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PUBLIC COMMENTS TO PROPOSED PAROLE REGULATIONS SUBMITTED BY THE CORRECTIONAL ASSOCIATION OF NEW YORK

November 10, 2016

To: Kathleen M. Kiley, Counsel to the Board of Parole
Department of Corrections and Community Supervision
1220 Washington Avenue, Building 2
Albany, New York 12226

RE: **I.D. No. CCS-39-16-00004-P**
Amendment of 8002.1 Title 9 NYCRR
Amendment of 8002.2 Title 9 NYCRR
Amendment of 8002.3 Title 9 NYCRR

Please accept the following as public comments 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 Correctional Association of New York (CA) has a long history being engaged in the development and implementation of the state parole system. The CA has had statutory authority since 1846 to visit New York's prisons and to report to the legislature, other state policymakers, and the public about what is happening in our prison system. Our access has provided us with a unique opportunity to observe and document the actual practices inside NY's prisons, including during the last several years since the merger of DOCS and Parole into DOCCS, and to learn from both incarcerated persons and staff their views on the processes and outcomes of parole decisions. In addition, the CA has analyzed systemic data published by DOCCS and the Board of Parole during the past three years and has obtained information from formerly incarcerated persons regarding parole in the past. All of this data and information has been used in preparing these comments.

A. RECENT HISTORY OF PAROLE LAW AND ITS IMPLEMENTATION

In 2011, the New York State Legislature amended Executive Law Sec. 259-c(4) requiring the Parole Board to "establish written procedures for its use in making parole release decisions, and that such procedures incorporate 'risk and needs' principles to measure the rehabilitation of inmates, their likelihood of success if released and assist the Board in making its release decisions." In 2014, the Parole Board promulgated regulations to implement this requirement in subsections 8002.3 (a)(11) and (12), Title 9 NYCRR, which required the Parole Board to consider: "the most current risk and needs assessment that may have been prepared by the Department of Corrections and Community Supervision;" and "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 Corrections Law."

Despite the 2011 amendments to the Executive Law and the 2014 amendments to 8002.3 (a), the Parole Board has continued its practice of regularly denying parole to a majority of the persons appearing before the Board, including many individuals with low risk as documented in DOCCS' Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) re-entry instrument. COMPAS is an evidence-based clinical assessment instrument intended to assist staff in evaluating a person's risk and needs. According to DOCCS Directive 8500, COMPAS "compiles criminogenic need scales inclusive of risk of felony violence, arrest risk, and risk of absconding, criminal involvement, history of violence, prison misconduct, re-entry substance abuse, negative social cognitions, low self-efficacy/optimism, low family support, re-entry financial, and re-entry employment expectations. It also summarizes the releasee's criminogenic profile and delineates their strengths and weaknesses to be used together with professional judgment to reach supervision classification decisions and guide supervision activities."

Since the implementation of the COMPAS instrument into the parole process, there has been little change in the Parole Board's decision-making process as reflected in the number of persons denied parole who appear initially before the Board or are reappearing before the Board having been denied release at an earlier parole hearing. **Table A** reflects data published by DOCCS for 2012, when COMPAS was not widely used, through 2015.

Table A – Parole Board and Presumptive Release Dispositions – 2012 - 2015

| Interview Type | 2012 | | 2013 | | 2014 | | 2015 | |
|-------------------|-----------|----------|-----------|----------|-----------|----------|-----------|----------|
| | # / Inter | Rel Rate | # / Inter | Rel Rate | # / Inter | Rel Rate | # / Inter | Rel Rate |
| Total Initials | 10,072 | 27% | 9,530 | 26% | 9,587 | 25% | 9,110 | 25% |
| Initials | | | 6,858 | 15% | | | 6,800 | 17% |
| Shock | | | 931 | 85% | | | 679 | 80% |
| Medical | | | 15 | 73% | | | 18 | 67% |
| Early Deportation | | | 65 | 62% | | | 42 | 57% |
| LCTI | | | 61 | 23% | | | 106 | 21% |
| Merit Time | | | 1,598 | 33% | | | 1,464 | 35% |
| Suppl Merit | | | 2 | 50% | | | 1 | 100% |
| Reappearances | 3,704 | 21% | 3,257 | 19% | 3,284 | 21% | 2,936 | 20% |
| Parole & CR Viol. | | | 124 | 27% | | | 144 | 20% |
| Total | 13,776 | 25% | 12,911 | 24% | 12,871 | 24% | 12,190 | 23% |

This data reveals that since COMPAS was introduced in late 2012 and early 2013 and subsequently incorporated in the parole review process, release rates have remained essentially the same for initial appearances, ranging from 25% to 27%, and for reappearances at 23% to 25%. Although no data has been published by DOCCS on 2016 release rates, an analysis of the dispositions of individual parole hearings as summarized on the DOCCS website for each month from January through September 2016 shows that the percentage of decisions recorded as "Denied" for both initial and reappearance hearings has decreased only by two to three percentage points as compared to decision rates for 2015.

Such low release rates are inconsistent with risk assessments expected from the COMPAS process. It should be noted that DOCCS has failed to produce any data on the outcomes resulting from its use of COMPAS in terms of the percentage of persons found to be in a low, medium or high risk group. But based upon national data used to develop the COMPAS instrument, one would expect that using the general COMPAS guidelines, a person with a risk of arrest score of 1-4 would be assessed as a low risk and represent about 40% of the interview pool, those with a medium risk would have scores from 5-7 representing 30% of the group and high risk individuals would have scores of 8-10 on the risk scale and represent about 30% of those being assessed. With only 23% of those appearing before the Board being released, it is clear that many individuals with low risk assessments are being denied parole.

The situation is even more egregious for aging persons in prison who have longer prison sentences. Many of these individuals have been denied parole multiple times despite their low risk assessment. The population of persons 50 and older in DOCCS has nearly doubled every 10 years during the last two decades; older persons (50+ years) represented 4.8% of the prison population in 1996, 10.3% in 2006, and now account for 19.4% of all incarcerated persons in DOCCS, totaling 10,140 persons as of January 2016. The Parole Board has not been receptive to releasing these aging persons, despite their long time inside and the reduction in their risk assessment. For persons who had reappearances before the Board in 2016 and who were 50 years old or more at the time of their appearance, only 26% were released. For those who were 65 or older only 20% were released. This decision-making process defies any reasonable assessment of risk. DOCCS' data on recidivism of persons released from prison during the three years after discharge demonstrates that older individuals have a much lower risk of returning. The most recent information published in *DOCCS 2011 Inmate Releases: Three Year Post-Release Follow-Up* report indicates that although releases under 50 years old have a total 3-year return rate of 43.6%, including 9.0% for new commitments, those 50 to 64 years old have return and new commitment rates of 33.2% and 6.1%, respectively, and those over 65 years old have substantially lower return and new commitment rates of 10.0% and 1.1%, respectively. Clearly these older persons have lower recidivism rates, as do those who were denied parole and remain inside, and therefore, this entire group poses much less risk to their communities if released.

This data on low risk assessments is confirmed by more than 150 surveys we have conducted during the past two years of currently incarcerated persons in DOCCS who have appeared before the Parole Board and been denied release. When asked to summarize their COMPAS assessment scores, more than half of those denied parole reported that they had a low risk for arrest or a low recommended supervisory score, signifying that they would not require intense supervision, and only 21% fell into a high risk category. Additionally, of those individuals deemed low-risk, almost one third (28.6%) received written parole denials that *only* listed static factors, such as the instant offense, prior criminal record, or that the release would deprecate the seriousness of the crime as to undermine the respect for the law, as the justification for denying parole. Each of these reasons do not cite new occurrences of problematic behavior and rely on past, fixed factors,

that ignore consideration for growth and change by the denied person. Looking more specifically at persons 50 years or older, nearly 40% of those with low risk assessments fell into this age population, they had been denied parole by the Board on average five times and spent more than 27 years in DOCCS custody. It was unreasonable for the Board to conclude that these individuals would pose any risk to public safety and inappropriate for it to deny release based upon unchangeable events that occurred so long ago.

B. 2016 AMENDMENTS TO SECTION 8002, TITLE 9 NYCRR

Based upon these data, it is clear that the Parole Board has not been complying with the legislative directive to base its decisions on “risk and needs” assessments, but is over-relying on the static parameters of nature of the crime and the applicant’s criminal history and using these factors to essentially re-sentence the person to the Board’s perception of what their minimum sentence should be. This practice must change and the new regulations are an attempt to curtail the Board’s inclination to emphasize static factors in making its determinations and to force the Board to focus on the dynamic factors that are most relevant to determining whether parole applicants can safely return to their communities and become productive members of society.

We commend the Parole Board, and particularly its chair, for making changes to the regulations. We believe these amendments advance the efforts to force the Board to rely in most cases on risk and needs parameters, but the amendments do not go far enough to ensure that adequate weight is given to these assessments.

(1) Section 8002.2 – Parole Release Decision-Making

In order to emphasize the need for more robust attention by the Board to the DOCCS risk and needs assessment (COMPAS) in making its parole decisions, the Board has amended subsection 8002.2 to create a separate subsection 8002.2(a) specifically addressing the process for evaluating COMPAS and its importance in guiding Board decisions. We commend this separation, the direction that “the Board shall be guided by the inmate’s risk and need scores” and the requirement that if the Board denies release for a person where such decision is inconsistent with the COMPAS scores, the Board must specify an “individualized reason for such departure.” These are important steps in ensuring that the results of the COMPAS assessment are specifically considered by the Board and that it articulates why a low risk assessment in a particular case does not warrant release.

The amendments are not sufficient, however, to end the long-standing practice of the Board to rely on the static factors such as the crime of conviction and past criminal behavior in denying parole. The introductory clause to section 8002.2 “Parole release decision-making: factors to be considered” leaves an inference that subsection 8002.2 (a) on risk and needs assessment is only one factor that is not necessarily more significant than all the factors listed in subsection (b),

which include the static factors of the seriousness of the offense and prior criminal record. The flaw in the current amendment is that there is no guidance on how the Board's evaluation of the risk and needs assessment should be weighed in comparison to the other factors. Given the fact that the reference to risk and needs assessments has been in the law since 2011 and in Board regulations since 2013 without appreciably changing Board's practices, we urge that the amendments be more explicit about the weight given to the risk assessment element.

Specifically, we urge that subsection 8002.2(a) should be modified as followed:

§ 8002.2 Parole release decision-making: ~~factors to be considered~~
(a) Risk and Needs Assessments: In making a release determination, the Board shall *primarily* be guided by ~~the inmate's~~ risk and needs *principles including scores* as generated by the Correctional Offender Management Profiling for Alternative Sanctions ("COMPAS") assessment if prepared by the Department of Corrections and Community Supervision. If a Board determination, denying release, departs from the COMPAS scores, ~~an~~ *written* individualized reasons for such departure shall be given in the decision *explaining why the COMPAS assessment was inadequate in assessing risk and needs and/or why it was appropriate in this individual case to override risk and needs principles due to clearly identified compelling or exceptional circumstances.*

Similarly, we believe the Board needs to receive some direction on how the static factors of crime of conviction and prior criminal behavior are to be used by the Board in rendering its decisions. It must be emphasized that the COMPAS instrument already includes in its risk assessment consideration of the crime of conviction and prior criminal history. Moreover, the sentencing court has considered these factors in determining the sentence of the parole applicant when the court specified a minimum sentence. We believe these static factors should have very limited or no influence on the Board's determination unless the Board can articulate some specific reasons why the COMPAS assessment is erroneous or some information not available to the court rendered the court's determination an inadequate evaluation of these static factors.

In subsection 8002.2 (c), the proposed amendments attempt to address the issue of parole determinations for youth who have been incarcerated with a maximum sentence of life imprisonment. We commend the Board for providing some direction to its members when conducting a hearing for a person who was given a life sentenced for acts when they were a juvenile. The regulations specify that the Board shall consider the "diminished culpability of youth" and their "[g]rowth and maturity since the time of the commitment offense." The amendment defines that the "hallmark features of youth include immaturity, impetuosity, a failure to appreciate risks and consequences, and susceptibility to peer and familial pressures."

The recognition of mitigating factors related to the culpability of young persons and acknowledgment that youth have the ability to change and mature is an important step in refocusing the Board when they have to evaluate a person convicted as a youth. We conclude, however, based in part upon the reasons articulated by Yale Law School Professor Issa Kohler-Hausmann's submission to the Board of October 29, 2016 and other youth advocates, that the amendment does not go far enough to address the requirements of Graham v. Florida, 560 U.S. 48 (2010) and Miller v. Alabama, 132 S.Ct. 2455 (2012), which require states to provide these persons with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham, 560 U.S. at 75. Specifically, the amendments do not provide any direction to the Board on the weight that its member must place on the diminished culpability of youth or the changes these young people have experienced since the time their crime was committed. Given the Board's resistance to adequately implement the risk and needs assessment when it was listed as another "factor" to consider in Board's parole determinations, we believe it is inappropriate to add these even more sophisticated considerations as another item on its list of factors for the Board to consider without greater guidance. Rather, in implementing the constitutional requirements of Miller and Graham, the Board should be instructed to focus primarily on the diminished culpability of these young people and an assessment whether these persons have demonstrated that their subsequent development and maturity is such that it is safe to release them to the community.

Given the complexity of evaluating both the diminished culpability of youth and how to assess their maturation and rehabilitation, we agree with Professor Kohler-Hausmann that the Board must be trained in how to evaluate youthful experiences and their development, and that applicants should be given assistance in preparing and presenting this evidence to the Board at the time of their review. Moreover, the COMPAS risk assessment instrument may be inadequate to fairly evaluate these applicants and therefore, the Board should carefully evaluate this tool to determine if DOCCS must develop a tool that is appropriate for this population.

(2) 8002.3 - Post-Interview Requirements and Considerations

We commend the Board for requiring in subsection 8002.3(b) that a written decision denying parole must contain greater detail in how the factors were analyzed by the Board. It mandates that detailed and factually individualized explanations be provided for how the factors were considered. We would suggest that this language be modified to explicitly require that all reasons for denial be articulated and explained by amending the section to read: "Reasons for the denial of parole release shall be *comprehensive*, given in detail, and shall, in factually individualized and non-conclusory terms, address how the applicable factors listed in 8002.2 were considered in the individual's case."

We also recommend, as we have in prior comments to the Board's regulations, that in all adverse decisions, the Board should be required to inform the applicants what specific steps, actions or

accomplishments they could take in order to improve their likelihood for release at future Board appearances.

(3) Additional Recommendations

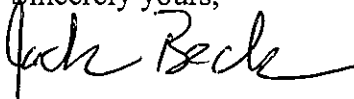
In addition to the changes recommended here to the current language contained in the proposed amendments, we urge that the Board consider additional language addressing the following issues:

- The Parole Board members should be required to participate in extensive training on several issues important to their decision-making process, including (a) child and adolescent development and neuroscience; (b) medical, mental health and cognitive impairments of aging persons and the particularly rapid aging experienced by older individuals who are incarcerated; and (c) the strengths and limitations of the COMPAS instrument and its effectiveness in assessing special populations, such as youth, aging, mentally ill or those with other disabilities.
- DOCCS should be required to annually evaluate and publicly report on the outcomes of the COMPAS assessment process in terms of the number and percentage of applicants in each score for each risk and needs component and the parole hearing outcomes related to the final risk assessments of low, medium and high risk determinations. Moreover, the Parole Board should be required regularly to conduct a study on the relationship between COMPAS scores and recidivism to ascertain the effectiveness of this tool in predicting success on parole.

We believe the current amendments to 8002 represent a positive step towards reforming the parole process to reach the goal of focusing the decision-making process on the assessment of an incarcerated person's transformation and rehabilitation and consequently evaluating whether they are likely to return home as a contributing member of their community who will not adversely impact the public safety. We also assert, however, that the current language does not adequately reach this goal, and that further amendments are needed to ensure persons who have realized that transformation are properly and safely released from prison.

Thank you for your consideration of these comments.

Sincerely yours,



Jack Beck

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