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Sent via E-mail: rules@doccs.ny.gov

Kathleen M. Kiley, Counsel
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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 this letter as public comment submitted on behalf of the Osborne Association 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 Osborne Association supports the proposed changes to the Parole Board regulations and commends the Chairperson and Counsel for continuing to encourage transparency in Parole Board decision-making. The proposed changes will provide a clearer sense of how and why Board Commissioners deliver their hearing outcomes, increasing confidence in the fairness and specificity of this process. The changes also refocus the Parole Board on rehabilitation and public safety, rather than on retribution and permanent punishment.

We offer the below additional suggested changes and recommendations to the proposed regulations to support these important steps forward.

By separating the risk and needs assessments from the additional factors the Board considers in its release determination, the newly proposed regulations more clearly reflect amended Executive Law §259-c(4). A risk and needs score should be the result of the most contemporary validated, reliable, and equitable risk and needs assessment instrument (currently DOCCS relies on COMPAS). This score, along with an individual's institutional record, and his or her age at the time of the crime, should be the primary factors to be considered in evaluating an individual for release. In addition, the proposed regulations add the important requirement that the Board explain in a decision denying parole release any departures from the COMPAS scores.



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We recommend that:

- COMPAS - the current risk and needs assessment utilized- be validated every two years and its limitations assessed and alternative instruments considered;
- the guidelines should address risk and needs scores in a generic manner, and not specify COMPAS, a product supplied by a for-profit vendor, which is the current assessment tool but which might be replaced in the future if it fails to meet the Board's goals;
- the Board ought to place a particular emphasis on the dynamic factors of an individual by prioritizing their institutional record, including program goals and accomplishments and the degree to which they have changed and grown during their incarceration;
- the recently added "minor offender" consideration be included as a primary factor for the Board to consider.

On this last point, we applaud the new regulations for recognizing the age at which the crime was committed, taking into consideration current neuroscience and research on adolescent development. In calling for the Parole Board to provide special consideration to those who committed crimes as teenagers, the regulations acknowledge and respect the science that proves what every parent knows: that the "hallmark features of youth include immaturity, impetuosity, a failure to appreciate risks and consequences," and also recognize that the hallmark features of adulthood ought to include fairness and forgiveness for those who demonstrate high marks for institutional achievements, and low risk of future crime.¹

Emphasizing these more dynamic factors as primary factors will help to further distinguish the role of the Board from the province of the judiciary and reassure the public that the Board is not a (re)sentencing body, but instead fulfilling its mandate to evaluate an individual's readiness for release based on who they are today.

As it relates to the Board's remaining factors, we suggest the following additions:

- Regarding the Board's mandate to take into account the statements of crime victims and their representatives: crime victims and their representatives should be given the opportunity to learn about who the applicant for parole is today. With the consent of the applicant/ individual, victims and their representatives should receive a summary completed by the individual and/ or the facility Offender Rehabilitation Coordinator (ORC) which provides information about accomplishments, programs completed, and other relevant updates.
- "Representatives" of the victim shall be limited to those directly affected by the crime, generally family members, and must not include unrelated public servants, public serving bodies, public petitions, letter campaigns, or what the Board commonly refers to as "Community Opposition." Taking into account the statements of people who are not directly affected by the crime extends the definition of "representative" too widely as many who submit and support statements opposing an individual's release have no connection to the victim or the specific harm caused and are simply expressing an opinion that, for example, people who have committed certain crimes should never be released, which is not the law and should not be considered in individual cases.

¹ The proposed changes are also in line with *Hawkins v. NY State Department of Corrections*, 140 A.D.3d 34, 39 (3rd Dep't 2016).

- In addition to the important requirement that the Board provide individualized, non-conclusory reasons for a denial decision, the Board must also individually inform each denied applicant of the specific steps he/she can take in order to improve their chances of release at future Board appearances.

It is essential that these regulations and the aforementioned suggestions be incorporated in initial, reappearance, and de novo hearings.

In addition, a meaningful, expedient, and quality-assured administrative appeals procedure is a critical component of the parole process and will provide an opportunity for the Board to master its new regulations in the earliest stages of implementation. We suggest that the regulations include a firm deadline of 60 days after submission of an administrative appeal for issuance of the decision. In addition, we suggest that the exhaustion period be reduced to 90 days from the current 120 days, so that an applicant who has been denied parole release may pursue judicial remedies if no decision has been issued within 90 days of submission of the administrative appeal.

In order to ensure that denied applicants are adequately resourced when determining whether or not to file an appeal, they must automatically receive their parole hearing minutes within 30 days of the hearing. Finally, in all denial hearings in which there is a dissenting opinion, otherwise known as a “split-decision,” we suggest that a date for reconsideration of a release determination be not more than 12 months from the interview, as opposed to the current maximum of 24 months.

Furthermore, recognizing the challenging and critically important role of Parole Commissioners, we recommend that they receive training to ensure they are kept abreast of new and relevant research and science. To be most helpful, the trainings should be oriented towards the newly proposed regulations and specifically the primary factors the Board is to consider.

We specifically recommend:

- 1) Training regarding the scope of programs and services (including eligibility criteria) offered within DOCCS facilities. Such training will support Board commissioners in their articulation of the steps individuals can take that may help to better qualify them for future release. Additionally, the Parole Board should receive regular updates from DOCCS when program offerings change, including descriptions of any new programs or reductions of program offerings or capacity;
- 2) To implement the new primary factor “Minor Offender” consideration, the Board should receive training in child and adolescent development and neuroscience;
- 3) With 20 percent of the prison population- more than 10,000 people- in New York State now being aged 50 and older², it is imperative that the Parole Board receive training

² DOCCS 2016 *Under Custody Report*.

regarding the specific issues faced by the growing population of those aging in prison. Just as the new regulations acknowledge the “hallmark features of youth,” they should also acknowledge the hallmark features of adulthood which include maturity, greater perception of risk and consequences, and low-level of risk-taking behavior. The phenomenon commonly referred to as “aging out of crime” is validated by the fact that older people have the lowest recidivism rates of any age cohort in NY State and U.S. prisons.³ When considering granting parole and medical parole to older adults, the Board must seek to expand its age-specific practices beyond “minor offenders” by also giving special consideration to the age--and thus the relatively low risk--of older people.

- 4) Data suggests that more than 80% of the individuals serving life sentences in New York are people of color; nearly 90% of those lifers who were sentenced as juveniles are Black or Latino. Given the resulting disparate impact of sentencing and parole decisions, it is important the Board take special precautions to insure that assessments and decision-makers are attentive to and receive training related to structural racism, cultural competence, and implicit bias at every level.

We reiterate our sincere appreciation for the Board’s proposed changes which reflect a commitment to public safety, recognition of individual transformation and rehabilitation, and a desire to incorporate the latest research and best practices into the Board’s implementation of existing executive and case law.

Thank you for your consideration of these comments.

Sincerely,



Elizabeth Gaynes
President/CEO

³ DOCCS 2011 *Inmate Releases: Three Year Post-Release Follow-Up*.