New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

Comments on Proposed Rules Regarding Parole

Committee on Civil Rights

Civil Rights #1 November 10, 2016

To: Kathleen M. Kiley, Counsel to the Board of Parole,
NYS Department of Corrections and Community Supervision

Please accept this public comment submitted on behalf of the New York State Bar Association Committee on Civil Rights (the "Committee") in response to the Notice of Proposed Rule Making published in the New York State Register on September 28, 2016 concerning the proposed amendment of sections 8002.1, 8002.2 and 8002.3 of Title 9 NYCRR. This comment represents the views of the Committee and does not purport to be the position of the New York State Bar Association.

First, the Committee applauds the willingness of the New York State Department of Corrections and Community Supervision (the "Department") to reconsider and revise the parole regulations adopted in 2014. Additionally, the Committee commends the Department's apparent recognition that risk and needs principles should play a greater role in parole determinations. Finally, the Committee is pleased to see that "diminished culpability of youth" and evidence of subsequent growth and maturity are listed as considerations for parole determinations involving individuals incarcerated for crimes committed at a young age.

The Committee nevertheless has certain concerns with the proposed regulations and appreciates the opportunity to comment on these:

First, the proposed regulations do not adequately distinguish between the risk and needs principles that are to guide parole determinations and the individual factors to be considered under those principles. Confusion may arise because the proposed regulations characterize both as "factors." Under the statutory scheme, however, the risk and needs principles are not "factors" to be considered, but rather are the lens through which the Parole Board is to assess certain identified considerations when making parole determinations. *See* N.Y. Exec. L. §§ 259-c(4) (requiring the Board of Parole shall "establish written procedures . . . [that] 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 inmates may be released to parole supervision"); 259-i(2)(a) (requiring the Parole Board to make determinations "in accordance

with the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c); 259-i(2)(c)(A) ("In making the parole release decision, the procedures adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered . . . ." and identifying specific considerations). The proposed regulations obfuscate this distinction. To remedy this, the Committee urges two changes. First, the Department should rename the subheading of § 8002.2 to read: "§ 8002.2 Parole release decision-making: *principles and* factors to be considered." Second, § 8002.2(c)(1) should be revised to read: "When making any parole release decision pursuant to section 259-i(2)(c)(A) of the Executive Law for a minor offender, the Board shall, in addition to other provisions of this section, consider the following . . . ." The Committee believes that these revisions will eliminate any confusion that the "Risk and Needs Assessments" described in § 8002.2(a) are not considered a "factor" in the sense of the "Factors to be Considered" described in § 8002.2(b).

Second, the proposed regulations still fall short of ensuring that the Parole Board's decision-making will be made in accordance with the legislative mandate. Specifically, the Committee is concerned that the proposed regulations' reference to "risk and need *scores*" does not conform to the letter or spirit of the Executive Law, which requires that Parole Board determinations be made "in accordance with" "risk and needs *principles* to measure the rehabilitation of persons appearing before the board [and] the likelihood of success of such persons upon release." N.Y. Exec. L. §§ 259-i(2)(a); 259-c(4). The distinction between "scores" and "principles" is an important one. Currently, the Parole Board uses the Correctional Offender Management Profiling for Alternative Sanction ("COMPAS") instrument to measure risk. That tool produces a number of "scores," including some that measure historical phenomena, e.g., "History of Violence," and others that measure rehabilitation and likelihood of successful reentry, e.g., "Risk of Felony Violence," "Arrest Risk," and "Abscond Risk." The regulations should make clear that it is these future-looking risk assessments that are to guide parole determinations.

Third, the proposed regulations should do more to address the legislative mandate that the Parole Board incorporate "needs principles." *See* N.Y. Exec. L. § 259-c(4). Specifically, the proposed regulations should require the Parole Board to inform any candidate for parole who is denied release of specific steps he or she should take to improve his or her chance of release in the future. Further, should the candidate take the recommended steps, the Parole Board should be required to consider such efforts at any future parole hearing(s).

Fourth, the proposed regulations should provide for ongoing, data driven assessments of the particular risk assessment instrument employed by the Department for evidence of bias. The Committee takes no position on the COMPAS risk instrument that the Department has chosen to employ. That tool (or any other the Department may adopt), however, should be regularly scrutinized to determine whether its predictions demonstrate bias on the basis of race, gender, orientation, etc., and if so, to account for any such bias in making parole determinations and/or continuing to employ that instrument over another.

Fifth, the Department's new category, "minor offender," is overly restrictive. Under § 8002.2(c) of the proposed regulations, the Parole Board is required to consider "diminished culpability of youth" and evidence of subsequent growth and maturity only for "minor offenders," that is, persons serving a maximum sentence of life imprisonment for a crime

committed prior to his or her eighteenth birthday. While the Committee is pleased to see the Department recognize that youth and growth are valid and indeed necessary considerations for parole determinations involving individuals incarcerated for crimes committed at a young age, these considerations ought to apply generally, including to those persons who committed an underlying offense subsequent to turning eighteen years of age and those whose maximum term of incarceration is less than life.

Respectfully submitted on behalf of the Committee on Civil Rights.