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Community Service Society | Fighting Poverty Strengthening New York

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November 10, 2016

Kathleen M. Kiley
Counsel to the Board of Parole
Department of Corrections and Community Supervision
1220 Washington Avenue, Building 2
Albany, NY 12226-2050

Sent via email: rules@doccs.ny.gov

Re: Public Comment
Notice of Proposed Rule Making, 9 NYCRR, Sections 8002.1, 8002.2 and 8002.3

Dear Ms. Kiley, Chairperson Stanford and Members of the Board of Parole:

Please accept the Community Service Society of New York's (CSS) 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 September 28, 2016.

The newly proposed regulations are an improvement on those promulgated two years ago, but they still do not go far enough in taking the rehabilitative efforts and accomplishments of individuals who come before the Parole Board (the "Board") into account.

While the 2011 amendments to Executive Law § 259-c(4) were a notable attempt to make the Board's assessment mechanisms more functional, the regulations adopted in 2014 intended to implement these amendments fell short of this goal. In large part as a result of this failure, the Board does not currently operate in a way designed to ensure that individuals at low risk of reoffending are released, and has not in some time.

The Board's decisions should be based on an assessment of the person appearing before them – their attributes, achievements, progress and promise. That analysis should be fluid, looking closely at the things the person has had the power to achieve and change while in prison rather than focusing on static things the person cannot change, including the crime that resulted in the prison term and any prior conviction history.

CSS has a vested interest in making sure that individuals who pose little risk to the community are allowed to rejoin it. For over 173 years, CSS has employed a variety of tools – including advocacy, direct service, research and policy analysis and litigation – to help low-income New Yorkers become full participants in the City's civic and community life. Our research, and our direct experiences working with more than 750 clients per year, show us that imprisonment – and the associated criminal record that, in New York, can never be expunged – keeps thousands upon thousands of New Yorkers from being able to regain a foothold in

our communities. Many of our clients have appeared before the Board time after time, only to be denied release despite their singular achievements while incarcerated, based in the main on the severity of their crime of conviction. Given their experiences, and the similar experiences of many of our colleagues in the advocacy community, it seems clear that prolonged incarceration beyond any demonstrated risk substantially lowers the likelihood of a person's "successful" reintegration into the community. Family members lose touch or pass away, tenuous work networks and skill sets erode, and the stigma of incarceration impairs any reasonable chance to secure employment. This is on top of the huge roadblocks individuals with conviction histories face even if they have never been incarcerated: in this era of almost ubiquitous background checking, having a criminal record guarantees that an individual will be at a serious disadvantage when searching for a job.

CSS works to change this reality to the extent we can. Our Next Door Project, utilizing highly trained older adult volunteers, helps people with conviction histories obtain, understand and fix mistakes in their official records of arrest and prosecution, and counsels them on how to accurately describe their conviction history on employment and housing applications. CSS also founded and hosts the New York Reentry Roundtable, a regular forum on criminal justice issues where individuals with conviction histories, practitioners, advocates, and allies meet to discuss matters that impact policy and the families and communities affected by mass incarceration.

Guided by these experiences, and by the wisdom of our partner agencies who directly engage with currently incarcerated individuals and their families, we ask that the proposed regulations be amended as follows:

- **Low COMPAS Scores Should Create a Presumption of Release**

The proposed update to Section 8002.2(a) requires the Board to give individualized reasons for departing from COMPAS when denying release to a person with a low risk score. This section should be strengthened by specifically stating that a low COMPAS score creates a presumption of release, meaning that an applicant who has a low risk score will be granted parole *unless* specifically articulated exceptional circumstances exist to warrant denial. The section should further state that an applicant's crime of conviction or past criminal history will in no case constitute exceptional circumstances. It should also state that a high COMPAS score does not create a presumption against granting parole.

- **Demonstrated Rehabilitation and Readiness Should Create a Presumption of Release**

The regulations should be updated to mandate that applicants who have successfully demonstrated rehabilitation or readiness be released, absent exceptional circumstances. If such applicants are denied parole, the Board must be required to provide a substantial and compelling explanation in writing and articulate how the individual can overcome any deficiencies prior to the next application for parole.

- **The Board Should Not be Permitted to Consider Any Factor Twice**

The proposed updated to Section 8002.2(b) lists the traditional eight factors that the Board must consider in their release determinations. However, several of these factors are already taken into consideration in the COMPAS risk assessment instrument, which is formally incorporated into the proposed update. For this reason, the factors listed in Section 8002.2(b)(7) and (8), namely, the seriousness of the offense and prior criminal record, should be eliminated. Taking these factors into account twice unfairly weights the analysis against the individual being evaluated for release.

- **The Board's Proposed Regulations Regarding Youthfulness at the Time of Conviction Must be Strengthened**

The proposed update to Section 8002.2 lists youth at the time of the underlying offense as a factor for the Board to consider in their evaluations. However, calling youth a "factor" makes the consideration of it seem discretionary, when in fact the Constitution requires the Board to analyze whether an individual incarcerated as a youth demonstrates "maturity and rehabilitation" at the time of evaluation for release. This Constitutional language must be included in the regulations. Additionally, the regulations must note the Constitutional guarantee of heightened procedural protections for juveniles sentenced to a life term, including access to attorneys at all parole hearings.

- **Justifications for Parole Denials Must be Factually Individualized, Comprehensive and Exhaustive**

The proposed update to Section 8002.3(b) requires the Board to provide "factually individualized" reasons for denying a person parole release. This language should be amended to add that the reasons given must also be "comprehensive" and "exhaustive." Pursuant to Section 259-c(4) of the Executive Law and the "needs" component of the 2011 legislative amendment, this section should also require the Board to inform an applicant, upon denial of parole, of specific steps the applicant can take to improve their chances of release at future appearances. The section should add that if the Board denies an applicant who followed the instructed steps after a prior denial, the Board shall not re-issue the same or inherently similar demands.

- **Impact statements that do not come directly from victims or their families and representatives, including "community opposition," are not confidential and should therefore be made accessible to the parole applicant.**

There is no security risk in providing these statements to the applicant, and it is only fair the applicant should see them in advance of the hearing.

- **Applicants who are older than 50 or who have served 15 consecutive years of imprisonment should be afforded review of their case in order to determine their suitability for reduced security classification or recommended release on parole through the clemency process.**

Individuals over the age of 50 are the fastest growing population in our State prisons. Studies show that those over 50, as well as individuals who have served lengthy prison terms, "age out" of recidivism, and are generally of low risk to the community.

- **The Board must provide a more meaningful and timely process for appealing parole denials.**

Currently, the only means for an individual to appeal a denial of parole is to file an Article 78 petition against the Board in the New York State Supreme Court. These petitions can take over a year to be adjudicated, and give wide discretion to the Board, upholding all Board decisions unless they are found to be "arbitrary and capricious." Even when a court does find that the Board's parole denials amount to an abuse of discretion, the Board often ignores the court's orders, making a mockery of the state justice system that the Board is supposed to be helping to enforce.

We thank you for this opportunity to submit comments on these very important regulations.

Yours very truly,

Judith M. Whiting
General Counsel