in response to the Notice of Proposed Rulemaking as published in the New York Register on December 18, 2013 (I.D. No. CCS-51-13-00013).

The functions, powers and duties of the Board of Parole were amended in 2011 to require it to "establish written procedures for use in making parole release decisions." The legislation specified that the written "procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood or 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" (L.2011, ch. 62, part C, subpart A).

The proposed regulation utterly fails to do this.

The 2011 legislation superseded the "guidelines" for parole release decision-making, requiring the Board to establish the written procedures as a replacement for the guidelines. The guidelines were promulgated in 1978 in response to a 1977 legislative direction that parole release decision-making be conducted in a standardized manner to promote fairness and consistency. The purpose of the guidelines was "to create an appropriate framework within which the parole system can arrive at individual determinations that are just and proper to the particular [inmate] while at the same time consistent with the treatment of others similarly situated." *See* L. 1977, ch. 904, § 1.

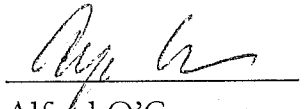
Comments on Proposed Rule
January 28, 2013

Unfortunately, the Board stopped updating the guidelines in the 1980's and has effectively ignored them for the past two decades. The 2011 legislation offered the Board an opportunity to again promote consistency and fairness in the parole release decision-making process as required by the legislature. Regrettably, the Board has failed to do so. The proposed regulation fails to provide any guidance to Board members about appropriate exercise of the parole-release function.

As proposed, the regulation does not "establish written procedures" for consideration of a risk and needs assessment by the Board. It simply tacks on to the list of statutory factors that must be considered by the Board under Executive Law § 259-i – adding "the most current risk and needs assessment that may have been prepared by the Department of Corrections and Community Supervision." Because the proposed regulation reduces the risk and needs assessment to just another factor to be considered by the Board, it offers no guidance about how it should be used. Board members are seemingly free to give the risk and needs assessment as much - or as little - weight as they see fit. How does this "assist members of the state board of parole in determining which inmates may be released to parole supervision." How does this promote consistency and fairness?

The proposed regulation was issued more than two years late, apparently in hasty response to an unfavorable court decision. The Board should go back to square one and start over. The proposed regulation is meaningless. The legislature has demanded more of the agency. The people of New York deserve better.

Sincerely,



Alfred O'Connor
New York State Defenders Assoc.

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LEGAL ACTION CENTER

January 22, 2014

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Sent via e-mail: terrence.tracy@doccs.ny.gov

To Whom It May Concern:

Please accept the Legal Action Center's ("LAC") comments 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 Legal Action Center is the only non-profit law and policy organization in the United States whose sole mission is to fight discrimination against people with histories of addiction, HIV/AIDS, or criminal records, and to advocate for sound public policies in these areas. For four decades, LAC has worked to combat the stigma and prejudice that keep these individuals out of the mainstream of society. The Legal Action Center is committed to helping people reclaim their lives, maintain their dignity, and participate fully in society as productive, responsible citizens.

LAC believes strongly that the early release opportunities afforded by a parole scheme can be extremely beneficial in incentivizing incarcerated individuals to grow and change and to take the steps necessary to increase their likelihood of successful reentry upon release. Parole sentences also permit an opportunity to assess the appropriateness of an individual's continued incarceration.

However, while we strongly support the continuation of a parole-based release scheme, we feel that the way that the Board of Parole (the "Board") now operates does not produce the desired result - ensuring that individuals at low risk of reoffending are released. For many decades, the Board has denied release to far too many people in an arbitrary manner. The Board has often based these decisions primarily on the individual's crime of conviction or past criminal history, static factors that can never change, rather than 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 Executive Law § 259-c(4) to direct the Board to focus on risk and needs principles and to measure rehabilitation and likelihood of success upon release. The 2011 amendments were a notable attempt to make the Board's assessment mechanisms more functional. However, the newly-

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proposed regulations intended to implement these amendments fall short of this goal. In brief, the proposed regulations fail to fully utilize the risk and needs assessment principles incorporated in the amendments. They do not give the risk and needs assessment process the prominence the legislature intended it to have, but instead relegate it to a list totaling 12 items that the Board must consider, allowing the current situation to continue, in violation of the language and intent of the 2011 amendments.

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 role of the Board has traditionally been to evaluate whether a person who has served the minimum sentence deemed appropriate for their crime by the legislature and imposed by a court is ready to return to their community. In making a decision about parole release, the Board is required to consider each of the factors listed in Executive Law § 259-i, 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, to decide 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 any one factor can be determinative.

However, the Board regularly focuses, often exclusively, on the nature of the instant offense and the individual's prior criminal history. In so doing, the Board frequently denies parole to individuals who present a very low risk to society and to those who have demonstrated their rehabilitation and readiness for return to their communities through program participation and self-transformation. The Board also often denies parole to applicants who successfully participate in temporary release programs and/or those who have obtained college degrees. Furthermore, by continuing to allow a focus on the static factors that the trial judge considered, the Board is upsetting the separation of powers within the state criminal justice system and is effectively acting as another sentencing court

In light of these problems, the legislature amended the Executive law to refocus the Board's decision-making on whether the individual before it was ready to reenter society. Amended Executive Law § 259-c(4) 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 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."

The Board's proposed language does not implement the intent and language of the 2011 amendments. If the proposed regulations are adopted, the Board would be complying with the

regulations, but not the statute, if it denied a rehabilitated individual parole based exclusively on the nature of their instant offense or past criminal history. By properly drafting regulations that require analysis of more factors than the nature of the underlying crime, the Board can bring parole back to its original mission while keeping pace with changing times. New York has recently started a legislative trend to make positive change, which the Board should heed. In 2006, N.Y. Penal Law § 1.05(6) was amended to provide that one of the purposes of punishment, in addition to deterrence, confinement, securing public safety, and rehabilitation is "the promotion of the successful and productive reentry and reintegration [of the incarcerated person] into society." Id. This focus is not only practical but necessary, as approximately 22,000 people are released to parole and post-release supervision in New York each year.

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.

Thank you for your consideration of these comments.

Sincerely,

Sebastian Solomon
Policy Associate

Anita Marton
Vice President

January 13, 2014

Sent Via E-Mail: Terrence.tracy@doccs.ny.gov

JKoury@NYSenate.gov

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

Dear Mr. Tracy and Mr. Koury,

Please accept this public comment submitted pursuant to the State Administrative Procedures Act, in response to the Notice of Proposed Rule Making as published in the New York State Register on December 18, 2013.

I served as a Member of the New York State Board of Parole from May, 2004 until July, 2010. I was the Executive Assistant to the Chair of the Parole Board from May, 1996 until my confirmation by the State Senate as a Member of the Parole Board in May, 2004.

Prior to my employment with the Parole Board, I was the Committee Director to the New York State Senate Codes Committee and the Judiciary Committee.

For over eighty years, the modern Parole Board release decision making process has been governed by a hodgepodge of statutes, rules, regulations and court decisions. Parole Board Members must consider the instant offense, criminal history, completion of recommended correctional programs, disciplinary history, release plans, victim impact statements, mental health status and the likelihood of re-offense, when making a decision on whether or not to grant release to a parole applicant.

Perhaps the most important consideration for the residents of New York State is the likelihood of re-offense within the outside community.

In 2011, the New York State Legislature passed and the Governor signed into Law Executive Law 259- c (4) which required the Parole Board to develop an empirical measure of risk and needs principles to assist the Parole Board in making sound release decisions.

Finally, the Parole Board would have an objective instrument which would provide them with a best practices and evidence based measure aimed at enhancing community safety.

In December, 2013 the Parole Board finally proposed a new regulation in a belated attempt to comply with the 2011 legislation.

Unfortunately, the Parole Board's proposed regulation does not enhance community safety. The Parole Board simply decided to bury evidence based risk assessment within

a section of its regulation containing a veritable laundry list of factors to be considered.

Community safety should not be buried within a list of factors to be considered. Community safety should always be a PRIMARY consideration of the Parole Board. Incredibly, the Parole Board's proposed regulation does not emphasize or highlight the concerns of the hard-working residents of our great State. The people of New York deserve better.

A parole applicant who receives a low risk evidence based evaluation should be granted a presumption of release by the Parole Board unless exceptional circumstances are enumerated by the Parole Board in writing.

Sincerely yours,

Thomas P. Grant