NATIONAL LAWYERS GUILD

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

Re: Proposed Changes to Current Parole Regulations

To Ms. Kiley and the Board of Parole:

We write on behalf of the National Lawyers Guild – New York City Chapter. This letter comes in response to the call for public comment on recent proposed changes to the Parole Board regulations, codified in sections 8002.1, 8002.2 and 8002.3 of Title 9 NYCRR.

Changes to current parole regulations will impact all people serving indeterminate sentences, but it is those serving life sentences with whom we are most concerned. Almost 10,000 people—one-fifth of our prison population—are serving life sentences, and nearly 3,000 are already eligible to return home. The majority of these parole-eligible people are men of color from the five boroughs of New York City, and most are over age 50, with many entering their 60s and 70s.

The majority of this population has done considerable, even exceptional, work towards community-readiness. Many have undergone profound personal transformations. Further, research shows that criminal conduct decreases substantially with age and infirmity, and re-incarceration rates for new crimes for those who have served long sentences are less than 1%, demonstrating that this population poses low to no risk to public safety.

However, despite their institutional accomplishments, commitment to self-transformation, and eligibility for release, the Board keeps people in prison for decades longer than their minimum sentences, some for 30 or 40 years. While the Board is legally required to consider all factors in the Executive Law, commissioners continually cite the nature of the crime as the primary reason for denial. By looking only to the facts of the underlying case, a person's freedom is determined by an event or events many decades in the past. The Board of Parole must stop illegitimately acting as a re-sentencing authority, tacking decades onto peoples' court-imposed sentences.

Because of the Board's practices, some people have lost hope of ever being paroled. Many believe they will die in prison, and in reality, some will. John Mackenzie is one such example. At 70 years old, John had spent more than half of his life—41 years—in prison on a 25-to-life sentence.

While incarcerated, John earned three college degrees, founded new programs for incarcerated men, and never received a disciplinary infraction. In August 2016, the Board of Parole denied him release for the tenth time. Four days later, he committed suicide in a prison cell in Fishkill Correctional Facility. In an essay from 2013, John wrote, "if society wishes to rehabilitate as well as punish wrongdoers through imprisonment, then society — through its lawmakers — must bear the responsibility of tempering justice with mercy. Giving a man legitimate hope is a laudable goal; giving him false hope is utterly inhuman."

We recognize that the proposed changes reflect the belief of some authorities and Board Commissioners that further regulatory guidance is necessary for the Board to follow existing law. The Board's attempts to further articulate the importance of a risk and needs assessment in release determinations, as well considerations of a person's age at the time of the crime, are laudable.

However, while we are enthusiastic about any attempt to reform regulations that we perceive to be flawed and ineffective, the proposed changes are poorly worded, generally insufficient, and fail to reflect some of the most important demands of parole reform leaders in New York State.

Our proposed additions and changes are as follows:

Section 8002.2: ***Parole release decision-making: factors to be considered***
Section 8002.2 begins: "Parole release decision-making: factors to be considered." These so-called "factors" refer to a risk and needs assessment (utilizing COMPAS), an evaluation of a person's young age at the time of the crime, and the eight factors outlined in the Executive Law that the Board has historically considered (seriousness of the offense, release plans, prior criminal record, etc.) in their determinations.

The Board's proposal to qualify the risk and needs assessment and an evaluation of youth as "factors" is not only confusing, but inaccurate and unconstitutional. It is not within the Board's discretion to consider, for example, a person's age at the time of their crime. Considering age is a constitutional mandate, and fundamental component of their analysis, as determined by the New York Appellate Division, Third Department in *Hawkins v. NY State Department of Corrections*. (See below for additional discussion of *Hawkins* and its impact on the proposed regulations.)

As such, the traditional factors of the Executive Law outlined in Section 8002.2(b) should comprise their own section entirely, and the two remaining subsections in 8002.2 should be labeled as "requirements," or mandatory and determinant "principles" or "methodologies."

Section 8002.2(a): ***Risk and Needs Assessments***
The proposed changes to Section 8002.2(a) clearly reflect the Board's renewed commitment to the 2011 legislative changes to the Executive Law. While we are encouraged that the Board seeks to utilize evidence-based approaches, COMPAS should not be identified in the parole regulations as the sole or even primary evaluative tool in a risk and needs assessment. A risk and needs assessment must be holistic, forward-looking and rationally based. A review of a COMPAS score does not achieve such an analysis on its own. While the end of Section 8002.2(a) references additional criteria commissioners may consider in their risk and needs assessment, the beginning of Section 8002.2(a) places too great an emphasis on COMPAS. The text should read:

(a) Risk and Needs Assessments: In making a release determination, the Board shall be guided by ~~the inmate's~~ *risk and need principles* ~~scores~~ *including* the ~~inmate's~~ *person's* scores generated by the Correctional Offender Management Profiling for Alternative Sanction ("COMPAS") assessment if prepared by the Department of Corrections and Community Supervision. …."

Further, a positive evaluation based on risk and needs, including, but not primarily reliant on a low COMPAS score, should create a presumption of release. Applicants who appear before the Board with a demonstrated history of rehabilitation and readiness for release, and low risk scores, should be granted parole *unless* exceptional circumstances exist as to warrant a denial.

If the Board believe such exceptional circumstances exist, they must provide, in writing, substantial and compelling reasons why such circumstances warrant an override of this presumption. An applicant's crime of conviction or past criminal history, in and of themselves, must not constitute the requisite exceptional circumstances, and must not form the predominant basis for release denial.

Further, because a risk and needs assessment must be holistic and include an evaluation of multiple factors, a high COMPAS score alone cannot create a presumption of further incarceration. If an applicant presents with a high score, the Board must still consider each enumerated factor from the Executive Law in their determination.

Section 8002.2(c): ***Considerations for inmates serving a maximum sentence of life imprisonment for a crime committed prior to the inmate attaining 18 years of age ("minor offender")***

Parole hearings for life-sentenced juvenile offenders is a pressing issue in New York and across the country. The Supreme Court has held that the U.S. Constitution requires that juveniles sentenced to life before the age of 18 must be given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham v. Florida*, 560 U.S. 48, 75 (2010); *Miller v. Alabama*, 132 S.Ct. 2455, 2469 (2012); *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

The Supreme Court's firm and swift action in both *Montgomery* and *Miller* informed the decision in a recent case from the New York Appellate Division, Third Department. There, the Court recognized that scientific discoveries relating to youth, immaturity and the potential for rehabilitation apply just as much to the New York State Board of Parole as to a sentencing court. *Hawkins v. NY State Department of Corrections*, 140 A.D.3d 34, 38 (3rd Dep't 2016).

While Section 8002.2(c) of the proposed parole regulations comes in response to this Third Department decision, it is woefully inadequate and a complete misstatement of the law. Despite the proposed introductory language in 8002.2, youth is not a discretionary matter or a "factor" for the Board to potentially consider. The principle question in a parole hearing for people sentenced as juveniles, *must* be whether the individual demonstrates "maturity and rehabilitation," as mandated by the Constitution.

The Constitution also guarantees heighted procedural protections for juveniles sentenced to life, including access to attorneys at all parole hearings. No such accommodation is outlined in the current regulation.

In sum, the proposed regulations protect neither the substantive nor due process rights of people convicted as juveniles. Their diminished culpability and enhanced capacity for reform affords them such protections.

8002.3(b) ***Post interview requirements and considerations***

We applaud the addition in Section 8002.3(b) that requires the Board to provide "factually individualized" reasons for denying a person parole release. We agree that the Board must ensure that parole decisions are individually tailored and based on evidence drawn from the record and interview.

However, the reasons given for denials should also be "comprehensive" and "exhaustive," and the Board should inform an applicant, upon denial of parole, of specific steps the applicant can take to improve their chances of release at future appearances. If an applicant is to successfully complete and provide documentation of the specific steps outlined by the Board in the most recent appearance resulting in denial, the Board should not be able to re-issue the same, or inherently similar, demands at future hearings.

Make Non-Victim Opposition Materials Available

The proposed regulations do little to ensure greater transparency in the parole release determination process. While parole decisions offer some insight into how commissioners arrive at their conclusions, these decisions are often boilerplate restatements of the law. Further, commissioners often use material that is inaccessible to the applicant as the basis for their denials, making it impossible for applicants to address statements made against them. "Community opposition" is a prime example of such material.

Making impact statements that do not come directly from the victims or their families accessible to the applicant will improve a person's application for parole, and will afford them the opportunity to discuss issues raised in these statements. These materials are not confidential and should be released.

Conclusion

We thank you for your consideration, and we encourage you to continue your efforts in drafting parole regulations that are fair, just, effectively written, and consistent with legislative and constitutional authorities.

Respectfully submitted,

The National Lawyers Guild – New York City Chapter