



April 2, 2019

To: Members of the House of Delegates

Re: April 13, 2019 meeting

Enclosed are the agenda and related background materials for the upcoming meeting of the House of Delegates scheduled to begin at 9:00 a.m. on Saturday, April 13, 2019 at the Bar Center in Albany. *Please note the change in the meeting time.* The enclosed background materials cover agenda items 2-3, 5-8, 10, and 12-13.

We look forward to seeing you in Albany.

Michael Miller
President

Henry M. Greenberg
President-Elect



**NEW YORK STATE BAR ASSOCIATION
MEETING OF THE HOUSE OF DELEGATES
BAR CENTER, ALBANY, NEW YORK
SATURDAY, APRIL 13, 2019 – 9:00 A.M.**

AGENDA

1. Call to order, Pledge of Allegiance, and welcome 9:00 a.m.
2. Approval of minutes of January 18, 2019 meeting 9:05 a.m.
3. Report of Treasurer – Mr. Scott M. Karson 9:10 a.m.
4. Election of Nominating Committee and State Bar
Delegates to ABA House of Delegates – Mr. David P. Miranda. 9:15 a.m.
5. Report and recommendations of Committee on Standards of
Attorney Conduct 9:25 a.m.
6. Report and recommendations of Task Force on School to
Prison Pipeline – Mr. John H. Gross 9:55 a.m.
7. Report and recommendations of Committee on Attorney
Professionalism – Messrs. Andrew Oringer and Robert I.
Kantowitz 10:15 a.m.
8. Report and recommendations of Task Force on Wrongful
Convictions – Hon. Barry Kamins and Hon. Robert S. Smith 10:35 a.m.
9. Report of President – Mr. Michael Miller 10:55 a.m.
10. Report and recommendations of Task Force on Evaluation of
Candidates for Election to Judicial Office – Mr. Robert L. Haig
and Hon. Susan P. Read 11:10 a.m.
11. Report of The New York Bar Foundation – Ms. Lesley Rosenthal 11:35 a.m.
12. Report and recommendations of New York City Bar Association –
Mr. Steven Fink 11:45 a.m.
13. Report and recommendations of Task Force on Incarceration
Release Planning and Programs – Mr. Scott M. Karson and
Ms. Sherry Levin Wallach 12:05 p.m.
14. Administrative Items – Mr. Henry M. Greenberg 12:25 p.m.

15. New Business 12:35 p.m.
16. Date and place of next meeting:
Saturday, June 15, 2019
The Otesaga, Cooperstown, New York

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
NEW YORK HILTON MIDTOWN, NEW YORK CITY
JANUARY 18, 2019**

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PRESENT: Aaron; Alcott; Barclay; Baum; Belowich; Ben-Asher; Bennett; Berman; Billings; Block; Bonina; Briwn Spitzmueller; Brown, E.; Brown, T.A.; Buholtz; Burke; Castellano; Chambers; Christensen; Cilenti; Coffey; Cohen, D.; Cohen, O.; Connery; Dean; Di Pietro; Doerr; Doxey; Effman; Eng; England; Entin Maroney; Fernandez; Ferrara; Finerty; Fishberg; Flood; Foley; Freenman, H.; Friedman; Frumkin; Genoa; Gerstman; Gold; Goldschmidt; Grays; Greenberg; Grimaldi; Grogan; Gutekunst; Gutenberger Grossman; Gutierrez; ack; Hage; Haig; Heath; Heller; Hines; Hurteau; Hyer; Jaglom; James; Kamins; Karson; Kean; Kelly; Kobak; Lau-Kee; Lawrence; Leber; Levin Wallach; Levin; Levy; Lewis; Lindenauer; MacLean; Madden; Madigan; Maldonado; Mancuso; Mandell; Margolin; Marinaccio; Markowitz; Maroney; Matos; May; McCann; McGinn; McNamara, C.; McNamara, M.; Meisenheimer; Meyer; Miller, C.; Miller, M.; Millett; Millon; Minkoff; Miranda; Mohun; Moore; Moretti; Moskowitz; Murphy; Napoletano; Nowotarski; Nussbaum; O’Connell; O’Donnell; Onderdonk; Owens; Palermo, C.; Perlman; Pessala; Pitegoff; Pleat; Poster-Zimmerman; Radick; Richman; Richter; Rodriguez; Rosner; Russell; Ryan; Ryba; Safer; Santiago; Scheinkman; Schofield; Schraver; Schreiber; Schub; Scott; Sen; Shafer; Shamoon; Shishov; Shoemaker; Sigmond; Silkenat; Singer; Skidelsky; Slavit; Spirer; Stanclift; Standard; Steiglitz; Strenger; Sweet; Taylor; Teff; Tennant; Tully; Udell; van der Meulen; Vecchio; Vigdor; Weathers; Weiss; Westlake; Weston; Whiting; Whittingham; Young; Younger.

Mr. Greenberg presided over the meeting as Chair of the House.

1. Approval of minutes of November 3, 2018 meeting. The minutes were deemed accepted as distributed.
2. Report of the Treasurer. The Treasurer’s report for twelve months ending November 30, 2018, which had been presented by Treasurer Scott M. Karson to members of the Association at the Annual Meeting, was received with thanks.
3. Report of the Nominating Committee and election of officers and members-at-large of the Executive Committee. David P. Miranda, chair of the Nominating Committee, reported that the Committee had nominated the following individuals for election to the indicated offices for the 2018-2019 Association year: President-Elect: Scott M. Karson, Melville; Secretary: Sherry Levin Wallach, White Plains; Treasurer: Scott M. Karson, Melville; and Vice Presidents: First District – Diana S. Sen and Carol A. Sigmond, New York City; Second – Aimee L. Richter, Brooklyn; Third – Robert T. Schofield IV, Albany; Fourth – Marne Onderdonk, Saratoga Springs; Fifth – Jean Marie Westlake, East Syracuse; Sixth – Richard C. Lewis, Binghamton; Seventh – David H. Tennant, Rochester; Eighth – Norman P. Effman, Warsaw; Ninth – Mark T. Starkman, New Windsor; Tenth – Donna England, Centereach; Eleventh – Karina E. Alomar, Ridgewood; Twelfth – Michael A. Marinaccio, White Plains; Thirteenth – Jonathan B. Behrins, Staten Island. Nominated as members-at-large of the Executive Committee were Margaret J. Finerty, New York City; William T.

Russell, Jr., New York City; Richard M. Gutierrez, Forest Hills; Andre R. Jaglom, New York City; and John P. Christopher, Glen Head.

There being no further nominations, a motion was made and carried unanimously to elect the above-named individuals as officers and members-at-large of the Executive Committee.

4. Memorial for Paul Michael Hassett. Immediate Past President Sharon Stern Gerstman presented a memorial in honor of Mr. Hassett, who served as Association President 2000-2001 and who passed away October 25, 2018. A moment of silence was observed in Mr. Hassett's memory.
5. Presentation of awards by Committee on Bar Leaders of New York State. Marne Onderdonk, chair of the committee, presented the Bar Leaders Innovation Awards, which recognize how bar associations adapt to the needs of their members and the community at large by introducing new programs, ideas and methodologies. The Small Bar recipient was the Rensselaer County Bar Association of its restoration work at the Rensselaer County Courthouse; the Medium Bar recipient was the Onondaga County Bar Association for its creation of a Veterans' Rights and Military Law Section; the Large Bar recipient was the Suffolk County Bar Association for its "Another Night" video project; and the Emerging Bar recipient was the Caribbean Attorneys Network for its program "What the Health: Mental Health Among Professionals of Color."
6. Address by Hon. Janet DiFiore, Chief Judge of the State of New York. Chief Judge DiFiore addressed the House of Delegates with respect to the status of Unified Court System initiatives. She provided an update on the Excellence Initiative; an increase in ADR programs; the Judiciary's budget request; criminal justice reform; technology; and a committee on evidence. The chair thanked the Chief Judge for her report.
7. Presentation of the Ruth G. Schapiro Memorial Award. Mr. Miller presented the annual Ruth G. Schapiro Award to Deborah A. Scalise in recognition of her contributions on behalf of women, and commitment to championing equal opportunities for all.
8. Report and recommendations of Committee on Standards of Attorney Conduct. Roy D. Simon and Barbara S. Gillers, co-chairs of the committee, together with past chair Joseph E. Neuhaus, presented proposed amendments to Rules 1.0, 1.7, 1.8, 1.10 (with the exception of a proposal regarding lateral hires), 1.11, 1.12 and 6.5 of the Rules of Professional Conduct. They noted that the balance of the committee's report, relating to lateral hires and tribunals, would be deferred to the April 2019 House meeting. After discussion, a motion was adopted to approve the proposed amendments.
9. Report of President. Mr. Miller highlighted items contained in his written report, a copy of which is appended to these minutes. In addition, he addressed the partial government shutdown in effect; the need for an independent judiciary and attacks on the rule of law; and opposition to an increase in the attorney registration fee.

10. Report of Committee on Membership. Thomas J. Maroney, chair of the Committee on Membership, reported on recent membership initiatives. The report was received with thanks.
11. Report and recommendations of Working Group on Judiciary Law §470. David M. Schraver, chair of the Working Group, outlined the Working Group's recommendation that Judiciary Law §470, which requires a physical presence in New York for nonresident lawyers admitted to practice in New York, be repealed. After discussion, a motion was adopted to approve the report and recommendations.
12. Report and recommendations of Task Force on Evaluating Candidates for Election to Judicial Office. Robert L. Haig and Hon. Susan P. Read, co-chairs of the Task Force, presented an informational report regarding the Task Force's recommendations for best practices, guidelines and standards for groups that evaluate candidates for election to judicial office. They presented a scheduling resolution to govern the House's consideration of the report at the April 13, 2019 meeting. After discussion, a motion was adopted to approve the following resolution:

RESOLVED, that the House of Delegates hereby adopts the following procedures to govern consideration at the April 13, 2019 meeting of the House, and any subsequent meetings as may be necessary, of the report and recommendations of the Task Force on Evaluation of Candidates for Election to Judicial Office:

1. The report and recommendations of the Task Force will be circulated to members of the House, sections and committees, county and local bar associations, and other interested parties.
2. **Comments on report and recommendations:** Any comments on the Special Committee's report or particular recommendations contained therein must be submitted in writing to the Secretary of the Association at the Bar Center by March 15, 2019; otherwise they shall not be considered. All comments complying with this procedure shall be distributed to the members of the House in advance of the April 13, 2019 meeting.
3. **Consideration of the report and recommendations at the April 13, 2019 meeting and any subsequent meetings:** The report and recommendations will be scheduled for formal debate and vote at the April 13, 2019 meeting and considered in the following manner:
 - a. The Task Force shall be given an opportunity to present its report and recommendations.
 - b. All those wishing to speak with regard to the report and recommendations may do so only once for no more than three minutes.
 - c. The Task Force may respond to questions and comments as appropriate.
 - d. Procedural motions shall be considered out of order until debate on substantive issues is concluded.

- e. A vote on the report and recommendations shall be taken at the conclusion of the debate.
14. Report of Task Force on Wrongful Convictions. Hon. Barry Kamins and Hon. Robert S. Smith, co-chairs of the Task Force, presented an informational report on the Task Force's work in the areas of conviction review units, forensic science issues, actual innocence claims and implementation of new procedures. The report was received with thanks.
15. Report of Task Force on School to Prison Pipeline. John H. Gross, co-chair of the Task Force, outlined the Task Force's recommendations with respect to the law relating to school discipline and best practices in discipline and restorative justice. The report was received with thanks.
16. Administrative items. Mr. Greenberg reported on the following:
- NYSBA delegates to ABA House of Delegates. At the April 13, 2019 meeting, the House would be requested to elect six of the Association's 11 delegates to the American Bar Association House of Delegates. The Nominating Committee had nominated the following individuals: Claire P. Gutekunst, Yonkers; Seymour W. James, Jr., New York City; Bernice K. Leber, New York City; Michael Miller, New York City; Scott M. Karson, Melville.
17. New Business.
- Government shutdown. Past President Mark H. Alcott proposed a resolution condemning the impact of the partial government shutdown on the federal court system. After discussion, a motion was approved to adopt the following resolution:
- RESOLVED, the New York State Bar Association condemns the federal shutdown which is impairing our legal system and the rule of law, and calls for an immediate end of the shutdown.
16. Date and place of next meeting. Mr. Greenberg announced that the next meeting of the House of Delegates would take place on Saturday, April 13, 2019 at the Bar Center in Albany.
17. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned.

Respectfully Submitted,



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Secretary

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**President's Report
to the House of Delegates
January 18, 2019**

A little more than halfway through my term as New York State Bar Association president, I want to take this opportunity to applaud the tremendous work being done by lawyers across New York, across the United States and around the world to protect and advance the rule of law.

I write this even as I note events in recent months that jeopardize the fundamental rule of law and the democratic principles that it supports. More than 30 attorneys in the Philippines have been targeted and murdered over the past two years. In Hungary, a new “administrative court system” controlled by the executive branch has been established to handle certain cases, including corruption, election law, and the right to privacy. Europe’s highest court recently ordered the Polish government to reinstate two dozen judges who had been ousted from office for decisions unfavorable to the government. In our own country, U.S. Supreme Court Chief Justice John Roberts issued a forceful defense an independent judiciary, a rare public statement from a sitting member of the court.

At this writing, large parts of the federal government are shut down due to the inability of the President and Congress to come to an agreement on funding. NYSBA expressed its concerns about the impact of the shutdown on the operations of the federal judiciary and called upon Congress and the President to ensure sufficient funding to enable the court system to fulfill its constitutional duties. In a statement that was picked up by the *New York Law Journal* and other media sources and in an on-air interview that was broadcast in eight upstate New York television markets, I noted that operations of the federal courts – and, indeed, justice for all Americans – should not and must not be subject to the vagaries of politics.

NYSBA Sections, Committees, Task Forces, Working Groups & Advocacy

As in the past, NYSBA’s sections and committees continue to conduct excellent meetings of substance, superb CLE programs and opportunities for members to improve their professional skills, our profession and our community. Our various entities produce excellent reports on issues of relevance and concern, affording our House of Delegates valuable opportunities to take policy positions and advocate for improvements in the law and support for the rule of law. Today, a number of reports of consequence will be presented for consideration. It is gratifying to note that our Women in Law Section, one of the fastest growing sections in NYSBA’s history, offers enhanced opportunities to explore inequities and advocate for gender equality. And our International Section has done an excellent job at increasing membership.

The task forces appointed in June and those previously appointed have been hard at work and are developing reports that will be presented to you during 2019. Before I highlight for you some of their work, it is important to note that the large number of initiatives we have undertaken pose considerable additional burdens on certain members of NYSBA's dedicated staff. They have been incredibly supportive and have made truly meaningful contributions. I want to express special recognition and appreciation to Kathy Baxter, Ron Kennedy, Kevin Kerwin, Pam McDevitt, Kit McNary, Kathy Suchocki, Dan Weiller and Mark Wilson for their considerable efforts in assisting the various task forces and working groups.

The **Task Force on the Evaluation of Candidates for Election to Judicial Office**, co-chaired by Hon. Susan P. Read and Robert L. Haig, has developed a comprehensive report that it will present to you on an informational basis at this meeting and for debate and vote at the April meeting.

That task force, working through the summer and fall, collected and examined a vast amount of background information, including a review of the work of the New York State Commission to Promote Public Confidence in Judicial Elections [the Feerick Commission], the Independent Judicial Election Qualification Commissions [IJEQCs], and local, affinity and specialty bar associations that evaluate judicial candidates subject to election. The task force also researched judicial screening in other states, and surveyed local, affinity and specialty bar associations asking them to assess their work and positions on judicial screening and their work with the IJEQCs.

The task force solicited views on judicial screening and the efficacy of the current judicial screening regimen from political party leadership in each county, individual members of the IJEQCs and sitting elected judges. Its conclusions and recommendations are driven by the facts ascertained during its extensive investigations of current practices throughout New York State.

The **Task Force on Incarceration Release Planning and Programs**, co-chaired by NYSBA secretary Sherry Levin Wallach and president-elect designee Scott M. Karson, is reviewing issues that incarcerated people face upon release along with ways to enhance their successful reintegration into urban, suburban and rural communities throughout the state. The task force is looking at how to address a range of barriers to re-entry including availability of housing, education and vocational training; restoration of rights; inconsistency in rules; limited availability of substance abuse and mental health treatment programs; and housing options and limited availability of housing. The task force is also examining the impact on our communities and on formerly incarcerated people that results from inadequate release planning.

The task force held an open meeting on November 9 with formerly incarcerated individuals, representatives from several state and local agencies, and not-for-profit organizations, to discuss all aspects of release planning and programs. The information that was obtained from that meeting will be incorporated into the final report. The task force will be presenting an informational report at this meeting, with the final report scheduled for April 2019.

The **Task Force on Wrongful Convictions**, co-chaired by Hon. Barry Kamins and Hon. Robert S. Smith, has been hard at work, building upon NYSBA's ground-breaking 2009 report. The task force is in the process of updating the previous report with focus on four primary areas: conviction review units, forensic science issues, actual innocence claims and monitoring implementation of new procedures. The task force will be making an informational report at this meeting and expects to submit a report and recommendations for consideration at the April meeting.

The **Task Force on Mass Shootings and Assault Weapons**, co-chaired by Margaret J. Finerty and past President David M. Schraver, is considering the connection between mental health and mass shootings, the relationship between domestic violence and mass shootings, and whether assault weapons belong in civilian hands, issues which are constantly in the news. It has met a number of times, one of which included an extraordinary presentation by NYPD senior weapons experts.

The **Task Force on the Role of Paralegals**, co-chaired by Vincent Ted Chang, past President Maryann Saccomando Freedman and Margaret L. Phillips, is updating the 1997 paralegal guidelines adopted by the House of Delegates and is also exploring relevant issues to make recommendations for best practices for the use of paralegals in the modern 21st century law office. The task force also is considering whether NYSBA should enroll paralegals as members or ancillary members.

The **Working Group on Puerto Rico**, co-chaired by Richard M. Gutierrez, Drew Jaglom, Hilary F. Jochmans and Maria Matos, continues to identify steps that can be taken to assist the people of Puerto Rico in their continued recovery efforts. In addition, with the 116th Congress taking office this month, we will continue our efforts to secure an exemption from the Jones Act for Puerto Rico.

You may recall that last month, the New York Court of Appeals upheld Civil Rights Law §50-a, which bars the disclosure of police officer personnel records except under limited circumstances. Last spring, after our Committee on Media Law and Committee on Civil Rights presented a report to the Executive Committee on this statute, we established a **Working Group on Civil Rights Law §50-a** co-chaired by Catherine A. Christian and Norman P. Effman to examine whether the statute should be repealed or amended. The working group is expected to issue a report shortly.

Our **Working Group on Judiciary Law §470**, chaired by past President David M. Schraver, has worked diligently in collaboration with our CPLR Committee. Judiciary Law §470 requires generally that in order to appear as an attorney of record in New York courts, an attorney must have a physical office in New York. This requirement dates back to an 1862 predecessor law. For decades, critics have argued that this requirement is an anachronistic vestige of the past. This topic has frequently been raised by our non-resident members when I have attended meetings and receptions outside New York. The Working Group will be presenting a report and recommendations at this meeting.

The Task Force on School to Prison Pipeline, chaired by Sheila A. Gaddis and John H. Gross, was established last year by past president Sharon Stern Gerstman. The task force has submitted a thoughtful report to the House with substantive recommendations. It will be making an informational presentation at this meeting and will seek adoption of its report and recommendations in April.

Communications & Membership

I have often said that “all roads lead to membership.” In partnership with staff, association leaders have worked hard to enhance the membership experience through programs and media coverage emphasizing NYSBA’s relevance in today’s world. Thanks to the commitment of the Rapid Response Advisory Group established in June and chaired by past President David P. Miranda, NYSBA has been able to speak out more quickly and effectively in forceful support of the rule of law. And thanks to the leadership of NYSBA’s Senior Director of Communications Dan Weiller, our media presence has been heightened significantly.

Director of Attorney Retention and Engagement Victoria Shaw developed a comprehensive strategic and tactical plan which is reaping promising results. Some months ago, we established a weekly year-over-year membership report looking back five years. This gives us an opportunity to compare revenue collected, total members, total paid members, retention rates, differences from prior years, trends and other relevant information.

Utilizing this information and creative billing changes, I am very pleased to report that our retention rate of 64.0% is the highest it has been since before 2013. Paid count and revenue collected are the highest they have been at this point in the renewal cycle since 2015. Additionally, we reached our goal of 70,000 total members a few weeks ago. As of December 31, our total membership stood at 70,307 members.

We contemplate embarking upon a strategic membership recruitment campaign to begin February 1, with two separate campaigns in 2019. The first will occur from February through April and the second from September through November. The goal of these campaigns will be to recruit new members. Our invoice cycle runs through February, at which point we will do one round of telemarketing outreach and will encourage our insurance partners at USI to reach out to members ahead of drops. In order for members to continue to qualify for reduced group rates, they must continue to be NYSBA members. After drops, we will reach out to USI to have them do a second outreach to dropped members.

Also, our dedicated Membership Committee, co-chaired by Thomas Maroney and Mitchell Katz, has been hard at work. Amongst other efforts, it has held a number of receptions and gatherings of young and diverse attorneys in New York City and Albany, affording those members with greater opportunities to connect with colleagues and to develop a greater sense of membership value. Other events are contemplated around the state.

NYSBA is actively examining our global membership and our potential global market and developing a growth strategy for 2019 with support from our International Section. Our international membership has grown considerably over the past decade and we believe we have enormous opportunity for expansion with a thoughtful and strategic plan. Our sales

representative, MCI, examined NYSBA's international membership in Canada, the United Kingdom, Germany, France, China, Japan and Hong Kong – the countries with the highest NYSBA membership. They also surveyed New York-registered attorneys who were not NYSBA members in those countries. It is gratifying to report that our brand is remarkably strong in those important markets. We have begun outreach to our members and non-members alike and the results seem promising.

Budget, Finance and Technology

Detailed information on finances will be provided in the Treasurer's Report, but I want to highlight the fact that the 2018 budget year ended on very positive notes: we stabilized dues revenue, substantially increased non-dues revenue and reduced expenses. As a result, I am pleased to report that NYSBA ended the year with a surplus rather than a deficit, as we had at the close of 2017. Over the past two years, the Finance Committee, chaired by T. Andrew Brown, devoted a great deal of time scrutinizing every aspect of NYSBA's budget and assisted leadership and senior management in making difficult and complex decisions about staffing and other resources.

We have been keenly focused on increasing non-dues revenue and NYSBA staff has employed creative ways to develop new and enhance existing streams of non-dues revenue. In 2017, we had only five non-revenue streams for advertising. Last year, we added 12 new advertising streams, bringing the total to 17, and we have already brought that number to 20 this year.

Our sales representative MCI has far exceeded goals in advertising space sales in the NYSBA Journal and other publications, as well as sponsorships and exhibit space at the Annual Meeting and other events. Last year, we had 20 vendors at the Annual Meeting. Thanks to the hard work of MCI, we added an additional 30 vendors and for the first time ever, space for the Annual Meeting was entirely sold out. MCI has asked us to arrange for even more exhibition space to be available to sell next year.

By more effective placement on our website and sending a weekly email, our job board revenue doubled in 2018 to approximately \$100,000. Additionally, we are in the final stages of negotiating an agreement with Kaplan Test Prep which will provide NYSBA student members with a significant discount, and a royalty payment to NYSBA.

The primary drivers of the budget surplus were stable dues revenue, substantial increases in non-dues revenue, targeted reductions in the costs associated with previously budgeted large expense items, and open staff positions in our IT department. These open positions relate in turn to our work to update our 20-year-old association management system, as well as our outdated website and other IT functions. We are currently working with a technology consulting company to help us evaluate IT needs throughout NYSBA and determine the appropriate resources, staffing and skill-sets required to master and manage the most advanced new systems.

Adaptable and dependable IT systems and state-of-the-art websites are more important than ever for professional organizations such as NYSBA. The changes that we contemplate in IT will ensure that our data is accurate and readily available and can be used to make smart and strategic decisions that help us retain and recruit members. We hope to roll out a new website in 2019 that

will allow us to present trusted NYSBA content most effectively and streamline web commerce, membership and program registration functions. Together, these projects will provide a much-improved IT experience for members, potential members and the public – and for NYSBA leadership and staff.

NYSBA CLE

It is exciting to report that beginning this month, all NYSBA CLE programs in New York City are based at Convene, located at 810 Seventh Avenue at 53rd Street. The sleek Convene space includes state-of-the-art classroom spaces as well as comfortable lounge areas featuring complimentary beverages and snacks. Over the past year, we explored many options to create a home base for our New York City CLE programs. We believe that our partnership with Convene offers the most convenient and practical setting for our program participants. No CLE provider in New York City offers a comparable environment.

Building upon the large inventory of New York-specific content, Senior Director of Continuing Legal Education & Law Practice Management Katherine Suchocki and or CLE Committee, ably chaired by James Barnes, have done a spectacular job of coordinating and marketing our offerings. Their efforts helped NYSBA sell more than one million dollars of online programming in 2018, a goal never before achieved. Also, thanks to their initiative, we will very shortly be moving our online programming to a new state-of-the-art platform that will give our customers a significantly enhanced CLE experience.

Annual Meeting

This Annual Meeting week has been a whirlwind of meetings, programs, receptions and dinners. I am gratified to have seen so many of you participating in these events and connecting with other members of our profession in this setting. Our staff, led ably by Executive Director Pamela McDevitt, did an exceptional job of coordinating and planning and I am most grateful for their hard work and dedication. Special recognition goes to Director of Section and Meeting Services Patricia B. Stockli and Kimberly A. McHargue, executive assistant to the executive director, who worked tirelessly to make the Annual Meeting a success.

While programs, meetings and networking may be the focus of Annual Meeting for our members, selling exhibitor space at the event is an increasingly important non-dues revenue opportunity for NYSBA. I hope you had a chance to visit the new exhibitor space in Rhinelander North this year. As I mentioned above, thanks to the hard work of MCI, space for the Annual Meeting was entirely sold out for the first time ever.

I am pleased to report that planning for the 2020 annual meeting is already underway with a view towards spending resources efficiently and in a manner that creates opportunities for as many members as possible to participate. To that end, plans are in the works for a single gala-style dinner open to all members, in lieu of the Thursday evening House Dinner and Saturday evening President's Dinner. President-Elect Hank Greenberg is working on the event with John Gross, the immediate past president of the New York Bar Foundation and chair of the dinner planning committee, as well as past Presidents Stephen P. Younger, Vincent E. Doyle III and others.

Representing NYSBA

Since my last report, I have been pleased to represent NYSBA at many events honoring lawyers who have made special contributions to our profession. Among the events I attended were:

- The New York County Lawyers Association Edward Weinfeld Award Luncheon, at which chief judge of the Federal District Court for the Eastern District of New York Dora Irrizarry was honored;
- The Haywood Burns Award ceremony at CUNY School of Law in Long Island City, at which our Committee on Civil Rights presented the 2018 Haywood Burns Memorial Award to Esmeralda Simmons, executive director of the Center for Law and Social Justice at Medgar Evers College, in recognition of her work in advocacy, community education, coalition-building and public policy campaigns on behalf of underserved communities;
- The Bar Association of Erie County Reception in Buffalo honoring retired Court of Appeals Judge Eugene Pigott;
- The Scales of Justice Academy Scholarship Reception at Fordham University School of Law, at which NYSBA's Family Law Section was honored for its substantial support over the years;
- The Foundation for the Judicial Friends, Inc. annual Rivers, Toney, Watson Dinner;
- The joint dinner meeting of the Nassau and Suffolk County Bar Associations Executive Committees at the Nassau County Bar Association in Garden City;
- A luncheon at Patterson Belknap with NYSBA Vice President Taa Grays, arranged by past President Stephen Younger, with approximately 50 Patterson associates in connection with our large firm membership initiative;
- Our Bridging the Gap CLE program at our new New York City CLE home location in midtown Manhattan;
- The Albany County Bar Holiday Party;
- The joint holiday party of the New Rochelle, Port Chester, Rye, Harrison, Larchmont and Mamaroneck Bar Associations at the John Jay Mansion in Rye; and
- The NYSBA staff holiday pizza party at the Bar Center in Albany.

With the determined support and assistance of Ronald Minkoff, I participated in multiple conference calls with various ABA committees and entities concerning NYSBA's resolution seeking adoption of best practices for online legal document providers. In the spirit of cooperation, we adopted many proposed revisions and are hopeful that our resolution will be adopted by the ABA House at the end of January, resulting in Best Practice Guidelines for online legal document providers which will afford consumers certain protections and reliability.

I was pleased to attend a number of meetings of NYSBA committees, section executive committees, working groups and task forces and participated in many of their conference calls. It is always inspiring and gratifying to witness so many colleagues working to improve our profession, make the law more effective, support the rule of law, enhance access to justice and make our world a little bit better. Additionally, I had the extraordinary opportunity to meet with various congressional leaders and their staff members on January 2nd and 3rd in Washington, D.C. at swearing-in and reception ceremonies for the new Congress.

Last month, I was very honored to receive the New York County Lawyers Association's prestigious Boris Kostelanetz President's Medal at their Annual Dinner. Participation in local bar associations is extremely valuable both personally and professionally, and I am humbled to receive such recognition for contributions to the legal profession.

In closing, I would be remiss if I failed to acknowledge the extraordinary support and counsel I receive from President-Elect Hank Greenberg. His advice is always thoughtful and sound, his support unwavering, his friendship unshakeable.

The next meeting of the House of Delegates will occur on Saturday, April 13, 2019 at the Bar Center in Albany. I look forward to seeing you there.

Respectfully submitted,

A handwritten signature in black ink that reads "Michael Miller". The signature is written in a cursive style with a prominent initial "M" and a long, sweeping underline.



Staff Memorandum

**HOUSE OF DELEGATES
Agenda Item #3**

Attached for your reference are the financial statements for the period ending February 28, 2019.

**NEW YORK STATE BAR ASSOCIATION
2019 OPERATING BUDGET
TWO MONTHS OF CALENDAR YEAR 2019**

REVENUE

	2019 BUDGET	ADJUST- MENTS	2019 BUDGET AS ADJUSTED	UNAUDITED RECEIVED 2/28/2019	% RECEIVED 2/28/2019	2018 BUDGET	UNAUDITED RECEIVED 2/28/2018	% RECEIVED 2/28/2018
MEMBERSHIP DUES	10,050,000		10,050,000	8,877,657	88.33%	10,050,000	8,745,309	87.02%
SECTIONS:								
Dues	1,302,000		1,302,000	1,182,145	90.79%	1,341,574	1,136,135	84.69%
Programs	3,160,640		3,160,640	797,800	25.24%	2,894,561	782,112	27.02%
INVESTMENT INCOME	478,000		478,000	(17,554)	-3.67%	477,000	-12,910	-2.71%
ADVERTISING	219,000		219,000	43,251	19.75%	296,000	36,619	12.37%
CONTINUING LEGAL EDUCATION	3,130,000		3,130,000	718,024	22.94%	3,635,000	914,798	25.17%
USI AFFINITY PAYMENT	2,196,800		2,196,800	368,241	16.76%	2,262,000	366,128	16.19%
ANNUAL MEETING	850,000		850,000	946,483	111.35%	930,000	826,543	88.88%
HOUSE OF DELEGATES & COMMITTEES	78,250		78,250	26,837	34.30%	211,500	34,265	16.20%
PUBLICATIONS, ROYALTIES AND OTHER	268,200		268,200	66,998	24.98%	296,500	31,327	10.57%
REFERENCE MATERIALS	1,274,000		1,274,000	100,082	7.86%	1,310,000	117,906	9.00%
TOTAL REVENUE	23,006,890	0	23,006,890	13,109,964	56.98%	23,704,135	12,978,232	54.75%

EXPENSE

	2019 BUDGET	ADJUST- MENTS	2019 BUDGET AS ADJUSTED	UNAUDITED EXPENDED 2/28/2019	% EXPENDED 2/28/2019	2018 BUDGET	UNAUDITED EXPENDED 2/28/2018	% EXPENDED 2/28/2018
SALARIES & FRINGE	9,382,242		9,382,242	1,438,331	15.33%	10,105,550	1,446,719	14.32%
BAR CENTER:								
Rent	284,000		284,000	31,766	11.19%	287,000	31,766	11.07%
Building Services	230,750		230,750	46,155	20.00%	238,250	27,164	11.40%
Insurance	162,000		162,000	25,354	15.65%	142,000	33,298	23.45%
Taxes	2,750		2,750	740	26.91%	5,250	-3,828	-72.91%
Plant and Equipment	862,000		862,000	84,728	9.83%	904,600	132,604	14.66%
Administration	539,100		539,100	88,239	16.37%	607,600	107,034	17.62%
SECTIONS	4,466,940		4,466,940	525,219	11.76%	4,198,850	568,084	13.53%
PUBLICATIONS:								
Reference Materials	306,752		306,752	45,836	14.94%	389,050	29,374	7.55%
Journal	360,200		360,200	46,331	12.86%	378,200	89,964	23.79%
Law Digest	172,300		172,300	29,637	17.20%	187,800	31,642	16.85%
State Bar News	135,300		135,300	14,468	10.69%	242,300	22,227	9.17%
MEETINGS:								
Annual Meeting	338,500		338,500	1,498,711	442.75%	345,800	1,374,874	397.59%
House of Delegates, Officers and Executive Committee	519,300		519,300	107,203	20.64%	526,950	107,712	20.44%
COMMITTEES:								
Continuing Legal Education	1,659,000		1,659,000	201,686	12.16%	1,711,950	208,615	12.19%
LPM / Electronic Communication Committee	55,950		55,950	7,375	13.18%	72,800	9,896	13.59%
Marketing / Membership	924,350		924,350	167,644	18.14%	798,100	142,297	17.83%
Media Services	30,450		30,450	3,843	12.62%	98,900	17,630	17.83%
All Other Committees and Departments	2,574,705		2,574,705	440,605	17.11%	2,556,410	310,539	12.15%
TOTAL EXPENSE	23,006,589	0	23,006,589	4,803,871	20.88%	23,797,360	4,687,611	19.70%
BUDGETED SURPLUS	301	0	301	8,306,093		(93,225)	8,290,621	

NEW YORK STATE BAR ASSOCIATION
STATEMENTS OF FINANCIAL POSITION
AS OF FEBRUARY 28, 2019

<u>ASSETS</u>	<u>UNAUDITED</u> <u>2/28/2019</u>	<u>UNAUDITED</u> <u>2/28/2018</u>	<u>UNAUDITED</u> <u>12/31/2018</u>
<u>Current Assets:</u>			
General Cash and Cash Equivalents	14,372,025	13,522,757	15,567,756
Accounts Receivable	239,268	162,632	230,010
Prepaid expenses	1,237,194	729,268	1,627,608
Royalties and Admin. Fees receivable	329,779	327,667	644,691
Total Current Assets	16,178,266	14,742,324	18,070,065
<u>Board Designated Accounts:</u>			
<u>Cromwell Fund:</u>			
Cash and Investments at Market Value	2,387,890	2,352,388	2,191,231
Accrued interest receivable	0	0	0
	2,387,890	2,352,388	2,191,231
<u>Replacement Reserve Account:</u>			
Equipment replacement reserve	1,117,391	1,117,056	1,117,337
Repairs replacement reserve	794,241	794,002	794,202
Furniture replacement reserve	219,915	219,849	219,904
	2,131,547	2,130,907	2,131,443
<u>Long-Term Reserve Account:</u>			
Cash and Investments at Market Value	23,717,068	22,951,474	21,745,927
Accrued interest receivable	0	0	147,237
	23,717,068	22,951,474	21,893,164
<u>Sections Accounts:</u>			
Section Accounts Cash equivalents and Investments at market value	3,720,662	3,604,633	3,699,977
Cash	1,454,725	1,350,163	-3,453
	5,175,387	4,954,796	3,696,524
<u>Fixed Assets:</u>			
Furniture and fixtures	1,431,781	1,380,096	1,431,781
Leasehold Improvements	1,368,781	1,368,781	1,368,781
Equipment	7,620,889	8,292,022	7,554,673
Telephone	107,636	107,636	107,636
	10,529,087	11,148,535	10,462,871
Less accumulated depreciation	9,145,140	8,892,286	9,118,640
Net fixed assets	1,383,947	2,256,249	1,344,231
Total Assets	50,974,105	49,388,138	49,326,658
<u>LIABILITIES AND FUND BALANCES</u>			
<u>Current liabilities:</u>			
Accounts Payable & other accrued expenses	1,529,891	1,427,572	1,016,651
Deferred dues	0	15	8,382,450
Deferred income special	653,845	884,615	692,307
Deferred grant revenue	27,406	34,630	27,406
Other deferred revenue	99,028	67,624	1,228,772
Unearned Income - CLE	29,221	22,441	57,487
Payable To The New York Bar Foundation	6,545	7,007	28,915
Total current liabilities & Deferred Revenue	2,345,936	2,443,904	11,433,988
<u>Long Term Liabilities:</u>			
Accrued Pension Costs	0	0	0
Accrued Other Postretirement Benefit Costs	7,153,910	7,601,026	7,128,910
Accrued Supplemental Plan Costs and Defined Contribution Plan Costs	326,197	369,739	296,197
Total Liabilities & Deferred Revenue	9,826,043	10,414,669	18,859,095
<u>Board designated for:</u>			
Cromwell Account	2,387,890	2,352,388	2,191,231
Replacement Reserve Account	2,131,547	2,130,907	2,131,443
Long-Term Reserve Account	16,236,961	14,980,709	14,320,820
Section Accounts	5,175,387	4,954,796	3,696,524
Invested in Fixed Assets (Less capital lease)	1,383,947	2,256,249	1,344,231
Undesignated	13,832,330	12,298,420	6,783,314
Total Net Assets	41,148,062	38,973,469	30,467,563
Total Liabilities and Net Assets	50,974,105	49,388,138	49,326,658

New York State Bar Association
Statement of Activities
For the Two Months Ending February 28, 2019

	<u>February 2019</u>	<u>February 2018</u>	<u>December 2018</u>
REVENUES AND OTHER SUPPORT			
Membership dues	8,877,657	8,745,309	9,902,972
Section revenues			
Dues	1,182,145	1,136,135	1,292,120
Programs	797,800	782,112	2,529,827
Continuing legal education program	744,401	914,798	3,240,221
Administrative fee and royalty revenue	428,096	391,199	2,483,276
Annual meeting	946,483	826,543	838,408
Investment income	3,095	4,181	1,580,794
Reference Books, Formbooks and Disk Products	100,082	117,906	1,076,377
Other revenue	98,597	89,495	518,422
	<hr/>	<hr/>	<hr/>
Total revenue and other support	13,178,356	13,007,678	23,462,417
PROGRAM EXPENSES			
Continuing legal education program	326,729	351,184	2,307,567
Graphics	280,098	323,719	1,749,965
Government relations program	84,676	82,839	483,561
Law, youth and citizenship program	11,967	13,277	76,021
Lawyer assistance program	22,152	16,486	108,395
Lawyer referral and information services	20,054	18,977	122,216
Law practice management services	20,744	4,762	88,689
Media / public relations services	55,429	69,477	350,259
Marketing and Membership services	317,121	301,624	1,485,399
Pro bono program	24,639	41,504	208,883
Local bar program	16,718	16,804	103,730
House of delegates	104,223	105,740	431,481
Executive committee	2,980	1,972	57,322
Other committees	36,535	56,757	634,270
Sections	525,219	568,084	3,853,509
Section newsletters	13,829	20,401	160,727
Reference Books, Formbooks and Disk Products	138,754	120,055	794,391
Publications	90,435	143,832	648,945
Annual meeting expenses	1,498,711	1,374,874	274,263
	<hr/>	<hr/>	<hr/>
Total program expenses	3,591,013	3,632,368	13,939,593
MANAGEMENT AND GENERAL EXPENSES			
Salaries and fringe benefits	628,568	499,312	3,907,677
Pension plans and other employee benefit plan costs	56,046	111,026	(131,456)
Rent and equipment costs	232,365	133,952	1,118,192
Consultant and other fees	212,763	170,074	903,249
Depreciation and amortization	56,300	112,600	1,294,000
Other expenses	26,816	28,276	176,382
	<hr/>	<hr/>	<hr/>
Total management and general expenses	1,212,858	1,055,240	7,268,044
CHANGES IN NET ASSETS BEFORE INVESTMENT TRANSACTIONS AND OTHER ITEMS			
	8,374,485	8,320,070	2,254,780
Realized and unrealized gain (loss) on investments	2,306,013	(167,197)	(2,603,313)
CHANGES IN NET ASSETS			
	10,680,498	8,152,873	(348,533)
Net assets, beginning of year	<hr/>	<hr/>	<hr/>
	30,467,564	27,749,522	30,816,097
Net assets, end of year	<hr/>	<hr/>	<hr/>
	41,148,062	35,902,395	30,467,564



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #5

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Standards of Attorney Conduct.

The Committee on Standards of Attorney Conduct (COSAC) is in the process of a comprehensive review of the Rules of Professional Conduct. In 2018, COSAC published for comment draft amendments to the rules relating to (a) conflicts of interest and (b) tribunals. COSAC received comments from several individuals and entities (attached to the committee's report) and revised its draft to take into account the comments received. It made further revisions to its proposals after it made an informal presentation at the November 2018 House meeting.

At the January 2019 House meeting, the House approved amendments to Rules 1.0, 1.7, 1.8, 1.10 (with the exception of a proposal regarding lateral hires), 1.11, 1.12 and 6.5 of the Rules of Professional Conduct. At this meeting, the House will consider the balance of the report.

The proposed amendments may be summarized as follows:

CONFLICTS

- ***Rule 1.10.*** In Rule 1.10, which governs imputation of conflicts among lawyers in a law firm, permit screening to avoid imputation of lateral-hire conflicts.

TRIBUNALS

- ***Rule 1.16(c)(5).*** Amend the test for when a lawyer may withdraw because a client has failed to pay fees. The existing test permits withdrawal only when a client "deliberately disregards" an agreement or obligation to the lawyer as to expenses or fees. The amended test would instead permit a lawyer to withdraw if "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled."

- **Rule 3.3(c).** Insert a proviso that a lawyer’s duty to remedy false testimony or criminal or fraudulent conduct before a tribunal ends at the conclusion of the proceeding.
- **Rule 3.4(a).** Insert a new provision prohibiting a lawyer from knowingly participating in or counseling the “the unlawful destruction or unlawful deletion of any document having potential evidentiary value.”
- **Rule 3.4(e).** Amend the existing prohibition on presenting or threatening “criminal charges solely to obtain an advantage in a civil case” so that it prohibits presenting “criminal or disciplinary charges to obtain an advantage in a civil matter, *if those charges are not advanced in good faith or are unrelated to the civil matter.*”
- **Rule 3.6(c).** Amend the introduction to the list of permitted forms of trial publicity in Rule 3.6(c) so that it reads “*Notwithstanding* paragraph (a)” rather than “Provided that the statement complies with paragraph (a).” The amendment will make Rule 3.6(c) a true safe harbor.

Comments on the proposals are attached.

A representative of the committee will present the report at the April 13 meeting.

(From COSAC Conflicts Report, January 2019)

Rule 1.10 **Imputation of Conflicts of Interest**

Overview

COSAC proposes the following four changes to Rule 1.10:

- (A) Remove imputation for personal conflicts;
- (B) Permit screening to avoid imputation of lateral-hire conflicts;
- (C) Avoid imputation of conflicts to a firm that is no longer associated with any lawyers who worked on a conflicting matter, but continues to have information regarding the matter in its databases or paper files, provided the firm meets certain conditions; and
- (D) Move Rule 1.10(h), which is not an imputation rule, to Rule 1.8.

Each of these proposals is explained below. In addition, for reasons set forth in the discussion of our proposal to amend Rule 1.11(d), relating to imputation of conflicts of current government employees, COSAC proposes to add a new paragraph (i) to Rule 1.10 and to amend Comment [7] to that Rule.

Proposal to remove imputation for personal conflicts

COSAC proposes to eliminate New York's minority rule that categorically imputes to associated lawyers all conflicts that arise from a lawyer's own financial, business, property or other personal interest ("personal conflicts"). New York's inflexible rule is shared by only five other states: Alabama, California, Georgia, Mississippi, and Texas. All other states appear to have adopted the position in ABA Model Rule 1.10(a) that such conflicts are not ordinarily imputed to the law firm as a whole.

The New York rule is an unrealistic standard that creates a conflict where, as Comment [3] to ABA Model Rule 1.10 puts it, "neither questions of client loyalty nor protection of confidential information are presented." Many personal conflicts affecting one lawyer in a firm pose no risks whatsoever to clients of other lawyers in the firm. For example, if a spouse of a lawyer in a large firm works for the contractual counterparty of the firm's client, or if the strong religious or political beliefs of one lawyer in the firm would prevent that lawyer from working on a particular matter, there is typically no risk that the independent professional judgment of other lawyers in the firm would be affected.

New York's rule imputing personal conflicts has been the subject of numerous ethics opinions, and has resulted in imputation (and hence disqualification of an entire firm) that often seems unwarranted in light of the minimal risks presented. *See, e.g.*, N.Y. State 900 (conflicts imputed from lawyer serving as a mediator); N.Y. State 881, 890, 895, and 941 (conflicts with lawyer's spouse imputed to firm); N.Y. State 925 (conflicts arising from lawyer's business relationship with law partner's adversary imputed to firm); N.Y. State 968 (conflict imputed from government lawyer with personal claim against agency for imposing furlough program); N.Y. State 994 (conflict imputed from part-time football coach where firm represents clients with claims against town); *see also* N.Y. State 798 and 909 (concluding that legislator-law enforcement conflicts are *not* imputed to firm because prohibition arises from Rule 8.4 and not from one of the conflicts rules).

Nevertheless, to ensure that client interests will be protected in the unusual cases in which personal conflicts in fact do present risks to client loyalty or confidentiality, COSAC proposes amending Rule 1.10(a) to provide for a safeguard. The safeguard is that the rule would provide for non-imputation of personal conflicts only if, "under the circumstances, a reasonable lawyer would conclude that there is no significant risk that the representation will be materially limited or that the independent professional judgment of the participating lawyers in the firm will be adversely effected."

The formulation we propose was previously proposed by COSAC in 2008 and varies from ABA Model Rule 1.10 in two ways: (1) COSAC expands the ABA term "personal interest" to the more descriptive phrase already in New York's Rule 1.7, "a lawyer's own financial, business, property or other personal interest"; and (2) COSAC replaces the ABA's language "does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm" with the language quoted above, which we believe is clearer and expressly provides for an objective, "reasonable lawyer" test rather than a subjective determination.

COSAC also considered variations on the ABA language from other jurisdictions, such as the District of Columbia's change from "materially limiting" to "adversely affecting," and North Dakota's adoption of a definition of a "personal conflict" to be a conflict "created by a lawyer's interests other than those arising from the representation of other clients or the owing of fiduciary duties to some third party." These changes do not seem to justify a further departure from the ABA Model Rule, and COSAC decided not to propose them.

COSAC also proposes to make two parallel changes to New York's Comments to Rule 1.10. First, COSAC proposes to add all of ABA Comment [3], which explains why personal conflicts generally should not be imputed. Second, COSAC proposes to expand New York Comment [4] to include a sentence from the ABA Comment making clear that there is no imputation of personal conflicts if a lawyer is personally disqualified "because of events before the person became a lawyer, for example, work that the person did while a law student." This later provision was removed from COSAC's proposed New York Comments after the New York Courts rejected COSAC's 2008 proposal not to impute most personal conflicts.

Proposal for screening to remove imputation arising from lateral hire conflicts

COSAC proposes that New York join more than a dozen other states whose rules provide that screening, with various conditions, will prevent imputation of conflicts from lateral-hire lawyers.¹

Current Comment [4A] to New York Rule 1.10 notes the following rationale for permitting screening to avoid imputation of lateral-hire conflicts:

[4A] ... If the principles of imputed disqualification were defined too strictly, the result would be undue curtailment of the opportunity of lawyers to move from one practice setting to another, of the opportunity of clients to choose counsel, and of the opportunity of firms to retain qualified lawyers. For these reasons, a functional analysis that focuses on preserving the former client's reasonable confidentiality interests is appropriate in balancing the competing interests.

New York's current version of Rule 1.10(a) imputes a lateral-hire lawyer's conflicts arising out of his or her former representation of a client in all cases except where "the newly associated lawyer did not acquire any information protected by Rule 1.6 or 1.9(c) that is material to the current matter" — an extremely limited exception that typically applies only to a very junior lawyer who did only abstract legal research for a former client and was exposed to no client confidences.

COSAC believes that Rule 1.10 should permit screening to avoid imputation of a lateral hire's conflicts with appropriate safeguards. The current rule creates a significant obstacle to the movement of lawyers between firms, particularly early in their careers. Obtaining a former client's consent to a conflict is frequently difficult, because the moving lawyer generally has no continuing relationship with the former client or with his or her former firm, and because neither the firm nor the client has any particular interest in promptly providing the required waiver.

As noted, in addition to the many states that have adopted lateral-hire screening by rule, some states have approved of screening for lateral hires via state court decisions. Further, federal courts in New York have repeatedly approved of screening to cure lateral-hire conflicts in decisions declining to disqualify counsel. *E.g., Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005) (approving of screening to cure conflict from laterally-hired of-counsel lawyer); *Maricultura del Norte, S. de R.L. de C.V. v. Worldbusiness Capital, Inc.*, 2015 WL 1062167, at *15 (S.D.N.Y. Mar. 9, 2015) (surveying case law in Second Circuit and concluding that "[i]n every other post-*Hempstead* case I have located within this

¹ States providing that screening, with various conditions, will prevent imputation of conflicts from all lateral-hire lawyers are Connecticut, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah, Washington and Wyoming. Further, as discussed in more detail below, another group of states have adopted rules providing for screening for lateral-hire lawyers who had limited participation in the prior matter, with the limited participation expressed in various standards, such as "did not have primary responsibility" or had "no substantial responsibility." These states are Arizona, California, Colorado, Indiana, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Tennessee, and Wisconsin.

circuit, the district court, after considering whether an ethical screen was sufficient, has found the presumption rebutted and denied a motion to disqualify”). COSAC proposes to codify these federal court decisions in New York’s Rule 1.10(a), which would then be applicable in state courts and in disciplinary proceedings and would provide clear guidance for the day-to-day practice of law firms in New York State.

Under the current New York Rules, screening is permitted to avoid imputation of conflicts of former government lawyers (Rule 1.11(b)), former judges, arbitrators and law clerks (Rule 1.12(d)), and lawyers who have received significantly harmful information from prospective clients (Rule 1.18(d)(2)). We propose to import into Rule 1.10 the screening procedures set forth in Rules 1.11, 1.12 and 1.18, with two exceptions noted below.

COSAC does not propose that New York adopt the screening procedures in ABA Model Rule 1.10, because they have some unusual provisions requiring: (i) “a statement that review may be available before a tribunal”; (ii) “an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures”; and (iii) periodic certifications of compliance with the screening procedures, to be provided to the former client at reasonable intervals upon the former client’s written request. These ABA provisions, adopted in full by only three states (Connecticut, Idaho, and Wyoming), are cumbersome and could encourage disputes over compliance. The ABA provisions, moreover, provide for a different screening procedure in Rule 1.10 from the screening procedure provided in Rules 1.11, 1.12 and 1.18. Finally, the ABA provisions appear to COSAC to be unduly complicated and unjustified. We see no substantial reason to distinguish among laterally-hired former government lawyers, laterally-hired former law clerks, and laterally-hired lawyers previously employed at other private law firms.

In 2008, COSAC proposed a limited form of lateral-hire screening. Under that proposed rule, if the lateral hire had acquired information that was material to the current matter while at his or her former firm, then screening could avoid imputation only if “a reasonable lawyer would conclude that any such information, if used, is not likely to be to the former client’s material disadvantage.” COSAC no longer supports that proposal. Apparently a compromise, the 2008 proposal would not apply to many representations and would often require a fairly searching inquiry into the information that the lateral hire had acquired in the course of the former representation, thus potentially jeopardizing the very information the screening proposal was designed to protect. Further, the proposal would not alleviate the difficulties in obtaining consent from former clients in the vast majority of cases. Under Rule 1.9, a lateral hire conflict exists in the first place only where a lawyer “has acquired information protected by Rule 1.6 [*i.e.*, confidential client information] ... that is material to the matter,” generally measured by whether the lawyer worked on a matter.

As a consequence, many firms already believe that if a lateral-hire lawyer had very limited involvement in a matter (such as a junior associate who did only legal research on discrete issues), the risk of conflicts is limited and can be managed by screening under the current rules. State court decisions have declined to disqualify lawyers who are properly screened in such circumstances. *E.g.*, *Nimkoff v. Nimkoff*, 18 A.D.3d 344, 346, 797 N.Y.S.2d 3, 6 (1st Dep’t 2005) (if party seeking to avoid disqualification proves that any information acquired by the lateral “is unlikely to be significant or material in the litigation,” then “a ‘Chinese Wall’ around

the disqualified [lateral] lawyer would be sufficient to avoid firm disqualification”); see *Matter of Jalcia G.*, 41 Misc. 3d 931, 971 N.Y.S.2d 831 (Bronx County Family Ct. 2013) (permitting Legal Aid Society to oppose a former client in a substantially related matter as long as (i) all LAS personnel working on current matter avoid any contact with records relating to representation of former client and (ii) all LAS staff who worked on former client’s matter are screened from current matter). See also *Kassis v. Teacher’s Ins. & Annuity Ass’n*, 93 N.Y.2d 611, 617 (1999) (disqualifying firm in particular matter but saying, in dicta, that screening at a lateral hire’s new firm would be sufficient to avoid disqualification where new firm can prove that “any information acquired by the disqualified lawyer is unlikely to be significant or material in the litigation”).

In response to concerns expressed when COSAC presented its proposals to the NYSBA House of Delegates in November 2018 for informational purposes, COSAC has drafted an alternative to its prior proposal. Specifically, concern was expressed that COSAC’s proposed provision regarding lateral-hire screening did not sufficiently protect a former client in a classic (albeit rare) case in which a client’s lawyer, in the midst of a hotly litigated matter, moves to the opposing firm. As an alternative, COSAC has drafted language that would limit the situations in which screening would avoid imputation of lateral-hire conflicts. Under the alternative provision – which COSAC does not favor – screening will not overcome a former client’s objection to the conflict arising from the extreme conflict that caused concern. In other words, under COSAC’s alternative proposal, screening will *not* substitute for the former client’s informed consent if the lawyer with “primary responsibility” for a litigated matter moves to the opposing law firm while the matter is pending. Screening in that situation will not overcome the former client’s objection even though the lawyer who had primary responsibility at the former firm will play no role whatsoever on the matter at the new firm and will have no access to the new firm’s confidential information about the matter.

Several states have adopted limitations on screening similar to COSAC’s alternative proposal. Arizona and Indiana limit screening to lawyers who did not have “primary responsibility” for the matter that is causing the disqualification; New Jersey and Tennessee bar screening in litigated matters where the lawyer had “primary responsibility” (New Jersey), or was “substantially involved” (Tennessee), in the representation.²

In addition another ten states have adopted screening for lateral-hire lawyers who had limited participation in the prior matter, with the limited participation expressed in various standards,

² Arizona Rule 1.10(d) and Indiana Rule 1.10(c) both limit lateral-hire screening to situations in which the lateral hire lawyer “did not have primary responsibility for the matter that causes the disqualification.” New Jersey Rule 1.10(c) permits screening to cure lateral-hire conflicts only where “the matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility”; the term “primary responsibility” is defined to mean “actual participation in the management and direction of the matter at the policy-making level or responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions.” Tennessee Rule 1.10(d) specifies that screening is unavailable where “(1) the disqualified lawyer was substantially involved in the representation of a former client; and (2) the lawyer’s representation of the former client was in connection with an adjudicative proceeding that is directly adverse to the interests of a current client of the firm; and (3) the proceeding between the firm’s current client and the lawyer’s former client is still pending at the time the lawyer changes firms.”

such as “performed no more than minor or isolated services” or “did not have a substantial role in the matter.”³

To be clear, COSAC opposes any exception to lateral screening. If any exception is adopted, however, COSAC believes that the exception should be narrow and should above all be objective and clearly expressed, so as not to swallow the rule by uncertainty. Thus, proposed Rule 1.10(c)(3) – which is an alternative to Rule 1.10(c)(2) without subparagraph (c)(3) – would specify that “screening as set forth in subparagraphs (i)-(iv) is not available to prevent imputation of conflicts where the matter involves an adjudicative proceeding for which the newly associated lawyer had *primary responsibility*.” A proposed new Comment [5F] would explain this provision.

COSAC also proposes two modifications to the screening procedures set out in existing New York Rules 1.11, 1.12 and 1.18.

First, COSAC proposes a self-executing provision that would permit the law firm to postpone sending the screening notice to lateral-hire’s former client if the notice would disclose confidential information protected by Rule 1.6. The notice would usually disclose confidential information, for example, (a) in merger and acquisition matters where the new firm was working for a potential bidder in an auction where the lateral-hire had previously worked for the target on the sale process, but the bidder’s interest has not yet been disclosed; or (b) in litigation matters where the new firm was in the process of investigating a claim that might be asserted against the lateral-hire’s former client. When the exception allowing a delayed screening notice applies, the notice would be provided to the former client once the confidential aspect of the work was otherwise disclosed to the former client or was otherwise no longer subject to protection under Rule 1.6. (As set forth below, COSAC is also recommending a parallel change to the screening procedures in Rules 1.11, 1.12 and 1.18.)

COSAC’s proposal for delayed notice to former clients roughly resembles a District of Columbia provision permitting a law firm to file the required notice with the D.C. Disciplinary Council if a firm’s current client has requested confidentiality, with the notice to be released to the former client when the new matter is no longer confidential. This D.C. provision is designed for situations where the existing or new matter at the lateral-hire’s new firm is confidential. It is a sensible innovation, but it would require constructing new infrastructure in New York authorizing disciplinary authorities to receive and embargo such notices. We do not believe that infrastructure would be worth the cost, because we think our proposed self-executing provision will achieve the same purpose without the new infrastructure.

Second, COSAC’s proposal for screening procedures does not include the requirement set forth in current New York Rules 1.11 and 1.12 that “there are no other circumstances in the particular representation that create an appearance of impropriety.” As explained in the discussions below with respect to Rules 1.11 and 1.12, the “appearance of impropriety” provision is not found in New York Rule 1.18 and incorporates the former Code’s otherwise now-discarded appearance-

³ The states setting out language regarding lateral-hire lawyers who had limited participation in the prior matter are California, Colorado, Massachusetts, Minnesota, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, and Wisconsin.

of-impropriety test. COSAC recommends that this vague highly subjective test also be eliminated from Rules 1.11 and 1.12.

We also propose amending the New York Comments to incorporate the substance of the Comments on these screening procedures that appear in the existing Comments to Rule 1.11 (Comments [6] – [7B]), Rule 1.12 (Comments [3] – [5]) and Rule 1.18 (Comments [7] – [8]). Proposed new Comment [5D] to Rule 1.10 modifies language taken from the existing Comments to Rules 1.11, 1.12 and 1.18. Here is the unmodified fourth sentence of existing Comment [7A] to New York Rule 1.11:

[7A] ... If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. ...

The identical language currently appears in Comment [4C] to Rule 1.12 and in Comment [7C] to Rule 1.18. In new Comment [5D] to Rule 1.10, COSAC proposes to modify this sentence by inserting an exception for disclosures permitted or required by other Rules (*e.g.*, permitted by Rules 1.6(b)(4) and 1.9(c), or required by Rule 3.3(a) or (b)). The modified sentence would thus read as follows:

[5D] ... *Except as these Rules would permit or require with respect to a current client or when information has become generally known,* If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent effort to institute or maintain screening will not avoid the firm's disqualification.

Thus, disclosure within a firm that is permitted by another Rule, such as disclosure to secure legal advice about compliance with the Rules or other law by a lawyer associated in a firm, would not be subject to the consequences set forth in the Comment. COSAC believes this qualification was likely implied in any event. (COSAC also proposes identical amendments to Comment [7A] to Rule 1.11 and Comment [4C] to Rule 1.12, and proposes to amend Comment [7C] to Rule 1.18 in a slightly different way – see below.)

In the Public Comment Conflicts Report, COSAC also proposed replacing the phrase “confidential information *about* the matter,” which is currently in Comment [5D] to Rule 1.10, with the phrase “confidential information *material* to the matter,” so that an immaterial leak or breach in screening procedures would not nullify the entire screen. (The same phrase also appears in Comment [7A] to Rule 1.11, Comment [4C] to Rule 1.12, and Comment [7C] to Rule 1.18.) The NYSBA Ethics Committee disagreed with this proposal. It stated that lawyers and the public were already skeptical about the efficacy of information walls and that adopting a “materiality” standard would weaken the incentive to make sure that walls are impermeable. COSAC is persuaded that adding a materiality standard is unnecessary and potentially unwise, and COSAC has withdrawn that recommendation. The phrase “confidential information about the matter” will therefore remain unchanged in all of the Comments in which it currently appears.

Proposal to clarify that conflicts based on former-client information solely in databases will not be imputed

We propose that Rule 1.10(b) be amended to clarify that, when all the lawyers who have worked on a matter have left a firm, the firm will not be disqualified from representing a party adverse to the former client based solely on information residing only in the firm's databases, as long as no lawyer presently at the firm has actual knowledge of, or has accessed, the information in the firm's databases. Under the current version of New York Rule 1.10(b), a law firm is prohibited from representing a person adverse to its former client "if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter." We think that standard is too harsh.

Our proposed amendment codifies the result in a recent New Jersey appellate decision, *Estate of Francis P. Kennedy v. Rosenblatt*, 149 A.3d 5 (N.J. Super. Ct. App. Div. 2016). The court there found that New Jersey's version of this rule was not violated where all the lawyers who had worked on the earlier matter had left the firm, even though the firm continued to maintain materials in its electronic files relating to the former representation, because no lawyer presently at the firm had accessed the electronic files (other than to determine that the files existed). The Superior Court reached that conclusion because New Jersey's version of Rule 1.10(b) refers to the condition that "any *lawyer* remaining in the firm has information protected by [Rule] 1.6 or [Rule] 1.9(c) that is material to the matter" (emphasis added), but New Jersey's version does not refer to the *firm* having such information.

The New Jersey interpretation cannot easily be reached under New York's current version of Rule 1.10, but the New Jersey approach makes sense in an age when the vast majority of the client information in law firm files is maintained electronically and those files are not typically deleted as lawyers who worked on matters leave the firm. COSAC therefore recommends amending Rule 1.10(b) to accord with New Jersey's practical approach to electronic files.

Proposal to move Rule 1.10(h) to Rule 1.8

Rule 1.10(h) currently reads:

A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

This rule is not a rule governing imputation of conflicts to lawyers in a law firm, but rather a special conflict rule dealing with family conflicts. The rule, which does not appear in the ABA Model Rules at all, presumably appears in Rule 1.10 in order to *avoid* imputation, which would otherwise apply if it appeared in Rule 1.8. If, as we propose, personal conflicts are not subject

to imputation, then Rule 1.10(h) can safely be moved to Rule 1.8, which deals with “Current Clients: Specific Conflict of Interest Rules.” That is where the rule logically belongs.

The NYSBA Ethics Committee recommended changing the phrase “the other lawyer” in this sentence to “the related lawyer” for clarity. COSAC does not see this change as necessary or particularly clarifying and therefore recommends no change in the language of Rule 1.10(h).

Redlined proposal to amend Rule 1.10(a), (b), (c), (h) and (i) and Comments [3], [4], [5], [5A] and [7]

We propose to revise New York Rule 1.10(a), (b), (c), (h) and (i) and the accompanying Comments (in relevant part) to read as follows:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein, unless:

(1) the prohibition is based on a lawyer’s own financial, business, property or other personal interests within the meaning of Rule 1.7(a)(2), and

(2) under the circumstances, a reasonable lawyer would conclude that there is no significant risk that the representation will be materially limited or that the independent professional judgment of the participating lawyers in the firm will be adversely affected.

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if ~~the firm~~ ~~or~~ any lawyer remaining in the firm has actual knowledge of, or has accessed, information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless

(1) the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter; or

(2) the newly associated lawyer’s current firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from

participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the former client to enable it to ascertain compliance with the provisions of this Rule, except that if the notice would disclose confidential information protected by Rule 1.6 the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the former client or is otherwise no longer protected by Rule 1.6;

[Note from COSAC: Below is a proposed new paragraph (c)(3), which would be combined with paragraph (c)(2) as an alternative to paragraph (c)(2) standing alone. In other words, COSAC is offering two screening choices: paragraph (c)(2)(i)-(iv) alone, or paragraph (c)(2)(i)-(iv) plus paragraph (c)(3).]

(3) Notwithstanding paragraph (c)(2), the screening measures set forth in subparagraphs (c)(2)(i)-(iv) of this Rule are not available to prevent imputation of conflicts where the matter is a litigation, arbitration or other adjudicative proceeding for which the newly associated lawyer had primary responsibility at the prior firm.

....

~~(h) [Moved to Rule 1.8(l).] A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.~~

(i) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11 and not by this Rule.⁴

⁴ New paragraph (i) in Rule 1.10 is explained below in the section of this report focusing on COSAC's recommended amendments to Rule 1.11.

Comment

....

Principles of Imputed Disqualification

....

[3] ~~[Reserved.]~~ The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. For example, where one lawyer in a firm could not provide competent and diligent representation to a given client because of strong political beliefs, but that lawyer will do no work on the matter and the political beliefs of that lawyer are unlikely to materially limit the representation by others in the firm or to adversely affect their independent professional judgment, the firm should not be disqualified. On the other hand, if an opposing corporate party in a matter were owned by a lawyer in the law firm, and there is a significant risk that others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation by others in the law firm where the disqualified lawyer is prohibited from acting because of events that occurred before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. *See* Rules 1.0(t), 5.3.

Lawyers Moving Between Firms

....

[5] Paragraph (b) permits a law firm, under certain circumstances, to represent a client with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, under Rule 1.7 the law firm may not represent a client with interests directly adverse to those of a current client of the firm. Moreover, the firm may not represent the client where the matter is the same or substantially related to a matter in which (i) the formerly associated lawyer represented the client, and (ii) the firm or any lawyer currently in the firm has actual knowledge of, or has accessed, information protected by Rule 1.6 ~~and~~ or Rule 1.9(c) that is material to the matter.

[5A] If all lawyers who have worked on a matter or have confidential information about a matter have left a firm, then the fact that the law firm retains confidential information in its electronic databases or paper files regarding the matter will not by itself give rise to a

conflict as long as (i) no lawyer currently in the firm has reviewed that information, and (ii) the firm takes appropriate steps to limit access to such information. Merely accessing files to determine whether information exists, without reading the confidential information, would not ordinarily constitute reviewing confidential information material to the matter. ~~In addition to information that may be in the possession of one or more of the lawyers remaining in the firm, information in documents or files retained by the firm itself may preclude the firm from opposing the former client in the same or substantially related matter.~~

[5B] Rule 1.10(c) permits a law firm to represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or the firm with which the lawyer was previously associated, represented a client whose interests are materially adverse to that client, provided that either (i) the newly associated lawyer did not acquire any confidential information of the previously represented client that is material to the current matter, or (ii) the newly associated lawyer is timely and effectively screened from the work on the current matter pursuant to Rule 1.10(c)(2). Situations in which a lawyer may accept employment from an adversary's law firm may arise in many circumstances, such as law firm mergers or geographical moves, or desires for changes in practice areas dictated by personal circumstances and may involve future assignment to matters unrelated to the lawyer's previous work on the matters creating adversity. Nevertheless, despite the possibility of subsequent screening, lawyers must continue to consider the ethical implications of discussing employment with an adversary's counsel while a matter is pending. See Comment [10] to Rule 1.7.

[5C] Paragraph (c)(2) contemplates the use of screening procedures that permit the law firm of a personally disqualified lawyer to avoid imputed disqualification. See Rule 1.0(t) for the definition of "screened" and "screening." A firm seeking to avoid disqualification under this Rule should consider its ability to implement, maintain, and monitor the screening procedures described by paragraph (c)(2) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will avoid imputed disqualification, a firm should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. Although the size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraph (c)(2).

[5D] In order to prevent any lawyer in the firm from acquiring confidential information about the matter from the newly associated lawyer, it is essential that notification be given and screening procedures implemented promptly. If the matter requiring screening is already pending before the personally disqualified lawyer joins the firm, the procedures required by this Rule should be implemented before the lawyer joins the firm. If a newly associated lawyer joins a firm before a conflict requiring screening arises, the requirements of this Rule should be satisfied as soon as practicable after the conflict arises. Except as these Rules would permit or require with respect to a current client or when information has become generally known, if any lawyer in the firm acquires confidential information material to the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not avoid the firm’s disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the personally disqualified lawyer and other lawyers in the firm in a given matter.

[5E] To enable the former client to determine compliance with the Rule, notice to the former client generally should be given as soon as practicable after the need for screening becomes apparent. Where the notice would disclose confidential information of the firm’s current client, however, the firm may postpone providing the required notice until the information is disclosed to the former client or is otherwise no longer protected under Rule 1.6. The notice must be given promptly thereafter in order to obtain the protection from imputation provided by Rule 1.10(c)(2).

[Note from COSAC: Below is proposed new Comment [5F], which should be adopted only if the House of Delegates also approves both subparagraph (c)(2)(i)-(iv) and new subparagraph (c)(3) (the limiting paragraph). In other words, if the House of Delegates approves subparagraph (c)(2)(i)-(iv) plus subparagraph (c)(3), then COSAC also recommends that the House approve the following new Comment [5F] to explain subparagraph (c)(3).]

[5F] Paragraph (c)(3) makes clear that the screening procedures set forth in paragraph (c)(2) are ineffective to prevent the imputation of conflicts where a lawyer having primary responsibility for a litigation, arbitration or other adjudicative proceeding moves during the proceeding to a law firm representing a party whose interests are materially adverse to the interests of that lawyer’s former client in the same or a substantially related matter. Screening under the terms described in paragraph (c)(2) and Comments [5C]-[5E] remains available to cure conflicts, however, in (i) all non-litigated matters and (ii) litigated matters where a law firm is hiring lawyers (such as associates or collaterally involved partners) who worked on the matter at the opposing law firm matter but did not have “primary responsibility” for the matter. The lawyer with primary responsibility for the matter will generally be the lawyer who had the primary decision-making role in the matter.

....

MEMORANDUM

January 3, 2019

To: NYSBA Executive Committee

Cc: Kathy Baxter, NYSBA General Counsel

From: NYSBA Committee on Standards of Attorney Conduct (“COSAC”)
Roy D. Simon, Co-Chair of COSAC
Barbara S. Gillers, Co-Chair of COSAC
Joseph E. Neuhaus, Chair of COSAC Review Committee

Subject: COSAC Proposals Regarding Rules 1.16, 3.3, 3.4, and 3.6

The New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”) is engaged in a comprehensive review of the New York Rules of Professional Conduct (the “Rules”). On July 19, 2018, COSAC circulated for public comment the proposals below to amend the Rules 1.16, 3.3, 3.4, and 3.6 of the New York Rules of Professional Conduct and related Comments. COSAC did not receive any public comments during the 90-day comment period.

COSAC presented the proposals to the House of Delegates at its November 2018 meeting for informational purposes. During the discussion in the House of Delegates, one member of the House expressed opposition to COSAC’s proposal (pp. 4-7 below) to insert a new clause into Rule 3.3(c) providing that a lawyer’s duty to remedy false testimony or criminal or fraudulent conduct before a tribunal ends at the conclusion of the proceeding. (The current version of Rule 3.3(c) does not specify any termination date for that duty.) COSAC acknowledges this member’s concern but has not revised its proposal. Another House member pointed out the significance of COSAC’s proposed amendments to Rule 3.4(e) (pp. 8-9 below) but did not take a position on it.

COSAC is now forwarding this report to the Executive Committee of the Association for consideration by the House of Delegates at its January 2019 Meeting. Below are COSAC’s proposals in the same form in which they were circulated for public comment and presented to the House of Delegates in November 2018. We summarize the issues that led COSAC to propose each particular amendment, and set out the proposed amendments in legislative style, striking out deleted language (in red) and underscoring added language (in blue).

Summary of Proposals

COSAC proposes the following changes to the black letter Rules, along with corresponding changes to the Comments:

- **Rule 1.16(c)(5).** Amend the test for when a lawyer may withdraw because a client has failed to pay fees. The existing test permits withdrawal only when a client “deliberately disregards”

an agreement or obligation to the lawyer as to expenses or fees. The amended test would instead permit a lawyer to withdraw if “the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.”

- **Rule 3.3(c).** Insert a proviso that a lawyer’s duty to remedy false testimony or criminal or fraudulent conduct before a tribunal ends at the conclusion of the proceeding.
- **Rule 3.4(a).** Insert a new provision prohibiting a lawyer from knowingly participating in or counseling the “the unlawful destruction or unlawful deletion of any document having potential evidentiary value.”
- **Rule 3.4(e).** Amend the existing prohibition on presenting or threatening “criminal charges solely to obtain an advantage in a civil case” so that it prohibits presenting “criminal *or disciplinary* charges to obtain an advantage in a civil matter, *if those charges are not advanced in good faith or are unrelated to the civil matter.*”
- **Rule 3.6(c).** Amend the introduction to the list of permitted forms of trial publicity in Rule 3.6(c) so that it reads “*Notwithstanding* paragraph (a)” rather than “Provided that the statement complies with paragraph (a).” The amendment will make Rule 3.6(c) a true safe harbor.

Rule 1.16

Declining or Terminating Representation

New York Rule 1.16(c)(5) currently provides that a lawyer may withdraw from representing a client (with court permission, if necessary) when “the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.” When read literally, this standard can prevent an attorney from seeking to withdraw if a client cannot afford to pay fees or expenses. In *United States v. Parker*, 439 F.3d 81 (2d Cir. 2006), for example, the court said: “Non-payment of legal fees, without more, is not usually a sufficient basis to permit an attorney to withdraw from representation.” *See also* N.Y. State 783 n.2 (2005) (withdrawal may “not necessarily be appropriate where the client is financially unable to pay”); N.Y. State 719 (“Mere failure to pay an agreed fee, which is not deliberate, is not a ground for requesting” permission to withdraw). The “deliberately disregards” standard thus has the potential to create a hardship on an attorney where a client is willing, but nonetheless unable, to meet financial obligations to the attorney.

However, many courts and ethics opinions have recognized this potential hardship for attorneys who are not getting paid and have interpreted the phrase “deliberately disregards” in a manner more favorable to attorneys. The most expansive discussion of “deliberately” appears in N.Y. State 598 (1989), where the question was: “May an attorney withdraw from employment in a litigated matter because of nonpayment of fees where the client is financially unable to make payment?” The Committee recognized that “a client’s “mere failure to pay an agreed fee, which is not deliberate,” does not warrant withdrawal by the attorney (*citing* N.Y. State 212 (1971)). Nevertheless, the Committee said:

COSAC Proposed Amendments to Rules 1.16, 3.3, 3.4 and 3.6
January 3, 2019

[W]e conclude that *a client's non-payment of fees because of an inability to pay may in certain circumstances be deemed a "deliberate" breach of the client's obligation* to counsel and, therefore, warrant permissive withdrawal from the representation by counsel. Such withdrawal will be appropriate in a litigated matter only if the attorney has provided clear notice to the client of the attorney's desire to withdraw, taken reasonable steps to avoid foreseeable prejudice to the client and obtained permission from the tribunal to withdraw [Emphasis added.]

Noting that the "key word is 'deliberately,'" the Committee in N.Y. State 598 elaborated on the meaning of that word, stating:

... We believe that a client "deliberately disregards an agreement or obligation" to pay legal fees whenever the failure is conscious rather than inadvertent, and is not *de minimus* in either amount or duration. A client's knowing and substantial failure to satisfy his or her financial obligations to a lawyer would justify the lawyer's withdrawal from employment ***This would be so even where the failure results from inability to pay.*** [Emphasis added.]

N.Y. State 598 also cited and expressly agreed with half a dozen judicial decisions that had expressed the same position, including two New York decisions, *Boyle v. Revici*, 1987 WL 28707 (S.D.N.Y. Dec. 16, 1987) (permitting withdrawal where clients had owed lawyers \$25,000 for several months and had "not been able to assure them that the \$25,000 or amounts due for future work will be paid at any time"), and *Cullen v. Olins Leasing*, 91 A.D.2d 537, 457 N.Y.S.2d 9 (1st Dep't 1982) (law firm retained by insurance company to defend insureds was permitted to withdraw after insurance company was placed in liquidation and could not pay fees).

More recent cases are in accord with the cases cited in N.Y. State 598 – *see, e.g., Aveos Fleet Performance Inc. v. Vision Airlines, Inc.*, 2013 WL 12250347 (N.D.N.Y. March 19, 2013) (client's "inability to make significant contributions to a large, outstanding debt for a term of several months" is "sufficient to satisfy good cause" for withdrawal, *citing Boyle* and N.Y. State 598); *Riverside Capital Advisers, Inc. v. First Secured Capital Corp.*, 2010 WL 4167222 (Nassau County Sup. Ct. Oct. 5, 2010) (granting motion to withdraw where "the non-payment issue has existed for some time" but client "cannot pay").

Although N.Y. State 598 was decided based on DR 2-110(C)(1)(f), which was the predecessor to current Rule 1.16(c)(5), it remains the leading ethics opinion on the meaning of "deliberately," and it continues to be cited. *See, e.g., N.Y. State 1061* (2015) (noting that "lawyers are not compelled to provide free legal services to all clients," *citing N.Y. State 598* for the proposition that "client's knowing and substantial failure to satisfy his or her financial obligations to a lawyer would justify lawyer's withdrawal from employment"); N.Y. State 910 (2012) (*citing N.Y. State 598* for discussion of "when a failure to pay a legal fee is 'deliberate'").

To bring the wording of Rule 1.16(c)(5) more closely into line with the interpretation by courts and ethics committees, and to avoid financial hardship to attorneys while also remaining fair to clients, COSAC proposes to amend Rule 1.16(c)(5) as follows:

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when . . . (5) the client ~~deliberately disregards an agreement or obligation to the lawyer as~~

~~to expenses or fees~~ fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.

This change makes New York's provision nearly identical to ABA Model Rule 1.16(b)(5). (The only difference is that the ABA lead-in clause uses the word "if" instead of "when" – a difference in style, not substance.) This formulation reflects the conclusion in N.Y. State 598 that a "knowing and *substantial failure* to satisfy his or her financial obligations to a lawyer would justify the lawyer's withdrawal from employment ... even where the failure results from inability to pay" (emphasis added). It also enhances protection of clients by adding the condition that a lawyer seeking to withdraw for nonpayment of fees must first give the client "reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." Where a client is unable to pay, the "warning" clause will give the client a reasonable time to borrow money, solicit financial support from relatives, or otherwise find a way to pay past due and future fees.

In litigation matters, current Rule 1.16(d) will provide an additional safeguard for clients. In matters pending before a tribunal, lawyers will ordinarily need to obtain court permission to withdraw pursuant to Rule 1.16(d), which provides: "If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission." Thus, courts will be able to ensure that lawyers do not abandon clients without substantial financial cause.

In non-litigation matters, a lawyer will have the option to withdraw when a client substantially fails to pay fees when due or otherwise substantially fails to abide by financial obligations in a retainer agreement or letter of engagement. COSAC does not think lawyers will abuse this right any more than lawyers abuse the dozen other grounds for optional withdrawal in Rule 1.16(c). Moreover, lawyers will often have a financial incentive to work out a payment plan or other arrangement that will enable the lawyers to get paid and keep the client rather than withdraw.

To preserve consistency with the amended text, COSAC also suggests amending current New York Comment [8] to match the ABA Model Rule version of Comment [8] to Rule 1.16. New York Comment [8] to Rule 1.16 would thus be modified to provide as follows:

[8] A lawyer may withdraw if the client ~~refuses~~ fails substantially to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Rule 3.3

Conduct Before a Tribunal

Rule 3.3(a)(3) and Rule 3.3(b) both obligate lawyers, in specified narrow circumstances, to reveal information to remedy misconduct by a client or other person, even if the revelation would otherwise be prohibited by Rule 1.6. If a lawyer comes to know that the client or another witness called by the lawyer "has offered material evidence" and "the lawyer comes to know of its falsity," *see* Rule 3.3(a)(3), or if a lawyer who represents a client before a tribunal "knows that a person

intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding,” *see* Rule 3.3(b), then the lawyer “shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal,” *see* Rule 3.3(a) and (b). Disclosure to the tribunal is a momentous step, fraught with serious consequences for both lawyer and client, and even less drastic remedial measures can telegraph problems with a case. Therefore, it is important for lawyers to know when the duty to make disclosure or take other remedial measures ends.

ABA Model Rule 3.3(c) addresses the end point by providing that the duties in paragraphs (a) and (b) “continue to the conclusion of the proceeding.” COSAC recommended that language to the Courts in 2008, but the Courts declined to adopt that recommendation, and did not substitute any alternative end point. Thus, New York Rule 3.3 does not specify when a lawyer’s duty to take reasonable remedial measures under Rules 3.3(a) and 3.3(b) terminates. Rather, New York Rule 3.3(c) says only that the duties stated in paragraphs (a) and (b) of Rule 3.3 “apply even if compliance requires disclosure of information otherwise protected by Rule 1.6” (New York’s basic confidentiality rule).

Various New York ethics opinions have attempted to interpret Rule 3.3 to articulate a workable and practical time limit under Rule 3.3(c). These opinions have done so by limiting the phrase “remedial measures” to situations where disclosure or other measures will actually remedy the problem of false evidence. In N.Y. State 831 n.4 (2009), for example, the Committee said:

We believe the obligation extends for as long as the effect of the fraudulent conduct on the proceeding can be remedied, which may extend beyond the end of the proceeding — but not forever. If disclosure could not remedy the effect of the conduct on the proceeding, we do not believe the Rule 3.3 disclosure duty applies.

N.Y. State 837 (2010) revisited this issue and said:

16. ... [T]he duration of counsel's obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used. ... *[T]he endpoint of the obligation nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available*, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3. [Emphasis added; citations omitted.]

N.Y. City 2013-2 (2013) reached a similar conclusion, saying:

[T]he obligations under Rule 3.3(a)(3) survive the “conclusion of a proceeding” where the false evidence was presented. ABA Rule 3.3, cmt. [13] clarifies that the phrase “conclusion of a proceeding” means “when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.” We believe that the courts’ rejection of an explicit statement that the obligation ends when the proceeding ends, makes this evident.

COSAC Proposed Amendments to Rules 1.16, 3.3, 3.4 and 3.6
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N.Y. City 2013-2 thus concluded that Rule 3.3(c) requires a lawyer to disclose false evidence (i) to the tribunal to which the evidence was presented “as long as it is still possible to reopen the proceeding based on this disclosure,” or (ii) “to opposing counsel where another tribunal could amend, modify or vacate the prior judgment.”

COSAC believes that these tests inject too much uncertainty into determining whether disclosing false testimony to a tribunal or to opposing counsel, or taking other remedial measures, is still required after the conclusion of a proceeding. For the same reason, COSAC rejected the Texas version of Rule 3.3(c), which provides that a lawyer’s duties continue until remedial legal measures are “no longer reasonably possible.” See Texas Rule 3.03(c) (“The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible”). Comment [14] to Texas Rule 3.04 elaborates on this test by saying: “The time limit on the obligation to rectify the presentation of false testimony or other evidence varies from case to case but continues as long as there is a reasonable possibility of taking corrective legal actions before a tribunal.”

In COSAC’s view, Rule 3.3(c) should articulate a bright line to mark the end point of the duty to take remedial measures under Rule 3.3(a) and (b). The certainty of a bright line is necessary both (i) to protect clients against belated accusations of perjury that may have no appreciable effect beyond damaging a client’s reputation, and (ii) to protect lawyers against discipline for failing to attempt remedial measures when a lawyer believes in good faith that remedial measures are no longer possible. COSAC therefore recommends that New York amend Rule 3.3(c) to match ABA Model Rule 3.3(c), which ends the lawyer’s obligation upon the “conclusion of the proceeding.” On balance, COSAC believes this bright line termination of the duty – at the conclusion of the proceeding – is preferable to New York’s current open-ended formulation, and is preferable to alternative formulations based on when remedial measures are no longer possible.

COSAC recognizes that, under the proposed formulation, some fraud on tribunals may go unremedied because the false evidence or other impropriety will not be discovered until after the conclusion of a proceeding. New York has a long tradition of a strong duty of confidentiality. Indeed, DR 7-102(B) in the old New York Code of Professional Responsibility did not ordinarily allow disclosure even to remedy a client’s fraud on a court if the information to be disclosed was protected as a confidence or secret.¹ New York did not appear to suffer from frequent unremedied fraud on tribunals under the Code. Nevertheless, COSAC is separately considering whether Rule 1.6 should include a discretionary exception to the duty of confidentiality that would permit (but not

¹ DR 7-102(B) provided as follows:

- B. A lawyer who receives information clearly establishing that:
1. The *client* has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer *shall reveal the fraud* to the affected person or tribunal, *except when the information is protected as a confidence or secret.*
 2. A person *other than the client* has perpetrated a fraud upon a tribunal *shall reveal the fraud* to the tribunal. [Emphasis added.]

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require) a lawyer to disclose confidential information to the extent the lawyer reasonably believes necessary to remedy a fraud on a tribunal or a wrongful conviction based upon such a fraud.

In any event, COSAC believes that a lawyer who has offered false evidence will most often come to know of its falsity per Rule 3.3(a)(3) before the conclusion of the proceeding (perhaps when an opposing party's cross-examination exposes the false evidence). Likewise, COSAC believes that a lawyer usually will learn before the conclusion of a proceeding that a person has engaged in criminal or fraudulent conduct related to the proceeding. Although no empirical evidence is available on these points, COSAC believes that the potential damage to confidentiality by *requiring* disclosure (or other remedial measures) after the conclusion of a proceeding outweighs the potential gain to the system of justice by retaining New York's current version of Rule 3.3(c). Trust is the fundamental bedrock of a strong attorney-client relationship, and the broader the exceptions to the duty of confidentiality, the more difficult it will be for attorneys to gain and maintain the trust of their clients.

Thus, although there are arguments that requiring a lawyer to take remedial measures beyond the conclusion of the proceeding furthers the interests of justice, COSAC believes that adopting the ABA version of Rule 3.3(c) and the related Comments strikes a better balance and will provide needed clarity and certainty in this important area. In reviewing the Rules of Professional Conduct adopted by other states, COSAC noted that only three other states (Florida, Texas, and Wisconsin) require remedial measures after the close of proceedings. In contrast, more than thirty jurisdictions terminate Rule 3.3 remedial duties under Rule 3.3(a) and (b) at the conclusion of the proceeding, in line with ABA Model Rule 3.3(c) – *see* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_3_authcheckdam.pdf or <https://bit.ly/2kfYBpx>.

Accordingly, COSAC recommends amending Rule 3.3(c) as follows:

- (c) The duties stated in paragraphs (a) and (b) [continue to the conclusion of the proceeding, and](#) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

COSAC also recommends adopting ABA Comment [13] as new Comment [13] to New York Rule 3.3, with revisions to refer not only to “when a final judgment in the proceeding has been affirmed on appeal,” as in the ABA Comment, but also more broadly to “when a final judgment or order in the proceeding has been entered after appeal.” Thus, new Comment [13] would explain the time limit in Rule 3.3(c) as follows:

[\[13\] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment or order in the proceeding has been entered after appeal or the time for review has passed.](#)

(Existing New York Comment [13] to Rule 3.3, which is on a different topic and has no equivalent in the ABA Model Rules, would be renumbered as New York Comment [13B]. That renumbering

would maintain consistency with ABA numbering and would continue New York’s convention of using capital letters to mark Comments adopted by New York but not by the ABA.)

Rule 3.4

Fairness to Opposing Party and Counsel

COSAC has two recommendations for changes to Rule 3.4.

First, amend Rule 3.4(a) to add the following new subparagraph (a)(6):

A lawyer shall not . . . [\(6\) knowingly participate in or counsel the unlawful destruction or unlawful deletion of any document or material having potential evidentiary value.](#)

The reason for the additional language is that Rule 3.4(a) currently prohibits *creating* false evidence, but does not prohibit *destroying* evidence. It should prohibit both, and should also prohibit the destruction of documents or materials that are not technically “evidence” but that have potential evidentiary value.

The recommended amendment would also align New York Rule 3.4(a) more closely with ABA Model Rule 3.4(a), which provides that a lawyer shall not “(a) unlawfully obstruct another party’s access to evidence or *unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. . .*” (Emphasis added.)

However, despite the general advantages of uniformity with the ABA (and with jurisdictions that have adopted ABA Model Rule 3.4), COSAC does not recommend adding the ABA clause “unlawfully obstruct another party’s access to evidence.” COSAC does not recommend adopting that clause because it duplicates other subparagraphs of New York Rule 3.4(a) not found in ABA Model Rule 3.4. For example, New York Rule 3.4(a)(1) provides that a lawyer shall not “suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce,” and New York Rule 3.4(a)(3) provides that a lawyer shall not “conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.” New York subparagraphs (a)(1) and (a)(3) of Rule 3.4 thus already effectively prohibit a lawyer from unlawfully obstructing another party’s access to evidence.

(Current New York Rule 3.4(a)(6), which prohibits a lawyer from knowingly engaging in “other illegal conduct or conduct contrary to these Rules,” would be moved to Rule 3.4(a)(7), since a catch-all provision should come at the end of a rule.)

Second, COSAC recommends amending Rule 3.4(e) by expanding the rule to cover disciplinary charges and by narrowing the rule via adding two qualifying phrases. As amended, Rule 3.4(e) would provide:

A lawyer shall not ... (e) present, participate in presenting, or threaten to present criminal [or disciplinary](#) charges to obtain an advantage in a civil matter, [if those charges are not advanced in good faith or are unrelated to the civil matter.](#)

COSAC believes that, in its current form, Rule 3.4(e) is both too broad and too narrow. It is too broad because it might preclude a threat to honestly report a crime in an effort to obtain restitution for the harm done by the crime, something that Comment [5] to Rule 3.4 expressly says would not be improper. Comment [5] says:

[5] The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), *the lawyer's threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done*. But extortion is committed if the threat involves conduct of the third person *unrelated* to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute). [Emphasis added.]

Since COSAC believes that Comment [5] correctly states the law, COSAC also believes that the current blanket ban on threatening to present criminal charges is too broad.

Rule 3.4(e) is also too narrow because it does not prohibit threatening meritless or unrelated *disciplinary* charges in ways that might be as improperly coercive as a threat to present criminal charges and might also pressure lawyers who are the target of such charges to act in ways that conflict with their clients' best interests. For example, a lawyer who has been threatened with disciplinary charges might seek to settle litigation or might yield to a negotiating demand in a transaction on terms unfavorable to the lawyer's client in the hope (or on the express condition) that the opposing lawyer would then drop the threat to file meritless disciplinary charges.

COSAC's proposed changes to Rule 3.4(e) attempt to rectify these two problems.

Rule 3.6

Trial Publicity

COSAC recommends a small but significant amendment to Rule 3.6(a). Unlike the ABA Model Rule, New York Rule 3.6(a) prohibits *all* extrajudicial statements (with one exception, discussed below) that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding." A lawyer violates this rule if the lawyer knows, or reasonably should know, that the lawyer's statement (a) will be disseminated by public communication and (b) will meet the "substantial likelihood" test just quoted.

ABA Model Rule 3.6(a) uses the same overarching "substantial likelihood" test, but creates a safe harbor for an enumerated list of certain types of statements that the ABA Rule says do not run afoul of the proscription, "notwithstanding" the "substantial likelihood" test above. The types of statements listed in the ABA Model Rule for both civil and criminal cases are either innocuous or necessary types of statements, boiling down in essence to:

- charge and defense information, including names of key people involved
- anything in a public record
- the fact of a pending investigation

COSAC Proposed Amendments to Rules 1.16, 3.3, 3.4 and 3.6
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- scheduling matters
- requests for assistance in obtaining evidence, and
- warnings of danger about people involved in litigation

Additionally, in criminal cases only, the following fall within the ABA safe harbor:

- pedigree information about the accused
- information necessary to aid in apprehending the accused
- the fact, time and place of arrest, and
- the identity of investigating and arresting officers or agencies involved

New York Rule 3.6(b) contains a nearly identical list, but instead of permitting extrajudicial statements regarding the items on the list “*notwithstanding*” the “substantial likelihood” test of 3.6(a), New York instead dictates that the statements on the list may be made only “[p]rovided that the statement complies with” the “substantial likelihood” test. New York’s “provided that” language deprives lawyers of a useful bright-line test and safe harbor, and therefore chills public statements of the type that are included on the list, for fear that even public statements falling within the safe harbors might be second-guessed based on the “substantial likelihood” test. Providing this safe harbor without the qualification would allay that fear, and would also help harmonize the New York Rules with the ABA Model Rules.

Accordingly, COSAC recommends the following change to Rule 3.6(c):

~~(c) Provided that the statement complies with paragraph (a);~~ Notwithstanding paragraph (a), a lawyer may state the following without elaboration

DISPUTE RESOLUTION SECTION

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From: Deborah Masucci, Chair of the Dispute Resolution Section
Re: Proposed Changes to New York Rule 3.4 (e)
Date: January 7, 2019

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The Executive Committee of the New York State Bar Association's Dispute Resolution Section ("the Section"), and the Section's Ethics Committee, reviewed the Committee on Standards of Attorney Conduct's ("COSAC") proposed change to New York Rule 3.4(e).

The Section lauds the efforts of COSAC to clarify the obligations of counsel under the Rules of Professional Conduct. This area involves competing considerations. On one hand, principled bargaining, whether in negotiation or mediation, can involve coordinated discussions with an eye towards satisfying the interests of all parties. On the other hand, threatening disciplinary or criminal action could generate a counterproductive culture of coercion, manipulation and recrimination.

Rule 3.4(e) is significant to the field of Dispute Resolution, which includes negotiation and mediation. It is the experience of members of this Section that threats of this kind do, in fact, surface, at times, during negotiations and mediations. For purposes of regulating the culture of negotiation and mediation in which counsel are involved, and to retain or enhance the civility of those proceedings while also furthering the interests of all parties and the legitimate interests of counsel, the Section provides the following comment.

First, the Section supports the inclusion of the phrase "**or disciplinary**" in the Rule. Prohibition of a threat of this kind is entirely apt. In this context, it can be helpful to consider all pertinent and material information, including the risk of discipline or criminal action.

Second, the Section recommends that the balance of the proposed change should be withdrawn for further study. Recognizing that there are challenges on either side of this equation -- and that this is an area with serious impact on the domains of dispute resolution with potentially criminal legal implications -- the Section recommends that the additional changes be withdrawn for further study. The Section, in particular, recommends study and comment by the Criminal Justice Section of the NYSBA. The Section offers a representative to study the potential changes and its impact on negotiations within the context of mediation and settlement discussion.



Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #5

To supplement the other materials submitted with respect to the Committee on Standards of Attorney Conduct, attached are comments submitted by the Criminal Justice Section.

March 22, 2019

Recommendations of the Criminal Justice Section

The Criminal Justice Section has been requested by other sections to review and comment on certain proposed revisions to the Rules of Professional Responsibility. Following are our recommendations and comments:

1. The Section approves the proposed revision of Rule 1.16(c)(5) broadening an attorney's ability to withdraw from a case if the client fails to perform his obligations to pay legal fees or disbursements. Failure of clients to pay legal fees is a serious economic problem for the criminal bar, particularly for the non- white collar small firm or single practitioner, many of whom are struggling. The proposal broadens the ability of an attorney to withdraw by replacing a subjective standard (when a client "deliberately disregards" his obligations) with a more objective one. We note that in court cases an attorney cannot withdraw unilaterally and must request court permission.
2. The Section disapproves of the proposed revision to Rule 3.3(c) which would terminate an attorney's obligation to report to a tribunal false testimony or fraud at the end of court (including appellate) proceedings. The Section is particularly concerned with the proposal's effect on the revelation of wrongful convictions based on police or prosecutorial misconduct. Many exonerations are based on a prosecutor's learning of and reporting misconduct well after court proceedings have ended (while the effect on a convicted client continues). We believe that the justice system, and its lawyers, have an obligation to attempt to correct decisions or verdicts, criminal or civil, based on fraud without time limitation. We recognize the concept of finality, but believe the concept of justice is paramount.
3. The Section approves the proposed addition of Rule 3.4(a) which would prohibit a lawyer from counseling or participating in the unlawful destruction or deletion of potential evidence. We note that such activity likely violates existing law.
4. The Section approves that part of the proposed revision of Rule 3.4(e) that expands the prohibition against reporting or threatening to report criminal conduct to gain an advantage in civil cases to expand the ban to include reporting or threatening to report disciplinary action. The Section disapproves that part of the proposal which would permit the reporting or threatening to report such conduct as long as the conduct was related to the matter in question and the report or threat done in good faith, a revision that would essentially swallow up the rule. The Section notes that threats of reporting criminal conduct to secure an advantage may be violative of criminal statutes. See Penal Law 135.60(4) (coercion in the second degree), Penal Law 215.15 (compounding a crime), although such cases are rarely prosecuted. We do recognize that there are reasonable arguments for permitting frank and explicit discussions about the possibility of a criminal (or disciplinary) referral rather than the veiled hints that often occur in negotiations. We also realize that such threats encourage resolution of civil matters without formal and time-consuming court proceedings, and often serve the laudable

facilitating quick compensation for deserving victims. We are troubled, however, that such threats will encourage secret settlements and thereby allow wealthy (but not poor) wrongdoers, thieves and sexual offenders for instance, to escape criminal prosecution and public scrutiny that would prevent or deter further wrongdoing. We also are concerned that such threats will coerce innocent people into paying false claims. We also note that the "good faith" standard is so vague that the rule may be unenforceable. Lastly, we note that that a distinction should be made between actual reports of criminal conduct and threats to do so. As a general rule, reporting possible criminal conduct so that police and prosecutors should consider and investigate it should be the preferred model and encouraged. Conversely, unrealized threats to report and concealment of possible wrongdoing upon a monetary payment should be discouraged.

5. The Section approves the revision of Rule 3.6(c) to allow public pre-trial comment in certain particular areas. We believe those areas concern information that is of genuine public concern and will not affect a fair trial. We do question whether the revision is necessary.

Lawrence Goldman
Chair

Criminal Justice Section Ethics and Professional Responsibility Committee



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #6

REQUESTED ACTION: Approval of the report and recommendations of the Task Force on School to Prison Pipeline.

Attached is a report from the Task Force on School to Prison Pipeline. The Task Force was appointed in 2017 to compile information about current practices with respect to school discipline, examine the current law relating to discipline, outline appropriate sanctions and restorative justice alternatives, and create “best practices” for school districts as to discipline and restorative justice.

The report provides an overview of New York Education Law §3214, which sets forth the procedures to be used by school districts in disciplining students with respect to out-of-school suspensions. The Task Force reviews studies documenting that students who are excluded from school face adverse consequences, including lower academic achievement, higher truancy, higher dropout rates, and higher contact with the juvenile justice system. These adverse impacts are experienced at higher rates by students of color, students with disabilities, and LGBTQ students.

The report reviews the use of restorative justice alternatives rather than the use of suspensions for bad behavior. While these alternatives take many forms, the aim of each is to bring individuals together in constructive dialogue to address the root of conflict. The report notes research indicates that the use of these models can result in a decrease in the use of suspensions and decrease the disparity in adverse impacts.

The Task Force makes the following recommendations:

- Education Law §3214 should be amended to permit the use of restorative justice practices in lieu of suspensions.
- School districts should review their codes of conduct to include restorative justice practices for specific code violations.
- The State Education Department should consider (1) the development of a standardized methodology for measuring disparities in discipline and report data

annually to the public and (2) develop model materials and processes that districts can use to analyze the root causes of disparities.

The report references three appendices: The proposed amendment to Education Law §3214, the December 2018 report of the New York Equity Coalition, and examples of codes of conduct. For the sake of reproduction, the appendices are not included in the printed materials, but may be accessed online at www.nysba.org/pipelinereport.

The report was posted in the Reports Community on January 2 and was presented to you on an informational basis at the January meeting. No comments have been received with respect to this report.

John H. Gross, co-chair of the Task Force, will present the report at the April 13 meeting.



John H. Gross
Partner
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Reply to Hauppauge Office

via electronic transmission

March 27, 2019

New York State Bar Association
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Re: Modifications to the Task Force on the School to Prison Pipeline Informational Report

Dear Executive Committee and House of Delegates:

In large measure, any modifications made to the initial Task Force report which was distributed on or about January 2, 2019, were editorial in nature, except for the following substantive changes:

1. Executive Summary (page 3): A paragraph was added to the end of the executive summary section urging financial support be provided by the Governor and State Legislature in support of restorative justice training as an alternative to school discipline.
2. Restorative Justice & Current Productive Practices (page 58): A few sentences were added to incorporate a report that was recently published by "The Children's Agenda" regarding the effects of exclusionary discipline and restorative justice practices in Rochester City School District.
3. Detailed Recommendation (pages 63-67): Similar to the modifications described in paragraph two above, a paragraph was added to the recommendation section regarding the decrease in student suspensions in the Rochester City School District since the implementation of its new Code of Conduct. Another paragraph was added to the end of the recommendation section to address a part of the Task Force's initial mission statement which included recommending policy regarding school resource officers. Lastly, additional revisions were made to the beginning of the recommendation section to further discuss the proposed bills by the Senate and Assembly.

Thank you for your attention to this matter.

Very truly yours,

JOHN H. GROSS, ESQ.

JHG/ran

Enclosure

**NEW YORK STATE BAR ASSOCIATION
TASK FORCE
ON THE SCHOOL TO PRISON PIPELINE¹
FINAL REPORT**

¹ Opinions expressed are those of the Task Force preparing this Report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

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I. Executive Summary

A. Task Force Mission

Sharon Gerstman, Esq., during her term as President of the New York State Bar Foundation, established the Task Force on the School to Prison Pipeline. The Task Force was charged with the following mission:

The mission of this Task Force was to compile information concerning current practices in schools regarding discipline, examine current law regarding school discipline, appropriate disciplinary sanctions, and institution of restorative justice alternatives including youth courts, and create a “best practices” for school districts regarding discipline and restorative justice.

B. Brief Synopsis of N.Y. Education Law § 3214 and the School to Prison Pipeline

New York Education Law Section 3214 sets forth the procedures that school districts may use when disciplining students for various code of conduct violations. Education Law Section 3214 also provides procedures for disciplining special education students, including but not limited to those students with an individualized education plan (“IEP”), or plan in accordance with Section 504 of the Rehabilitation Act (“504 Plan”). Currently, the only statutory form of discipline that may be issued against a student is out of school suspension. As explained in greater detail *infra*, the following disciplinary punishments may be issued:

1. Principal Suspension:

The principal of a school district may issue an out of school suspension of up to five days to a student for a code of conduct violation. Prior to issuing the suspension, the principal must advise the parent(s)/guardian(s) of the student of their rights for an informal conference in which the parent(s)/guardian(s) can question the complaining witness.

2. Superintendent’s Hearing:

If the principal deems that the code of conduct violation warrants a suspension of longer than five days, he/she can refer the violation to the Superintendent of Schools for a Superintendent’s hearing. The Superintendent or his/her designee will convene a due process hearing. During said hearing, the parent(s)/guardian(s) have the ability to cross-examine District witness(es) and call witnesses on their behalf.

3. Disciplinary Punishments for Students with Disabilities

If a student has an IEP or a 504 plan and has violated the school district's code of conduct, a manifestation hearing is held to determine whether the charged conduct was a manifestation of the IEP or 504 plan. If the charged conduct is determined to be a manifestation, then a student can be transferred to an alternative placement for no more than 45 cumulative days during a given school year. If there is no manifestation, then the student may be issued discipline like a general education student.

The "School to Prison Pipeline" has developed due in measure to the nature of these suspensions. The current system punishes misconduct by exclusion. Students with code of conduct violations are removed from the school setting and often placed into situations in which supervision, and more importantly instruction and the positive socialization effects of a school setting are not present during the day. This provides the unfortunate opportunity for students to become caught up in unacceptable and possible criminal activity. Further, whether knowingly or not, certain school districts suspend students of color and students with a disability at a greater frequency than students who are Caucasian or do not have an IEP or 504 plan. This disparate treatment of minority students and students with disabilities is shown in greater detail *infra*, in Section IV(A) entitled "Populations Subject to Disparate Treatment," through case studies and other statistical data from the United States Department of Education's Office of Civil Rights. Due to the fact that suspension is the statutorily endorsed discipline that may be issued in accordance with Education Law Section 3214, this trend will only continue to worsen unless ameliorative statutory change is effectuated.

School districts have not only suspended students for misconduct on school grounds, but have referred misconduct to law enforcement. As described more fully in Section IV(A)(1) *infra*, law enforcement referrals have increased significantly in 2018 and there is data that demonstrates implicit bias has led to high rates of referrals for students of color and/or students with a disability. Students who have been suspended or referred to law enforcement are more at risk to enter the juvenile system causing the flow of the "School to Prison Pipeline" to increase.

C. Recommendations

This Report includes the following recommendations that should be made to Education Law Section 3214. This Task Force believes that the inclusion of language in Education Law Section 3214 to permit and endorse the use of restorative justice practices in lieu of suspension of students will help rectify this growing problem of the "School to Prison

Pipeline.” By statutorily endorsing school district use of alternative disciplinary procedures to suspension, this Task Force believes that many more school districts will utilize this model to treat with student misconduct. The Task Force trusts that this will interrupt the disturbing trend of increase in the flow of the “School to Prison Pipeline.” The Task Force appreciates that there are several of the over seven hundred New York school districts that have exercised local discretion and have instituted restorative justice techniques. Our recommendation should not be taken to suggest that school districts were without independent authority to adopt restorative justice procedures.

This Task Force also recommends that school districts review their code of conducts to include the use of restorative justice practices for specific code of conduct violations. While this Task Force does not suggest a change in the law mandating the use of restorative justice practices for code of conduct violations, the New York State Education Department (“NYSED”) and the Board of Regents should undertake review of this statutory modification.

The Task Force urges that the New York State Education Department study and consider the following:

1. The development of a standardized methodology for measuring disparities in discipline at both district and school levels across the protected classes of race, gender, disability and, if possible, by LGBTQ status. NYSED would report the data annually to districts and the public.
2. The study and development of model materials and processes that districts and schools can use to analyze the root causes of the disparities demonstrated in their data. The Task Force suggests that this include information on strategies including training, services, courses, materials, consultants and best practices that have been shown to successfully reduce disparities in discipline to assist schools and/or districts in recognizing and addressing such disparities.

Finally, we urge the State Legislature and Governor to provide ample financial support to school districts’ introduction of restorative justice as an alternative to exclusionary discipline.

II. Overview of the School to Prison Pipeline

The School to Prison Pipeline Task Force (“Task Force”) of the New York State Bar Association is cognizant that student suspension from school is often the first step in a chain of events leading to undesirable consequences. In an attempt to address this important issue extant in many New York State school districts, the Task Force studied workable alternatives to student suspensions and thus urges the New York State Bar Association to affirmatively recommend that the Student Suspension statute, Education Law §3214 be amended to ensure that school districts consider employing restorative practices in their codes of conduct.

Research indicates that students who are excluded from school face dire consequences including lower academic achievement; higher truancy; higher dropout rates and a higher contact with the juvenile justice system. All of this leads to lower local and state economic growth.² In addition, the Office of Civil Rights (“OCR”) has documented that students of certain racial groups tend to be disciplined more than their peers. For example, African-American students without disabilities are more than three (3) times as likely as white peers without disabilities to be suspended or expelled.³

Statistical studies further demonstrate that students who are suspended are three times more likely to have risk of contact with the judicial system and two times more likely to drop out of school than are students who are not suspended from school. Furthermore, students with a first arrest and court appearance are four times more likely to drop out of school and students even who are treated as a juvenile in a court proceeding are seven times more likely to secure a future of adult criminal records.⁴

According to the Center for Urban Education Success, Restorative Justice Practice is an increasingly acknowledged and employed approach to school discipline, behavior, and relationships. Rather than focusing upon punitive measures, which lead to anger, shame and ostracism, Restorative Justice Practice is focused on repair and reconciliation. Its

² See generally, Russel J. Skiba, Mariella I. Arredondo, & M. Karega Rausch, *New and Developing Research on Disparities in Discipline*, DISCIPLINE DISPARITIES: A RESEARCH TO PRACTICE COLLABORATIVE AT INDIANA UNIVERSITY, March 2014.

³ U.S. DEP’T OF JUST. & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE 3 (Jan. 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>.

⁴ Fred Cheesman, *Facts about the School-to-Prison Pipeline*, NAT’L CONSORTIUM ON RACIAL AND ETHNIC FAIRNESS IN THE CTS., (2016), available at <http://www.national-consortium.org/~media/Microsites/Files/National%20Consortium/Conferences/2016/Materials/School-to-Prison-fact-sheet.ashx>; see also Steven C. Teske, & J. Brian Huff, *The Court’s Role in Dismantling the School-to-Prison Pipeline*, JUV. AND FAM. JUST. TODAY, Winter 2011, at 14-17.

principles are rooted in indigenous communities and religious traditions⁵ where the concept of justice relies on an assumption that everyone in a community is relationally connected to one another and to their community and that when a wrong has occurred, “it represents a wound in the community, a tear in the web of relationships”⁶ which requires repair. Restorative Justice Practice holds accountable everyone involved in a relationship – offenders, victims, and community members. Unlike exclusionary discipline, which separates victims and offenders, Restorative Justice Practice techniques are designed to bring these stakeholders together where they can take turns speaking in a safe listening space. Using both proactive and interventional strategies, students, teachers, and everyone else in the school community (social workers, staff, administrators, parents, school safety officers, etc.) meet in various formats, such as restorative circles, community building circles, restorative conversations and peer mediation⁷ which steers the conversations away from retribution and toward reintegrating wrongdoers back into the community. These Restorative Justice strategies are particularly beneficial in school settings where members of the community will be seeing each other repeatedly and often following a conflict.⁸ Similar to punitive discipline, Restorative Justice philosophy and practices can lead to community transformation⁹ over time, but deepened relationships and community rather than crime and isolation characterize the transformed culture.

The Late Chief Judge Judith Kaye tirelessly worked to secure legislation which would move school districts away from imposing only punitive disciplining measures on students and towards the employment of restorative practices. The New York State Bar Association should move in a direction to support legislative change making Judge Kaye’s vision a reality and to work toward the goal of dismantling the School to Prison Pipeline.

⁵ Anne Gregory & Rhona S. Weinstein, *The Discipline Gap and African Americans: Defiance or Cooperation in the High School Classroom*, 46 J. SCH. PSYCHOL. 455, 455-475 (2008).

⁶ HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 29 (2015).

⁷ Tom Cavanaugh, Patricia Vigil & Estrellita Garcia, *A Story Legitimizing the Voices of Latino/Hispanic Students and Their Parents: Creating a Restorative Justice Response to Wrongdoing and Conflict in Schools*, 47 EQUITY & EXCELLENCE IN EDUC. 565, 565-79 (2014); Anne Gregory, Russi Soffer, Easton Gaines, Aria Hurley & Neela Karikehalli, *Implementing Restorative Justice in Schools: Lessons Learned From Restorative Justice Practitioners in Four Brooklyn Schools*, BROOKLYN COMMUNITY FOUNDATION, Nov. 2016, http://www.brooklyncommunityfoundation.org/sites/default/files/lessons_learned_about_early_implementation_of_restorative_justice_in_schools_for_distribution.pdf; Allison Ann Payne & Kelly Welch, *The Effect of School Conditions on the Use of Restorative Justice in Schools*, 16 YOUTH VIOLENCE AND JUV. JUST. 224, 224-40 (2017).

⁸ Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 281-335 (2012).

⁹ Jeanne B. Stinchcomb, Gordon Bazemore & Nancy Riestenberg, *Beyond Zero Tolerance: Restoring Justice in Secondary Schools*, 4 YOUTH VIOLENCE AND JUV. JUST. 123, 123-47 (2006).

One note of caution – the Task Force does not recommend the dismantling of traditional student discipline under Section 3214 of the Education Law. There is little doubt that across New York State many school districts use the tools provided by this statute appropriately, effectively, and in accord with student due process protection.

III. Overview of the Current Law

Every board of education, board of trustees, board of cooperative educational services and county vocational extension board must adopt and amend a code of conduct to maintain order on school property¹⁰ or at a school function.¹¹ The code of conduct governs the conduct of students, teachers, school personnel, and visitors. At a minimum the code of conduct must include:

- **Conduct Guidelines:** appropriate conduct, language and dress on school property and acceptable treatment of teachers, school administrators, other school personnel, students and visitors on school property;¹²
- **Disciplinary Measures:** appropriate range of disciplinary measures that may be imposed for violation of the code;¹³
- **Roles:** roles of teachers, administrators, other school personnel, the board or other governing body, and parents;¹⁴
- **Provisions Against Bullying and Harassment:** provisions “prohibiting harassment, bullying, and/or discrimination against any student, by employees or students that creates a hostile school environment by conduct or by threats, intimidation or abuse, including cyberbullying” as defined in N.Y. Education Law § 11(8);¹⁵
- **Security Procedures:** standards and procedures to assure the security and safety of students and school personnel;¹⁶

¹⁰ School property means “[1] in or within any building, structure, athletic playing field, playground, parking lot or land contained within the real property boundary line of a public elementary or secondary school; or [2] in or on a school bus, as defined by section [142] of the vehicle and traffic law.” N.Y. EDUC. LAW § 11(1) (McKinney 2018).

¹¹ 8 NYCRR § 100.2(l)(2); School function is defined as “a school-sponsored extracurricular event or activity.” N.Y. EDUC. LAW § 11(2) (McKinney 2018).

¹² 8 NYCRR § 100.2(l)(2)(ii)(a).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* § 100.2(l)(2)(ii)(b).

¹⁶ *Id.* § 100.2(l)(2)(ii)(c).

- **Removal Procedures:** provisions for removing students and other persons who violate the code from the classroom or school property;¹⁷
- **Disruptive Pupils:** provisions “prescribing the period for which a disruptive pupil may be removed from the classroom for each incident, provided that no such pupil shall return to the classroom until the principal makes a final determination pursuant to Education Law § 3214(3-a)(c), or the period of removal expires, whichever is less;”¹⁸
- **Specific Disciplinary Measures:** disciplinary measures to be taken against those who possess or use weapons or illegal substances, use physical force, commit acts of vandalism, violate another student’s civil rights, threaten violence, or harass, bully, and/or discriminate against other students;¹⁹
- **Responding to Bullying, Harassment, and/or Discrimination:** provisions “for responding to acts of harassment, bullying, and/or discrimination against students by employees or students ..., which with respect to such acts against students by students, incorporate a progressive model of student discipline that includes measured, balanced and age-appropriate remedies and procedures that make appropriate use of prevention, education, intervention and discipline, and considers among other things, the nature and severity of the offending student’s behavior(s), the developmental age of the student, the previous disciplinary record of the student and other extenuating circumstances, and the impact the student’s behaviors had on the individual(s) who was physically injured and/or emotionally harmed;”²⁰
- **Disciplinary Procedures and Alternative Education:** provisions for the detention, suspension and removal from the classroom of students, consistent with applicable laws, including policies and procedures to ensure the continued educational programming and activities for students who are placed in detention, suspended from school or removed from the classroom;²¹
- **Reporting and Enforcement:** procedures to report and determine violations and procedures to impose and carry out disciplinary measures;²²

¹⁷ *Id.* § 100.2(l)(2)(ii)(d).

¹⁸ *Id.* § 100.2(l)(2)(ii)(e).

¹⁹ *Id.* § 100.2(l)(2)(ii)(f)-(g).

²⁰ *Id.* § 100.2(l)(2)(ii)(h).

²¹ *Id.* § 100.2(l)(2)(ii)(i).

²² *Id.* § 100.2(l)(2)(ii)(j).

- **Compliance with Other Laws:** procedures to ensure that the code and its enforcement comply with state and federal laws;²³
- **Criminal Acts:** provisions for notifying local law enforcement agencies about which code violations constitute a crime;²⁴
- **Parental Notification:** circumstances under and procedures by which persons in parental relation to the student will be notified of code violations;²⁵
- **Court Complaints:** circumstances under and procedures by which a complaint in criminal court, a juvenile delinquency petition, or person in need of supervision petition will be filed;²⁶
- **Referrals to Human Service Agencies:** circumstances under and procedures by which referrals to appropriate human service agencies are made;²⁷
- **Minimum Suspension Periods:** a minimum suspension period for students who repeatedly are substantially disruptive of the educational process or substantially interfere with the teacher’s authority over the classroom (suspending authority may reduce this period on a case-by-case basis to be consistent with any other state or federal law);²⁸
- **Violent Students:** a minimum suspension period for acts that would qualify the student as a violent pupil as defined by section 3214 of the Education Law (suspending authority may reduce this period on a case-by-case basis to be consistent with any other state or federal law);²⁹
- **Student Bill of Rights:** a bill of rights and responsibilities of students that focuses on positive student behavior and that will be annually publicized and explained to all students;³⁰

²³ *Id.* § 100.2(l)(2)(ii)(k).

²⁴ *Id.* § 100.2(l)(2)(ii)(l).

²⁵ *Id.* § 100.2(l)(2)(ii)(m).

²⁶ *Id.* § 100.2(l)(2)(ii)(n).

²⁷ *Id.* § 100.2(l)(2)(ii)(o).

²⁸ *Id.* § 100.2(l)(2)(ii)(p).

²⁹ *Id.* § 100.2(l)(2)(ii)(q).

³⁰ *Id.* § 100.2(l)(2)(ii)(r).

- **In-Service Programs:** guidelines and programs for in-service education programs for all district staff members to ensure effective implementation of the school policy on student conduct and discipline;³¹ and
- **Retaliation:** a provision “prohibiting retaliation against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.”³²

The code of conduct must be developed in collaboration with students, teachers, administrators, parent organizations, and school personnel.³³ Each school district must file a copy of its code of conduct and any amendments to the code of conduct with the Commissioner no later than thirty days after their adoption.³⁴ As set forth above, a school district’s code of conduct lays the foundation for student disciplinary procedures.

A. Education Law § 3214: Student Discipline Proceedings

The Fourteenth Amendment to the United States Constitution provides that no State shall “deprive any person of life, liberty, or property, without due process of law”³⁵ In 1975, the United States Supreme Court, in *Goss v. Lopez*, held that the Fourteenth Amendment “protects the citizen against the State itself and all of its creatures – Boards of Education not excepted.”³⁶ More importantly, in such case, the Court held for the first time that a student’s entitlement to a public education is a property interest protected by the Fourteenth Amendment’s Due Process Clause “which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.”³⁷

Furthermore, in *Goss v. Lopez*, the Court noted that “young people” who attend the public school system “do not ‘shed their constitutional rights’ at the schoolhouse door.”³⁸ More specifically, the Court observed that a “10-day suspension from school is not *de minimis* ... and may not be imposed in complete disregard of the Due Process Clause.” Although a short suspension is far less serious than an expulsion, the Court found that “[n]either the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may

³¹ *Id.* § 100.2(l)(2)(ii)(s).

³² *Id.* § 100.2(l)(2)(ii)(t).

³³ *Id.* § 100.2(l)(1)(i).

³⁴ *Id.* § 100.2(l)(2)(iii)(a).

³⁵ U.S. CONST. amend. XIV, § 1.

³⁶ *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

³⁷ *Id.*

³⁸ *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.”³⁹

The Court’s holding in *Goss v. Lopez* set the ground rules for state disciplinary procedures. While attempting to balance the interests of students and schools, the Court held that:

Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.⁴⁰

The ruling established in *Goss v. Lopez* affords students the right to due process prior to being suspended or expelled but it does not afford them the utmost protections under the law. For example, student discipline proceedings need not take the form of a judicial or quasi-judicial trial and students do not have the right to legal counsel or the right to confront and cross-examine witnesses for a suspension of 10 days or less.⁴¹

Even though the *Goss v. Lopez* decision focused primarily on suspensions of ten days or less, the Court nonetheless recognized that “[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.”⁴² Therefore, the Court left it up to the states to determine exactly what “more formal procedures” are required for long-term suspensions or expulsions.

Overall, the Court in *Goss* established the principle that fundamental fairness is inherent to the student discipline process. Therefore, *Goss v. Lopez* remains the cornerstone for student discipline proceedings in most, if not all states, especially New York.

The New York State Legislature created Education Law Section 3214 in 1947 as a procedure to discipline students, which includes suspension.⁴³ A school district’s board of education, board of trustees (or sole trustee), the superintendent of schools, district superintendent of schools, or principal of a school may suspend the pupils from required attendance upon instruction for the following conduct:

- Insubordination
- Being Disorderly
- Being Violent

³⁹ *Id.* at 576.

⁴⁰ *Id.* at 581.

⁴¹ *Id.* at 583.

⁴² *Id.* at 584.

⁴³ N.Y. EDUC. LAW § 3214 (McKinney 2018).

- Being Disruptive
- or Conduct otherwise endangers the safety, morals, health or welfare of others.⁴⁴

A violent pupil is defined as an elementary student or secondary student under twenty-one years of age who: ⁴⁵

- Commits an act of violence upon a teacher, administrator, or other school employee;⁴⁶
- Commits, while on school district property, an act of violence upon another student or any other person lawfully upon said property;⁴⁷
- Possesses, while on school district property, a gun, knife, explosive, or incendiary bomb, or other dangerous instrument capable of causing physical injury or death;⁴⁸
- Displays while on school district property, what appears to be a gun, knife, explosive or incendiary bomb or other dangerous instrument capable of causing death or physical injury;⁴⁹
- Threatens, while on school district property, to use any instrument that appears to be capable of causing physical injury or death;⁵⁰
- Knowingly and intentionally damages or destroys the personal property of a teacher, administrator, other school district employee or any person lawfully upon school district property;⁵¹ or,
- Knowingly or intentionally damages or destroys school district property.⁵²

A disruptive pupil is an elementary or secondary student under twenty-one years of age who is substantially disruptive of the educational process or substantially interferes with the teacher's authority over the classroom.⁵³

1. Corporal Punishment or Aversive Interventions

Section 3214 of the Education Law provides disciplinary procedures for disciplining students but it does not provide for the use of corporal punishment. No teacher, administrator, officer, employee or agent of a school district in New York State or Board

⁴⁴ *Id.* § 3214(3)(a).

⁴⁵ *Id.* § 3214(2-a).

⁴⁶ *Id.* § 3214(2-a)(1).

⁴⁷ *Id.* § 3214(2-a)(2).

⁴⁸ *Id.* § 3214(2-a)(3).

⁴⁹ *Id.* § 3214(2-a)(4).

⁵⁰ *Id.* § 3214(2-a)(5).

⁵¹ *Id.* § 3214(2-a)(6).

⁵² *Id.* § 3214(2-a)(7).

⁵³ *Id.* § 3214(2-a)(b).

of Cooperative Educational Services (BOCES), a charter school, state-operated or state supported school, may use corporal punishment against a pupil.⁵⁴ Corporal punishment is defined as any act of physical force upon a pupil for the purpose of punishing that pupil.⁵⁵

However, there are certain, and very limited instances, in which reasonable physical force can be used, including:⁵⁶

- i. To protect oneself from physical injury;⁵⁷
- ii. To protect another pupil or teacher or any person from physical injury;⁵⁸
- iii. To protect the property of the school, school district or others;⁵⁹ or
- iv. To restrain or remove a pupil whose behavior is interfering with the orderly exercise and performance of school or school district functions, powers and duties, if that pupil has refused to comply with a request to refrain from further disruptive acts.⁶⁰

Further aversive interventions cannot be used against pupils as a tool to reduce or eliminate maladaptive behaviors.⁶¹ An aversive intervention is defined as an intervention that is intended to induce pain or discomfort to a student for the purpose of eliminating or reducing maladaptive behaviors, including:⁶²

- i. Contingent application of noxious, painful, intrusive stimuli or activities; strangling, shoving, deep muscle squeezes or other similar stimuli;⁶³
- ii. Any form of noxious, painful or intrusive spray, inhalant or tastes;⁶⁴
- iii. Contingent food programs that include the denial or delay of the provision of meals or intentionally altering staple food or drink in order to make it distasteful;⁶⁵
- iv. Movement limitation used as punishment, including but not limited to helmets and mechanical restraint devices;⁶⁶ or
- v. Other stimuli or actions similar to the interventions described above.⁶⁷

⁵⁴ 8 NYCRR § 19.5(a)(1).

⁵⁵ *Id.* § 19.5(a)(2); 8 NYCRR § 100.2(l)(3)(i).

⁵⁶ 8 NYCRR § 19.5(3); 8 NYCRR § 100.2(l)(3)(i).

⁵⁷ 8 NYCRR § 19.5(3)(i); 8 NYCRR § 100.2(l)(3)(i)(a).

⁵⁸ 8 NYCRR § 19.5(3)(ii); 8 NYCRR § 100.2(l)(3)(i)(b).

⁵⁹ 8 NYCRR § 19.5(3)(iii); 8 NYCRR § 100.2(l)(3)(i)(c).

⁶⁰ 8 NYCRR § 19.5(3)(iv); 8 NYCRR § 100.2(l)(3)(i)(d).

⁶¹ 8 NYCRR § 19.5(b)(1).

⁶² *Id.* § 19.5(b)(2).

⁶³ *Id.* § 19.5(b)(2)(i).

⁶⁴ *Id.* § 19.5(b)(2)(ii).

⁶⁵ *Id.* § 19.5(b)(2)(iii).

⁶⁶ *Id.* § 19.5(b)(2)(iv).

⁶⁷ *Id.* § 19.5(b)(2)(v).

However, an aversive intervention does not include voice control, limited to loud, firm commands; time-limited ignoring of a specific behavior; token fines as part of a token economy system brief physical prompts to interrupt or prevent a specific behavioral interventions medically necessary for the treatment or protection of the student; or other similar interventions.⁶⁸

2. Off Campus Conduct and Social Media

Pupils may be disciplined for off-campus misconduct when it is “reasonably foreseeable” that the misconduct will “create a risk of a material and substantial disruption” in the school setting.⁶⁹ The board may take disciplinary action against a student who committed a school-related criminal act or school-related act that indicates the student’s presence in school poses a danger to the health, safety, morals, or welfare of other students.⁷⁰ However, a school district may not punish a student’s criminal conduct if it does not affect the school setting.⁷¹

The New York State Education Department (“NYSED”) and New York’s Attorney General have released guidance documents which define cyberbullying as the repeated use of information technology, including email, instant messaging, blogs, chat rooms, cell phones and gaming systems to deliberately harass, threaten, antagonize or intimidate others.⁷² Students have routinely been disciplined for conduct that occurred on social media, for example, posts relating to violence at school,⁷³ and cyberbullying, to both teachers and students.⁷⁴

With regard to searching students’ personal devices, students have a legitimate expectation of privacy in school, and school officials must balance that expectation of privacy against the school’s interest in maintaining order and discipline.⁷⁵ When determining whether a school appropriately searched a student’s device for the purpose

⁶⁸ *Id.* § 19.5(b).

⁶⁹ *Doninger v. Niehoff*, 527 F.3d 41 (2d. Cir 2008); *Appeal of S. W.*, 44 Ed. Dept. Rep. 446 (2005); *Appeal of K.S.*, 43 Ed. Dept. Rep. 492 (2004); *Appeal of R.C.*, 41 Ed. Dept. Rep. 446 (2002); *Appeal of Mangaroo*, 33 Ed. Dept. Rep. 286 (1993).

⁷⁰ *Appeal of Pollnow*, 21 Ed. Dept. Rep. 291 (1981).

⁷¹ *Id.*

⁷² *The New York State Dignity for All Students Act: A Resource and Promising Practices for School Administrators & Faculty*, NEW YORK STATE EDUCATION DEPARTMENT, (December 2017), <http://www.p12.nysed.gov/dignityact/documents/FINALDignityForAllStudentsActGuidanceDec2017.pdf>; *Cyberbullying*, ATTORNEY GENERAL: BARBARA D. UNDERWOOD, <https://ag.ny.gov/internet/cyberbullying> (last visited December 21, 2018). The term cyberbullying is also defined in the Dignity for All Students Act as harassment or bullying which occurs through any form of electronic communication. N.Y. EDUC. LAW. § 11(8) (McKinney 2018).

⁷³ *Wisniewski v. Bd. of Educ. of the Weedsport C.S.D.*, 494 F.3d 34 (2d Cir. 2007).

⁷⁴ *Appeal of E.S.*, 50 Ed. Dept. Rep. ____, Decision No. 16,105 (2010); *Appeal of J.F. and J.F.*, 46 Ed. Dept. Rep. 205 (2006); *Appeal of Ravlik*, 40 Ed. Dept. Rep. 262 (2000); *Appeal of Leahy*, 39 Ed. Dept. Rep. 375 (1999).

⁷⁵ *New Jersey v. T.L.O.*, 469 U.S. 341 (1985).

of discipline, a school must determine: 1) whether the search was justified in its inception, and 2) was the search reasonably related in scope to the circumstances which justified the interference in the first place.⁷⁶

3. Procedure for Suspension or Removal of Pupils

i. Teacher Removal of Disruptive Students.

Teachers have the power and authority to remove a disruptive pupil from his/her classroom consistent with discipline measures contained in the district's code of conduct.⁷⁷ School authorities must establish policies and procedures to ensure that the educational programming and activities for students removed from the classroom continues.⁷⁸ Students may not be removed in violation of any state or federal law or regulation.⁷⁹ The teacher must inform the student and school principal of the reasons for the removal.⁸⁰

If the teacher finds that the pupil's continued presence in the classroom does not pose a continuing danger to persons or property and does not present an ongoing threat of disruption to the academic process, the teacher has to explain the basis for the removal to the student, allowing the student to informally present his/her version of the incident, prior to removing the student from the classroom.⁸¹

In all other cases, the teacher must explain the basis for the removal to the student and provide an informal opportunity to be heard within twenty-four hours of the student's removal.⁸² If the twenty-four hour period does not end on a school day, it will be extended to the corresponding time on the next school day.⁸³

The principal must inform the student's parent or person in parental relation to the student of the removal and the basis for it within twenty-four hours. If the twenty-four hour period does not end on a school day, it will be extended to the corresponding time on the next school day.⁸⁴ The student and his/her parent will, upon request, be given an opportunity for an informal conference with the principal to discuss the reasons for the removal.⁸⁵

⁷⁶ *Id.*

⁷⁷ N.Y. EDUC. LAW § 3214(3-a) (McKinney 2018).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

If the student denies the charges, the principal will explain the basis for the removal and allow the student and his/her parent an opportunity to present the student's version of the incidents.⁸⁶ The informal hearing must be held within forty-eight hours of the student's removal.⁸⁷ If the forty-eight hour period does not end on a school day, it will be extended to the corresponding time on the second school day next following the student's removal.⁸⁸

The principal will not set aside the discipline imposed by the teacher unless he/she finds that the charges against the student are not supported by substantial evidence, that the student's removal violates the law, or that the conduct warrants suspension from school (suspension will then be imposed).⁸⁹ The principal's determination must be made by the close of business on the day succeeding the forty-eight hour period for an informal hearing.⁹⁰

Students may not return to the classroom until the principal makes a final determination, or the period of removal expires, whichever is less.⁹¹ The principal may, in his/her discretion, designate a school district administrator to carry out these functions.⁹²

ii. Suspensions of Five Days or Less

A student's legitimate entitlement to a public education may not be taken away for misconduct without due process.⁹³ As previously mentioned, only a school district's board of education, board of trustees (or sole trustee), the superintendent of schools, district superintendent of schools or principal of the school where the pupil attends will have the power to suspend a pupil for a period not to exceed five school days.⁹⁴ When a pupil is to be suspended, the board of education, board of trustees (or sole trustee), the superintendent of schools, district superintendent of schools, or principal must provide the pupil with notice of the charged misconduct prior to the suspension.⁹⁵ The school district must also immediately notify the parent(s) or person in parental relation in writing that the student may be suspended from school.⁹⁶ Such written notice must be

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See Goss*, 419 U.S. 565.

⁹⁴ N.Y. EDUC. LAW § 3214(3)(b)(1) (McKinney 2018). The principal's authority to suspend may not be delegated. *See Appeal of A.L., Jr.*, 42 Ed. Dept. Rep. 368 (2003) (finding that a suspension imposed by the assistant principal was improper); *see Appeal of T.B.*, 52 Ed. Dept. Rep. _____, Decision No. 16,385 (2012).

⁹⁵ N.Y. EDUC. LAW § 3214(3)(b)(1); *see also Goss*, 419 U.S. 565.

⁹⁶ *Appeal of J.G.*, 39 Ed. Dept. Rep. 393 (1999) (holding that telephone notification does not satisfy the writing requirement); *see also Appeal of V.G.*, 44 Ed. Dept. Rep. 271 (2005); *Appeal of T.B.*, 52 Ed. Dept. Rep. _____,

provided by personal delivery, express mail delivery or an equivalent means reasonably calculated to assure that the parent receives the notice within 24 hours of the suspension decision.⁹⁷ Notification sent by regular mail does not satisfy the delivery requirement.⁹⁸ The notice must describe the incident for which the suspension is proposed and inform the parent of his/her right to request an immediate informal conference with the principal.⁹⁹ The notice must also state that the student and parent have a right to an informal conference and that they have the right to question the complaining witness.¹⁰⁰ Failure to notify of these rights will result in expunging the suspension from the student's record.¹⁰¹

Furthermore, the board of education, board of trustees (or sole trustee), the superintendent of schools, district superintendent of schools, or principal, must provide an explanation for the suspension if the pupil denies the misconduct.¹⁰² The pupil and the person in parental relation to the pupil must be afforded an opportunity for an informal conference with the principal, person, or body authorized to impose discipline¹⁰³ at which the pupil and/or person in parental relation will be authorized to present the pupil's version of the event(s) and to ask questions of the complaining witness.¹⁰⁴ Such informal conference must take place prior to the suspension.¹⁰⁵ However, should the pupil's presence in the school pose a continuing danger to persons or property, or an ongoing threat of disruption to the academic process, the pupil's notice and opportunity for an informal conference will take place as soon after the suspension as is reasonably practicable.¹⁰⁶ Notwithstanding, a teacher should immediately report and refer a violent pupil to the principal or superintendent for a violation of the code of conduct pursuant to N.Y. Education Law §2801 and a minimum suspension.¹⁰⁷

Decision No. 16,385 (2012). Further, such written notice must be provided in the parent's primary language or mode of communication. *Appeal of S.C.*, 44 Ed. Dept. Rep. 164 (2004).

⁹⁷ *Appeal of a Student with a Disability*, 44 Ed. Dept. Rep. 136 (2004).

⁹⁸ *Id.*

⁹⁹ *Appeal of a Student Suspected of Having a Disability*, 38 Ed. Dept. Rep. 52 (1998).

¹⁰⁰ *Appeal of Coleman*, 41 Ed. Dept. Rep. 101 (2001); *Appeal of a Student Suspected of Having a Disability*, 39 Ed. Dept. Rep. 476 (1999); *Appeal of P.R. and C.R.*, 41 Ed. Dept. Rep. 48 (2001).

¹⁰¹ *Appeal of Coleman*, 41 Ed. Dept. Rep. 101 (2001); *Appeal of a Student Suspected of Having a Disability*, 39 Ed. Dept. Rep. 476 (1999); *Appeal of P.R. and C.R.*, 41 Ed. Dept. Rep. 48 (2001).

¹⁰² N.Y. EDUC. LAW § 3214(3)(b)(1); *see also Goss*, 419 U.S. 565.

¹⁰³ *Appeal of Somers*, 32 Ed. Dept. Rep. 431 (1993).

¹⁰⁴ N.Y. EDUC. LAW § 3214(3)(b)(1); *see also Goss*, 419 U.S. 565. It is insufficient to merely provide the student and his/her parent an opportunity to speak with the principal without the complaining witnesses present or an opportunity to speak to the complaining witnesses without the principal present. *Appeal of A.L., Jr.*, 42 Ed. Dept. Rep. 368 (2003); *Appeal of Allert*, 32 Ed. Dept. Rep. 342 (1992).

¹⁰⁵ *Appeal of a Student with a Disability*, 44 Ed. Dept. Rep. 136 (2004).

¹⁰⁶ N.Y. EDUC. LAW § 3214(3)(b)(1); *see also Goss*, 419 U.S. 565.

¹⁰⁷ N.Y. EDUC. LAW § 3214(3)(b)(2) (McKinney 2018).

As for in-school suspensions, a full §3214 disciplinary hearing is not required. Due process requires that a student be given an opportunity to appear informally before the person or body authorized to impose discipline to discuss the conduct.¹⁰⁸ Also, similar to suspensions for five days or less, school districts are not required to maintain a record of the informal meeting for an in-school suspension.¹⁰⁹

A student or person in parental relation to the student may appeal a suspension of five days or less directly to the Commissioner of Education, unless the board of education has a board policy which sets forth the proper appeal procedures for such suspension.¹¹⁰ Failure to strictly adhere to the due process requirements outlined above, will result in the Commissioner of Education issuing a directive to expunge the suspension from the student's record.¹¹¹ However, school districts may correct alleged procedural due process violations by holding a curative hearing and by allowing the student to return to school from the time the due process violation occurred to the date of the curative hearing.¹¹²

iii. Suspensions Exceeding Five Days

Education Law §3214 also develops procedures for suspensions exceeding five days, which also require notice and an opportunity for a fair hearing. The timing, contents of the notice, and nature of the hearing depend on the circumstances of the case.¹¹³ However, if the pupil is a student with a disability, or presumed with a disability, a manifestation proceeding must occur pursuant to N.Y. Education Law 3214(3)(g).¹¹⁴

In contrast to suspensions for five days or less, only the superintendent and the board have authority to suspend a student for more than five days. The pupil must have had

¹⁰⁸ *Appeal of Watts*, 23 Ed. Dept. Rep. 459 (1984).

¹⁰⁹ *Id.*

¹¹⁰ *Appeal of S.C.*, 44 Ed. Dept. Rep. 164 (2004); *see also Appeal of A.B.*, 57 Ed. Dept. Rep. ____, Decision No. 17,172 (2017). Commissioner of Education will only overturn a suspension if it was determined to be arbitrary, capricious, lacked rational basis or was affected by error of law. *Bd. of Educ. of Monticello Cent. Sch. Dist. v. Comm'r of Educ.*, 91 N.Y.2d 133 (1997).

¹¹¹ *See Appeal of P.B.*, 53 Ed. Dept. Rep. ____, Decision No. 16,533 (2013) (ordering the student's suspension be expunged for the following reasons: (1) the parent's right to an informal conference was not provided in the notice prior to the student's suspension; (2) the district failed to personally deliver the notice or use a method reasonably calculated to ensure receipt within 24 hours; and (3) the district failed to provide the parent(s)/guardian(s) with a meaningful opportunity to attend the informal conference and speak to witnesses prior to the imposition of the suspension); *see also Appeal of McMahon and Mosely*, 38 Ed. Dept. Rep. 22 (1998); New York State School Boards Association, New York State Association of School Attorneys, "Student discipline, never easy, gets a little harder," (January 27, 2014) *available at* <http://www.nyssba.org/news/2014/01/24/on-board-online-january-27-2014/student-discipline-never-easy-gets-a-little-harder/>.

¹¹² *Appeal of C.Q. and J.Q.*, 41 Ed. Dept. Rep. 294 (2002).

¹¹³ N.Y. EDUC. LAW § 3214(3)(c)(1) (McKinney 2018); *see also Goss*, 419 U.S. 565.

¹¹⁴ N.Y. EDUC. LAW § 3214(3)(c)(1).

the opportunity for a fair hearing, upon reasonable notice,¹¹⁵ at which such pupil will have the right of representation by counsel,¹¹⁶ who has the right to question witnesses¹¹⁷ against such pupil and to present witnesses and other evidence¹¹⁸ on his or her behalf.¹¹⁹ This type of hearing is called a Superintendent's Hearing, as the superintendent of schools, district superintendent of schools, or community superintendent, or his/her designee will personally hear and determine the proceeding or will designate a hearing officer to conduct the hearing.¹²⁰ The hearing does not need to be held within five days of the suspension, but the student must be allowed to return to school after five days if no hearing has been held.¹²¹ A pupil who has previously been suspended for an action by a principal, can be disciplined through a Superintendent's hearing for the same misconduct.¹²² During a hearing, the hearing officer may administer oaths and issue subpoenas in connection with the proceeding.¹²³ Unlike suspensions of five days or less, a record of the hearing must be maintained but no stenographic transcript is required, and a tape recording is satisfactory.¹²⁴ At the conclusion of the hearing, the hearing

¹¹⁵ Reasonable notice varies under the circumstances of each case but one day's notice is insufficient. *Appeal of Eisenhauser*, 33 Ed. Dept. Rep. 604 (1994); see also *Carey v. Savino*, 91 Misc. 2d 50 (holding that less than one day's notice is insufficient to comport with due process because it does not allow the student enough time to secure counsel). Such notice "must provide the student with enough information to prepare an effective defense, but need not particularize every single charge against a student." *Appeal of a Student with a Disability*, 39 Ed. Dept. Rep. 428 (1999); *Monticello*, 91 N.Y.2d 133 (finding that notice must allow the student and his/her counsel, if any, to prepare and present an adequate defense). Furthermore, the charges must be "sufficiently specific to advise the student and his counsel of the activities or incidents which have given rise to the proceeding and which will form the basis for the hearing." *Appeal of M.P.*, 44 Ed. Dept. Rep. 132 (2004).

¹¹⁶ There is no requirement that a student must be represented by counsel. *Appeal of Albicocco*, 21 Ed. Dept. Rep. 166 (1981).

¹¹⁷ Written statements of witnesses in lieu of testimony cannot be introduced by the school district during a hearing because such introduction violates the student's right to question witnesses. *Appeal of Coleman*, 41 Ed. Dept. Rep. 101 (2001); *Appeal of D.C.*, 41 Ed. Dept. Rep. 277 (2002).

¹¹⁸ *Appeal of a Student with a Disability*, 39 Ed. Dept. Rep. 428 (1999) ("As long as students are given a fair opportunity to tell their side of the story and rebut the evidence against them, due process is served.").

¹¹⁹ N.Y. EDUC. LAW § 3214(3)(c)(1).

¹²⁰ A due process violation does not occur where the superintendent imposes the suspension and acts as the hearing officer. *Appeal of Labriola*, 20 Ed. Dept. Rep. 74 (1980); *Appeal of Payne*, 18 Ed. Dept. Rep. 280 (1978) (finding that the performance of multiple functions by the same person is not a *per se* due process violation).

¹²¹ *Appeal of McMahon and Mosely*, 38 Ed. Dept. Rep. 22 (1998).

¹²² A short suspension imposed in conjunction with a further penalty for the same action does not constitute double jeopardy. *Appeal of Swingle*, 32 Ed. Dept. Rep. 245 (1992).

¹²³ N.Y. EDUC. LAW § 3214(3)(c)(1).

¹²⁴ *Id.* No *per se* due process violation occurs when there are inaudible portions of the tape recording. *Appeal of A.G.*, 41 Ed. Dept. Rep. 262 (2002) (holding that the petitioner must show how the inaudible portions of the hearing record may have mitigated against the finding of guilt or penalty imposed before a due process violation will be found to have occurred); *Appeal of Labriola*, 20 Ed. Dept. Rep. 74 (1980) (finding that the inaudible portions of the hearing record did not violate the student's due process rights where the school

officer will make findings of fact and recommendations to the superintendent as to the appropriate measure of discipline.¹²⁵ Unless completed by the superintendent, the hearing officer's report will be advisory only, and the superintendent can accept all or any part thereof.¹²⁶ However, the decision to suspend a student must be based on "competent and substantial evidence that the student participated in the objectionable conduct."¹²⁷ A student's admission of misconduct is sufficient proof of guilt¹²⁸ and hearsay evidence may also constitute competent and substantial evidence.¹²⁹

A Superintendent's Hearing determination can be appealed to the school district's board of education who will make its decisions solely upon the record of the hearing.¹³⁰ The board of education may adopt, in whole or in part, the decision of the superintendent of schools.¹³¹ However, if the basis for the suspension is the possession of any firearm, rifle, shotgun, dagger, dangerous knife, dirk, razor, stiletto, or any of the weapons, instruments, or appliances specified in N.Y. Penal Law §265.01¹³² on school grounds or

district gave the student the opportunity to correct any errors). School districts are not required to make a record for suspensions of five days or less. *Appeal of Lee, D.*, 38 Ed. Dept. Rep. 262 (1998).

¹²⁵ N.Y. EDUC. LAW § 3214(3)(c)(1).

¹²⁶ *Id.*; see *Appeal of Cellini*, 30 Ed. Dept. Rep. 473 (1991).

¹²⁷ *Appeal of a Student with a Disability*, 39 Ed. Dept. Rep. 427 (1999); see also *Appeal of Gorzka*, 35 Ed. Dept. Rep. 20 (1995); *Appeal of Swingle*, 32 Ed. Dept. Rep. 245 (1992); *Appeal of Albicocco*, 21 Ed. Dept. Rep. 166 (1981).

¹²⁸ *Appeal of Esther E.*, 39 Ed. Dept. Rep. 357 (1999); *Appeal of Eddy*, 36 Ed. Dept. Rep. 359 (1997); see also *Monticello*, 91 N.Y.2d 133 (holding that unimpeached testimony that the student admitted the misconduct supports a finding of guilty).

¹²⁹ *Appeal of a Student Suspected of Having a Disability*, 39 Ed. Dept. Rep. 476 (1999); *Appeal of a Student Suspected of Having a Disability*, 39 Ed. Dept. Rep. 127 (1999); *Monticello*, 91 N.Y.2d 133.

¹³⁰ N.Y. EDUC. LAW § 3214(3)(c)(1).

¹³¹ *Id.*

¹³² A person is guilty of criminal possession of a weapon in the fourth degree when:

(1) He or she possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, chukka stick, sand bag, sand club, wrist-brace type slingshot or slingshot, shank or "Kung Fu star"; or

(2) He or she possesses any dagger, dangerous knife, dirk, machete, razor, stiletto, imitation pistol, or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another; or

(3) [*repealed*]

(4) He possesses a rifle, shotgun, antique firearm, black powder rifle, black powder shotgun, or any muzzle-loading firearm, and has been convicted of a felony or serious offense; or

(5) He possesses any dangerous or deadly weapon and is not a citizen of the United States; or

(6) He is a person who has been certified not suitable to possess a rifle or shotgun, as defined in subdivision sixteen of section 265.00, and refuses to yield possession of such rifle or shotgun upon the demand of a police officer. Whenever a person is certified not suitable to possess a rifle or shotgun, a member of the police department to which such certification is made, or of the state police, will forthwith seize any rifle or shotgun

school property by the student, the hearing officer or superintendent will not be barred from considering the admissibility of such weapon, instrument, or appliance as evidence, notwithstanding a determination by a court in a criminal or juvenile delinquency proceeding that the recovery of such weapon, instrument or appliance was the result of an unlawful search or seizure.¹³³ Furthermore, student disciplinary hearings may still occur even if there are pending criminal charges against the student involving the same behavior because it is illogical to bar students who have committed lesser offenses from attendance at school for five days while allowing those who committed serious crimes to return pending disposition of the criminal charges.¹³⁴

Should a student be suspended for more than five days by the board of education, the Board may hear and determine the proceeding or appoint a hearing officer who will have the same powers and duties as the Board with respect to a Superintendent's Hearing.¹³⁵

The penalty imposed by either the superintendent or the board must be proportionate to the offense.¹³⁶ A penalty imposed by a school district will be overturned if it is so excessive to warrant substitution of the Commissioner's judgment for that of the superintendent or the board.¹³⁷ Furthermore, school districts may only impose penalties that are legally permissible under §3214 of the Education Law.¹³⁸ The only legally permissible penalty under §3214 is suspension from attendance.¹³⁹ School districts may not impose alcohol/drug assessments, counseling services, psychiatric evaluations or community service as a penalty.¹⁴⁰ A permanent suspension is an extreme penalty that may only be applied in extraordinary circumstances where the student shows "an

possessed by such person. A rifle or shotgun seized as herein provided will not be destroyed, but will be delivered to the headquarters of such police department, or state police, and there retained until the aforesaid certificate has been rescinded by the director or physician in charge, or other disposition of such rifle or shotgun has been ordered or authorized by a court of competent jurisdiction.

(7) He knowingly possesses a bullet containing an explosive substance designed to detonate upon impact.

(8) He possesses any armor piercing ammunition with intent to use the same unlawfully against another.

N.Y. PENAL LAW § 265.01 (McKinney 2018).

¹³³ N.Y. EDUC. LAW § 3214(3)(c)(1).

¹³⁴ *Pollnow v. Glennon*, 594 F.Supp. 220 (S.D.N.Y. 1984).

¹³⁵ N.Y. EDUC. LAW § 3214(3)(c)(2); *see Appeal of Cellini*, 30 Ed. Dept. Rep. 473 (1991).

¹³⁶ *Appeal of Eddy*, 36 Ed. Dept. Rep. 359 (1997).

¹³⁷ *Id.*

¹³⁸ *Appeal of J.G.*, 39 Ed. Dept. Rep. 393 (1999).

¹³⁹ *Appeal of McMahon and Mosely*, 38 Ed. Dept. Rep. 22 (1998).

¹⁴⁰ *See e.g., Appeal of a Student with a Disability*, 39 Ed. Dept. Rep. 427 (1999); *Appeal of J.G.*, 39 Ed. Dept. Rep. 393 (1999); *Appeal of McMahon and Mosely*, 38 Ed. Dept. Rep. 22 (1998); *Appeal of Eddy*, 36 Ed. Dept. Rep. 359 (1997).

alarming disregard for the safety of others"¹⁴¹ and where it is necessary to safeguard other students, which is discussed more fully below.

iv. Suspension of Pupils who Possess a Weapon on School Property

If a pupil brings a weapon¹⁴² on school property, the pupil will be immediately suspended for a period of not less than one calendar year.¹⁴³ Further, any nonpublic school pupil participating in a program operated by a public school district using funds,¹⁴⁴ who is determined to have brought a firearm to or possessed a firearm at a public school, or other premises used by the school district to provide such programs, will be suspended for a period of not less than one calendar year from participation in such program.¹⁴⁵ School districts may also impose permanent suspension on students who bring guns to school.¹⁴⁶ A superintendent of schools, district superintendent of schools, or community superintendent will have the authority to modify the suspension requirement on a case by case basis.¹⁴⁷ The determination of a superintendent will be subject to review by the board of education which is similar to any suspension of a student for longer than five days, and by the Commissioner of Education pursuant to Education Law §310.¹⁴⁸

Notwithstanding the foregoing, Education Law §3214 does not permit a superintendent to suspend a student with a disability in violation of the Individuals with Disabilities Education Act ("IDEA") or Article 89 of the Education Law.¹⁴⁹ If the pupil is under the age of sixteen, the Superintendent will refer the pupil to a presentment agency for a juvenile delinquency proceeding consistent with Article Three of the Family Court Act, unless the student is fourteen or fifteen years of age in which they would qualify for juvenile offender status.¹⁵⁰ Further, should the pupil have written authorization¹⁵¹ of such educational institution possession of such weapon would not warrant discipline.¹⁵²

¹⁴¹ *Appeal of A.S. and S.K.*, 44 Ed. Dept. Rep. 129 (1994).

¹⁴² 18 U.S.C. § 930(2)(g).

¹⁴³ N.Y. EDUC. LAW § 3214(3)(d)(1) (McKinney 2018); *see also* Federal Gun-Free Schools Act, 20 U.S.C. § 4141 *et. seq.*

¹⁴⁴ Pursuant to the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301, *et. seq.*

¹⁴⁵ N.Y. EDUC. LAW § 3214(3)(d)(1); *see also* 20 U.S.C. § 4141 *et. seq.*; 20 U.S.C. § 6301, *et. seq.*

¹⁴⁶ *Appeal of Henry*, 34 Ed. Dept. Rep. 470 (1995).

¹⁴⁷ N.Y. EDUC. LAW § 3214(3)(d)(1).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*; N.Y. CRIM. PROC. LAW § 1.20(42) (McKinney 2018).

¹⁵¹ Written authorization must be in a manner authorized by N.Y. PENAL LAW § 265 for activities approved and authorities by the trustees or board of education or other governing body of the public school and such governing body adopts appropriate safeguards to ensure student safety. N.Y. EDUC. LAW § 3214(3)(d)(2).

¹⁵² N.Y. EDUC. LAW § 3214(3)(d)(2).

v. Disciplining Pupils in Possession of Drugs, Alcohol, and Tobacco

School districts have the authority to discipline pupils for possessing, selling, using, or being under the influence of drugs, alcohol, or tobacco while on school property.¹⁵³ School districts may suspend students for such activities because those activities endanger the safety, morals, health, and welfare of others, and are likely a violation of the school district's code of conduct.¹⁵⁴ The Commissioner of Education has held that it is not irrational or an abuse of discretion to impose a greater penalty for drugs than for alcohol or tobacco.¹⁵⁵

For a school to discipline a pupil for being under the influence of alcohol they need to first determine whether the pupil is under the influence of alcohol by acquiring competent and substantial evidence. One way to acquire such evidence is through the use of breathalyzers for such determination.¹⁵⁶ School districts must properly administer such devices since the use of a breathalyzer constitutes a search under the Fourth Amendment.¹⁵⁷ A search must be: (1) justified at its inception; and (2) reasonably related in scope to the circumstances that justified the inception of the search.¹⁵⁸ In addition to the use of a breathalyzer, a school district may acquire competent and substantial evidence that a pupil has consumed alcohol by smelling alcohol on a pupil's breath or observing out of character behavior.¹⁵⁹

Certain activities involving drugs, alcohol, and tobacco constitute crimes under the New York Penal Law. Therefore pupils who engage in these activities will be disciplined and may also be referred to local law enforcement agencies.¹⁶⁰

vi. Waiver of the Right to a Student Disciplinary Hearing

A student's due process right to an opportunity for a student disciplinary hearing may be waived if the waiver is intelligent, knowing and voluntary.¹⁶¹ For a waiver to be valid, the student and his/her parent must be informed of their rights and the consequences of waiving those rights.¹⁶² The school district must provide the student and his/her parent with a written document that explains their rights and the consequences of waiving those rights.¹⁶³ A lawful waiver may only allow penalties that are legally permissible under

¹⁵³ *Appeal of D.G.*, 43 Ed. Dept. Rep. 299 (2003); *Appeal of Cynthia and Robert W.*, 37 Ed. Dept. Rep. 437 (1998).

¹⁵⁴ *Appeal of D.G.*, 43 Ed. Dept. Rep. 299 (2003); *Appeal of Cynthia and Robert W.*, 37 Ed. Dept. Rep. 437 (1998).

¹⁵⁵ *Appeal of J.P.*, 44 Ed. Dept. Rep. 204 (2004); *Appeal of C.C.*, 44 Ed. Dept. Rep. 207 (2004).

¹⁵⁶ *Appeal of James*, 39 Ed. Dept. Rep. 482 (2000).

¹⁵⁷ *Id.*; *O'Connor v. Ortega*, 480 U.S. 709 (1987).

¹⁵⁸ *O'Connor*, 480 U.S. 709.

¹⁵⁹ *Appeal of D.G.*, 43 Ed. Dept. Rep. 299 (2003).

¹⁶⁰ 8 NYCRR § 100.2.

¹⁶¹ *Appeal of J.G.*, 39 Ed. Dept. Rep. 393 (1999).

¹⁶² *Id.*

¹⁶³ *Appeal of V.L.*, 44 Ed. Dept. Rep. 160 (2004).

§3214 of the Education Law.¹⁶⁴ In other words, a school district's waiver system must only allow the imposition of penalties that are legally permissible.¹⁶⁵

vii. Procedure for After a Pupil Has Been Suspended

If a suspended pupil is of compulsory attendance age,¹⁶⁶ immediate steps must be taken for his/her attendance upon instruction elsewhere or for supervision or detention of said pupil pursuant to Article Seven of the Family Court Act.¹⁶⁷ In other words, any student of compulsory age who is suspended from attendance at school must receive an alternative education.¹⁶⁸ Such alternative instruction must be substantially equivalent to the student's regular classroom program.¹⁶⁹ If a pupil has been suspended for cause, the suspension may be revoked by the board of education whenever it is in the best interest of the school and the pupil to do so.¹⁷⁰ The board of education may also condition a student's early return to school and suspension revocation on the pupil's voluntary participation in counseling or specialized classes, including anger management or dispute resolution.¹⁷¹

viii. Involuntary Transfer¹⁷² of Students

The board of education, board of trustees or sole trustee, the superintendent of schools, or district superintendent of schools may transfer a pupil who has not been determined to be a student with a disability or a student presumed to have a disability for discipline purposes from regular classroom instruction to an appropriate educational setting in another school upon the written recommendation of the school principal and following independent review.¹⁷³

A school principal may initiate a non-requested transfer where it is believed that such a pupil would benefit from the transfer, or when the pupil would receive an adequate and appropriate education in another school program or facility.¹⁷⁴ No recommendation for pupil transfer will be initiated by the principal until such pupil and a person in a parental

¹⁶⁴ *Appeal of McMahon and Mosely*, 38 Ed. Dept. Rep. 22 (1998).

¹⁶⁵ *Id.*

¹⁶⁶ N.Y. EDUC. LAW § 3205 (McKinney 2018) ("In each school district of the state, each minor from six to sixteen years of age will attend upon full time instruction.").

¹⁶⁷ *Id.* § 3214(3)(e). School districts must promptly, not instantaneously, provide alternative instruction. *Appeal of Deborah F.*, 42 Ed. Dept. Rep. 178 (2002).

¹⁶⁸ *Appeal of Pickney*, 37 Ed. Dept. Rep. 284 (1998).

¹⁶⁹ *Appeal of A.L., Jr.*, 41 Ed. Dept. Rep. 368 (2003).

¹⁷⁰ N.Y. EDUC. LAW § 3214(3)(e).

¹⁷¹ *Id.*

¹⁷² Involuntary Transfer does not include a transfer made by a school district as part of a plan to reduce racial imbalance within the schools or as a change in school attendance zones or geographical boundaries. *Id.* § 3214(5)(a).

¹⁷³ *Id.*

¹⁷⁴ *Id.* § 3214(5)(b).

relation has been sent written notification of the consideration of transfer recommendation.¹⁷⁵ The notice sent to the parents, sets a time and place of an informal conference with the principal and will inform such person in parental relation and such pupil of their right to be accompanied by counsel or an individual of their choice.¹⁷⁶

After the informal conference, should the principal conclude that the pupil would benefit from a transfer or that the pupil would receive an adequate and appropriate education in another school program or facility, the principal may issue a recommendation of transfer to the superintendent.¹⁷⁷ The recommendation will include a description of behavior and/or academic problems indicative of the need for transfer and a description of alternatives explored and prior action taken to resolve the problem.¹⁷⁸ A copy of the letter must be sent to the person in parental relation and to the pupil.¹⁷⁹

Upon receipt of the principal's recommendation for transfer and a determination to consider that recommendation, the superintendent must notify the person in parental relation and the pupil of the proposed transfer and of their right to a fair hearing,¹⁸⁰ and must list community agencies and free legal assistance which may be of assistance.¹⁸¹ The written notice must include a statement that the pupil or person in parental relation has ten (10) days to request a hearing and that the proposed transfer will not take effect, except upon written parental consent, until the ten (10) day period has elapsed or if a fair hearing is requested, until after a formal decision following the hearing is rendered, whichever is later.¹⁸²

ix. Manifestation Proceeding: For Students with Disabilities

a. Discipline Procedures for Students with Disabilities under N.Y. Education Law § 3214

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* § 3214(5)(c).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* § 3214(3)(c).

¹⁸¹ *Id.* § 3214(5)(d).

¹⁸² *Id.*

As previously discussed, Education Law §3214 sets forth a specific procedure for disciplining students with disabilities,¹⁸³ or students presumed to have a disability.¹⁸⁴ This is referred to as a manifestation proceeding. A student with, or presumed to have a disability¹⁸⁵ may be suspended or removed from his or her current educational placement for violation of school rules only in accordance with the procedures established for a manifestation¹⁸⁶ proceeding.¹⁸⁷

The trustees or board of education of any school district, a district superintendent of schools, or building principal has the authority to order the placement of a student with a disability into an appropriate interim alternative educational setting (“IAES”), or another setting.¹⁸⁸ They also have the authority to suspend a pupil for a period not to exceed five consecutive school days where such student is suspended as long as the

¹⁸³ *Id.* § 4401(1).

A “student with a disability” means a person under the age of twenty-one who is entitled to attend public schools pursuant to section thirty-two hundred two of this chapter and who, because of mental, physical or emotional reasons can only receive appropriate educational opportunities from a program of special education. Such term does not include a child whose educational needs are due primarily to unfamiliarity with the English language, environmental, cultural or economic factors. Lack of appropriate instruction in reading, including in the essential components of reading instruction as defined in subsection three of section twelve hundred eight of the elementary and secondary education act of nineteen hundred sixty-five, or lack of appropriate instruction in mathematics or limited English proficiency will not be the determinant factor in identifying a student as a student with a disability. “Special education” means specially designed instruction which includes special services or programs as delineated in subdivision two of this section, and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability. A “child with a handicapping condition” means a child with a disability.

Id.

¹⁸⁴ Student presumed to have a disability is defined as a student who the school district is deemed to have knowledge was a student with a disability before the behavior that precipitated disciplinary action. N.Y. EDUC. LAW § 3214(3)(g)(2); *see also* 20 U.S.C. § 1415(k).

¹⁸⁵ A school district is deemed to have knowledge that the student had a disability if prior to the time the behavior occurred: (1) the student’s parent has expressed concern to school district personnel in writing that the student is in need of special education (may be oral if parent does not know how to write or has a disability that prevents a written statement); (2) the student’s behavior or performance demonstrates the need for special education; (3) the student’s parent has requested that an individual evaluation of the student be conducted; or (4) the student’s teacher, or other school district personnel, has expressed concern about the student’s behavior or performance to the director of special education or to other school district personnel in accordance with the district’s established child find or special education referral system. 8 NYCRR § 201.5(b); *see also Appeal of a Student Suspected of Having a Disability*, 41 Ed. Dept. Rep. 341 (2002).

¹⁸⁶ N.Y. EDUC. LAW § 3214(3)(g)(2)(ii) (A manifestation team is a representative of the school district, the parent or person in parental relation, and relevant members of the committee on special education, as determined by the parent or person in parental relation).

¹⁸⁷ *Id.* § 3214(3)(g)(1).

¹⁸⁸ *Id.* §§ 3214(3)(g)(3)(ii), (iv).

suspension does not result in a change in placement,¹⁸⁹ or if determined upon a recommendation of a hearing officer.¹⁹⁰

The superintendent of schools of a school district, either directly or upon recommendation of a hearing officer, may do the following: 1) order the placement of a student with a disability into an IAES, or another setting; 2) suspension for up to ten (10) consecutive school days, inclusive of any period in which the student is placed in an appropriate interim alternative educational placement, another setting or suspension, where the superintendent determines that the student has engaged in behavior that warrants a suspension and does not result in change of placement;¹⁹¹ and 3) order the change in placement of a student with a disability to an IAES for up to forty-five (45) days, but not to exceed the period of suspension ordered by a superintendent.¹⁹²

However, should a Committee on Special Education (“CSE”) determine that the behavior of a student with a disability was not a manifestation of the student’s disability, then the student can be disciplined similar to a student that does not have a disability, except that such student must continue to receive services, albeit in an interim alternative setting.¹⁹³

b. Discipline Procedures for Students with (or presumed to have) a Disability under the Commissioner’s Regulations

The Commissioner of Education has adopted regulations for suspensions and removals of students with disabilities. A manifestation of a review of the relationship between the student’s disability and the behavior subject to disciplinary action must be made immediately, if possible, but in no case later than ten (10) school days after:

- 1) A decision is made by a superintendent of schools to change the placement of a student to an IAES; or
- 2) A decision is made by an impartial hearing officer to place a student in an IAES; or
- 3) A decision is made by a board of education, district superintendent of schools, building principal or superintendent to impose a suspension that constitutes a disciplinary change in placement.¹⁹⁴

¹⁸⁹ The United States Supreme Court has held that removing a student from school for more than ten days constitutes a change in educational placement. *Honig v. Doe*, 484 U.S. 305 (1988).

¹⁹⁰ N.Y. EDUC. LAW §§ 3214(3)(g)(3)(ii), (iv).

¹⁹¹ *Id.* § 3214(3)(g)(3)(iii). Such short-term suspensions may be used to temporarily remove a disabled student who violated the school district’s code of conduct or who poses an immediate threat to the safety of others, even if the behavior related to the disability. *Appeal of a Student with a Disability*, 34 Ed. Dept. Rep. 634 (1995).

¹⁹² N.Y. EDUC. LAW § 3214(3)(g)(3)(iv).

¹⁹³ *Id.* § 3214(3)(g)(3)(vi).

¹⁹⁴ 8 NYCRR § 201.4(a).

A manifestation review is conducted by a manifestation team following the determination by a hearing officer that the student is found guilty of the misconduct.¹⁹⁵ The manifestation team includes a representative of the school district knowledgeable about the student and the interpretation of information about child behavior.¹⁹⁶ The parent and other relevant members of the CSE are also included in the manifestation review.¹⁹⁷ The manifestation team reviews all relevant information in the student's file, including the student's individualized education plan ("IEP"), any teacher observations, and any relevant information provided by the parents to determine if:

- 1) The conduct in question was caused by or had a direct and substantial relationship to the student's disability; or
- 2) The conduct in question was the direct result of the school district's failure to implement the IEP.¹⁹⁸

If either of these conditions are met, then it is determined that the conduct was a manifestation of the student's disability.¹⁹⁹ If a nexus is found between the misconduct and the student's disability, a suspension beyond ten school days may not be imposed, unless the student's presence constitutes a dangerous situation.²⁰⁰ Also, if the manifestation team ultimately determines that the conduct was a manifestation of the student's disability, a referral must be made to the CSE to determine whether a program modification is required.²⁰¹ In order to make such determination, the CSE must conduct a functional behavioral assessment ("FBA") and return the student to the placement from which the student was removed, unless the parent and the school district agree to a change of placement as part of the modification of the behavioral intervention plan ("BIP").²⁰² If no nexus is found between the student's misconduct and his/her disability, the school district may impose a penalty.²⁰³ However, the student's placement may not be changed without compliance with due process requirements.²⁰⁴

No later than the date on which a decision is made to change the placement of a student with a disability to an interim alternate educational setting ("IAES"),²⁰⁵ or a decision to

¹⁹⁵ *Id.* § 201.4(b). Students with disabilities are "entitled to an assessment by a multidisciplinary team to recommend accommodations and modifications necessary to meet the educational needs of the student." *Appeal of a Student with a Disability*, 34 Ed. Dept. Rep. 634 (1995).

¹⁹⁶ 8 NYCRR § 201.4(b).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* § 201.4(c).

¹⁹⁹ *Id.* § 201.4(d)(1).

²⁰⁰ *Appeal of a Student with a Disability*, 35 Ed. Dept. Rep. 22 (1995).

²⁰¹ *Id.*

²⁰² 8 NYCRR § 201.4(d)(2).

²⁰³ *Appeal of a Student with a Disability*, 36 Ed. Dept. Rep. 273 (1996). If no nexus is found, a student's anecdotal record may be considered but only under these circumstances. *Id.*

²⁰⁴ *Appeal of a Student with a Disability*, 35 Ed. Dept. Rep. 22 (1995).

²⁰⁵ 8 NYCRR § 201.2(k).

impose a suspension or removal,²⁰⁶ that constitutes a disciplinary change in placement,²⁰⁷ the parent must be notified of such decision and will be provided with the procedural safeguards notice.²⁰⁸

The trustees or board of education of any school district, a district superintendent of schools, or a building principal with the authority to suspend students pursuant to Education Law §3214 will have the authority to order the placement of a student with a

An interim alternative educational setting or IAES is a temporary educational placement, other than the student's current placement at the time the behavior precipitating the IAES placement occurred. A student who is placed in an IAES will:

- 1) Continue to receive educational services so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP; and
- 2) Receive as appropriate, a functional behavioral assessment and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur.

Id.

²⁰⁶ 8 NYCRR § 201.2(l) (Removal is defined as: "1) a removal of a student with a disability for disciplinary reasons from that student's current educational placement and 2) the change in placement of a student with a disability to an IAES by an impartial hearing officer.").

²⁰⁷ *Id.* § 201.2(e).

A disciplinary change in placement means a suspension or removal from a student's current educational placement that is either:

- 1) For more than 10 consecutive school days or
- 2) For a period of 10 consecutive days or less if the student is subjected to a series of suspensions or removals that constitute a pattern because they cumulate to more than 10 school days in a school year; because the student's behavior is substantially similar to the student's behavior in previous incidents that resulted in the series of removals; and because such additional factors as the length of each suspension or removal, the total amount of time the student has been removed and the proximity of the suspensions or removals to one another. The school district determines on a case-by-case basis whether a pattern of removals constitutes a change of placement.

Id.

²⁰⁸ 8 NYCRR § 201.4(3).

Prior written notice must include:

- (i) a description of the action proposed or refused by the district;
- (ii) an explanation of why the district proposes or refuses to take the action;
- (iii) a description of other options that the CSE considered and the reasons why those options were rejected;
- (iv) a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action;
- (v) a description of other factors that are relevant to the CSE's proposal or refusal;
- (vi) a statement that the parents of a student with a disability have protection under the procedural safeguards of this Part, and, if this notice is not an initial referral for an evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and
- (vii) sources for parents to contact to obtain assistance in understanding the provisions of this Part.

Id. § 201.7.

disability into an appropriate IAES, another setting or suspension for a period not to exceed five (5) consecutive school days, and not to exceed the amount of time that a nondisabled student would be subject to suspension for the same behavior.²⁰⁹

A superintendent of schools, either directly or upon recommendation of a hearing officer designated to conduct a superintendent's hearing, may order the placement of a student with a disability into an IAES, another setting, or suspension for up to ten (10) consecutive school days, inclusive of any period in which the student has been suspended or removed²¹⁰ for the same behavior.²¹¹ Should the superintendent determine that the student has engaged in behavior that warrants a suspension, the duration of any such suspension or removal will not exceed the amount of time that a nondisabled student would be subject to suspension for the same behavior.²¹² Except for when a student with a disability has a pattern of suspensions or removals, a superintendent of schools may only order additional suspensions of not more than ten (10) consecutive school days in the same school year for separate incidents of misconduct.²¹³

However, a student with a disability may not be removed other than imposition of the five (5) or ten (10) school day suspension if the removal would result in a disciplinary change in placement based on pattern of suspensions or removal as determined by school personnel.²¹⁴ If the manifestation team has determined that the behavior was not a manifestation of such student's disability or the student is placed in an IAES, the student may be removed.²¹⁵

Should a student with a disability be charged with behavior involving serious bodily injury, weapons, illegal drugs or controlled substances, a superintendent of schools, either directly or upon recommendation of a hearing officer, may order the change in placement of a student with a disability to an appropriate IAES, to be determined by the CSE for up to forty-five (45) school days, but not to exceed the period of suspension ordered by the Hearing Officer,²¹⁶ where the student:²¹⁷

²⁰⁹ 8 NYCRR § 201.7(b).

²¹⁰ Irrespective of any suspension of five days or less for the same behavior issued by the Principal under 8 NYCRR § 201.7(b).

²¹¹ 8 NYCRR § 201.7(c).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* § 201.7(d).

²¹⁵ *Id.* § 201.7(d).

²¹⁶ N.Y. EDUC. LAW § 3214(3).

²¹⁷ 8 NYCRR § 201.7(e)(1).

- 1) Has inflicted serious bodily injury,²¹⁸ upon another person while at school, on school premises or at a school function under the jurisdiction of the educational agency;²¹⁹
- 2) Carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of the educational agency;²²⁰ or
- 3) Knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function under the jurisdiction of the educational agency.²²¹

Notwithstanding the foregoing, the period of suspension or removal ordered by the superintendent may not exceed the amount of time that a nondisabled student would be suspended for the same behavior.²²² School personnel may also consider any unique circumstances on a case-by-case basis when determining whether a change in placement consistent with the other requirements of Part 201 of the Commissioner’s Regulations is appropriate for a student with a disability who violates a school district’s Student Code of Conduct.²²³

During any period of suspension, a student with a disability will be provided services to the extent required.²²⁴ During a suspension or removal for periods of up to ten (10) school days in a school year that do not constitute a disciplinary change in placement, students of compulsory attendance age with a disability will be provided with alternative instruction on the same basis as nondisabled students.²²⁵

B. Dignity for All Students Act (DASA)

The Dignity for All Students Act (“DASA”) was signed into law on September 13, 2010, and took effect on July 1, 2012 (with supplemental provisions on cyberbullying taking effect in July of 2013), to afford all students in public schools a safe and supportive school environment free of harassment, bullying and discrimination.²²⁶ The legislation

²¹⁸ *Id.* § 201.2(m) (“Serious bodily injury means bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty.”).

²¹⁹ *Id.* § 201.7(e)(1)(i).

²²⁰ *Id.* § 201.7(e)(1)(ii).

²²¹ *Id.* § 201.7(e)(1)(iii).

²²² *Id.* § 201.7(e)(2).

²²³ *Id.* § 201.7(f).

²²⁴ *Id.* § 201.10(a).

²²⁵ *Id.* § 201.4(b).

²²⁶ N.Y. EDUC. LAW § 12 (McKinney 2018); *see also The Dignity Act for All Students*, N.Y. ST. EDUC. DEP’T (NYSED), <http://www.p12.nysed.gov/dignityact/> (last updated July 9, 2018).

amended the Education Law by creating Article 2, “Dignity for All Students.” The Act also expanded Section 801-a of the Education Law by requiring that the mandated course of instruction in grades kindergarten through twelve, in civility, citizenship and character education include a component raising awareness and sensitivity to discrimination or harassment and civility.²²⁷ Additionally, DASA amended Education Law, Section 2801 by requiring the inclusion of language, compliant with DASA, into school districts’ Codes of Conduct.²²⁸

1. Requirements for School Districts

i. Article 2 of the Education Law

DASA provides that no student will be subjected to harassment or bullying, nor will any student be subjected to discrimination based on the student’s “actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender²²⁹ or sex.”²³⁰ The law’s broad definition of harassment makes it clear that the law protects students from threats, intimidation and abuse based on, but not limited to, the above categories.²³¹ DASA applies to harassment, bullying or discrimination of students by employees or students on school property or at a school function.²³² However, DASA does not prohibit denial of admission into, or exclusion from, a course of instruction based on a person’s gender otherwise permissible under

²²⁷ N.Y. EDUC. LAW § 801-a (McKinney 2018).

²²⁸ *Id.* § 2801(n).

²²⁹ DASA states that “gender” means “actual or perceived sex and will include a person’s gender identity or expression.” *Id.* § 11(6).

²³⁰ *Id.* § 12(1).

²³¹ DASA defines harassment and bullying as:

the creation of a hostile environment by conduct or by threats, intimidation or abuse, including cyberbullying, that (a) has or would have the effect of unreasonably and substantially interfering with a student’s educational performance, opportunities or benefits, or mental, emotional or physical well-being; or (b) reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety; or (c) reasonably causes or would reasonably be expected to cause physical injury or emotional harm to a student; or (d) occurs off school property and creates or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property.

Id. § 11(7). The conduct, verbal threats, intimidation or abuse includes but is not limited to such acts “based on a person’s actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex.” *Id.* The statute also includes the definition of “cyberbullying,” which is defined as harassment or bullying occurring through any form of electronic communication. *Id.* § 11(8).

²³² N.Y. EDUC. LAW § 12(1).

law, or to prohibit, as discrimination based on disability, actions that would otherwise be permissible under law.²³³

Under DASA, a school district's Board of Education is required to create policies and guidelines implementing its provisions. School districts must establish policies intended to create a school environment that is free from harassment, bullying, and discrimination; guidelines to be used in school training programs to discourage the development of harassment, bullying, and discrimination, and to make school employees aware of the effects of harassment, bullying, cyberbullying, and discrimination on students; guidelines that are designed to raise employees' awareness and sensitivity to potential harassment, bullying and discrimination, and to enable employees to prevent and respond to incidents of harassment, bullying and discrimination; as well as guidelines relating to the development of nondiscriminatory instructional and counseling methods.²³⁴

Additionally, a Dignity Act Coordinator must be appointed at every school. The Dignity Act Coordinator is an individual "thoroughly trained to handle human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender and sex."²³⁵

Provisions in the policies and procedures must include, but not be limited to, provisions which:

1. Identify the principal, superintendent, or either individual's designee as the school employee charged with receiving reports of harassment, bullying and discrimination;²³⁶

2. Enable students and parents to make an oral or written report of harassment, bullying or discrimination to teachers, administrators and other school personnel that the school district deems appropriate;²³⁷

3. Require school employees who witness harassment, bullying or discrimination, or who receive an oral or written report of such incidents, to promptly orally notify the principal, superintendent or either individual's designee not later than one school day after such school employee witnesses or receives a report of harassment, bullying or discrimination, and to file a written report with the principal, superintendent or either individual's designee not later than two school days after making such oral report;²³⁸

²³³ *Id.*

²³⁴ *Id.* § 13(1)-(3).

²³⁵ *Id.* § 13(3).

²³⁶ *Id.* § 13(1)(A).

²³⁷ *Id.* § 13(1)(B).

²³⁸ *Id.* § 13(1)(C).

4. Require the principal, superintendent or either individual's designee to lead or supervise the thorough investigation of all reports of harassment, bullying and discrimination, and to ensure that such investigation is completed promptly after receipt of any written reports;²³⁹

5. Require that when an investigation reveals any such verified harassment, bullying or discrimination, the school take prompt actions reasonably calculated to end the harassment, bullying or discrimination, eliminate any hostile environment, create a more positive school culture and climate, prevent recurrence of the behavior, and ensure the safety of the student or students against whom such harassment, bullying or discrimination was directed. The actions must be consistent with the guidelines to be created by the school district related to the development of measured, balanced and age-appropriate responses to such incidents;²⁴⁰

6. Prohibit retaliation against any individual who, in good faith, reports, or assists in the investigation of harassment, bullying or discrimination;²⁴¹

7. Include a school strategy to prevent harassment, bullying and discrimination;²⁴²

8. Require the principal to make a regular report to the superintendent on data and trends related to harassment, bullying and discrimination;²⁴³

9. Require the principal, superintendent or either individual's designee to promptly notify the appropriate local law enforcement agency when such individual believes that any harassment, bullying or discrimination constitutes criminal conduct;²⁴⁴

10. Include appropriate references to the provisions of the school district's code of conduct that are relevant to harassment, bullying and discrimination;²⁴⁵

11. Require that at least once during each school year, each school provide all school employees, students and parents with a written or electronic copy of the school district's policies on bullying, harassment and discrimination created in accordance with DASA, or a plain-language summary thereof, which includes a notification of the process by which students, parents and school employees may report harassment, bullying and

²³⁹ *Id.* § 13(1)(D).

²⁴⁰ *Id.* § 13(1)(E).

²⁴¹ *Id.* § 13(1)(F).

²⁴² *Id.* § 13(1)(G).

²⁴³ *Id.* § 13(1)(H).

²⁴⁴ *Id.* § 13(1)(I).

²⁴⁵ *Id.* § 13(1)(J).

discrimination. However, it is not necessary for school districts to further distribute such policies and guidelines to school employees, students and parents if they otherwise do so;²⁴⁶ and

12. Require the school district to maintain current versions of the school district's policies created pursuant to the requirements of DASA, on the school district's internet website, if one exists.²⁴⁷

School Training Programs under DASA

Back in May of 2012, the Board of Regents adopted Regulations with respect to training requirements.²⁴⁸ The Regulations require school districts to establish guidelines to implement school employee training programs, which promote a positive school environment free from harassment, bullying, and discrimination, and to discourage and respond to such incidents. In addition, these Regulations were amended in 2013 to require school districts to create guidelines that also address bullying, and that make school employees aware of the effects of harassment, bullying, cyberbullying, and discrimination.²⁴⁹ The guidelines will include, but not be limited to, the following:

- training to raise awareness and sensitivity to potential acts of discrimination and/or harassment directed at students, committed by employees or students, on school property or at school functions, including but not limited to, discrimination and/or harassment based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex. Such training must address the "social patterns of harassment, bullying and discrimination, the identification and mitigation of such acts, and strategies for effectively addressing problems of exclusion, bias, and aggression in educational settings;"²⁵⁰
- training to enable employees to prevent and respond to incidents of discrimination, bullying and/or harassment;²⁵¹
- training to make employees aware of the effects of harassment, bullying, cyberbullying, and/or discrimination on students;²⁵²

²⁴⁶ *Id.* § 13(1)(K).

²⁴⁷ *Id.* § 13(1)(L).

²⁴⁸ *See* 8 NYCRR § 100.2.

²⁴⁹ N.Y. EDUC. LAW § 13(2).

²⁵⁰ 8 NYCRR § 100.2(jj)(3)(i); N.Y. EDUC. LAW § 13(5).

²⁵¹ 8 NYCRR § 100.2(jj)(3)(ii).

²⁵² *Id.* § 100.2(jj)(3)(iii).

- training to ensure the effective implementation of school policy on school conduct and discipline, including but not limited to, guidelines on promoting a safe and supportive school climate while discouraging harassment, bullying and/or discrimination against students by students and/or school employees;²⁵³ and
- training to include safe and supportive school climate concepts in curriculum and classroom management.²⁵⁴

The Regulations do not specify the extent of the training required; however, the Regulations provide it may be incorporated into an existing professional development plan required under the Commissioner’s Regulations and/or conducted in conjunction with any other training for school employees.²⁵⁵ DASA and its accompanying regulations also require a school district’s board of education to create guidelines relating to the development of measured, balanced and age-appropriate responses to instances of harassment, bullying or discrimination by students. Such guidelines must include: (a) remedies and procedures that follow a progressive model that make appropriate use of intervention, discipline and education, which vary in method according to the nature of the behavior, the developmental age of the student and the student’s history of problem behaviors, and (b) are consistent with the school district’s code of conduct.²⁵⁶

Dignity Act Coordinator Training & Dissemination of Dignity Act Coordinator Information

Under DASA, Dignity Act Coordinators are required to receive training that coincides with the requirements of school training programs under Education Law §13. Therefore, Dignity Act Coordinators are required to be provided with training:

1. which addresses the social patterns of harassment, bullying and discrimination, including but not limited to those acts based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, and sex;²⁵⁷
2. in the identification and mitigation of harassment, bullying and discrimination;²⁵⁸ and

²⁵³ *Id.* § 100.2(jj)(3)(iv).

²⁵⁴ *Id.* § 100.2(jj)(3)(v).

²⁵⁵ *See id.* § 100.2(jj)(3)(vi).

²⁵⁶ N.Y. EDUC. LAW § 13(4).

²⁵⁷ 8 NYCRR § 100.2(jj)(4)(iii).

²⁵⁸ *Id.* § 100.2(jj)(4)(iv).

3. in strategies for effectively addressing problems of exclusion, bias, and aggression in educational settings.²⁵⁹

Furthermore, Dignity Act Coordinators and school employees should be informed during the training program that the Regulations should not be construed to prohibit a denial of admission into, or exclusion from, a course of instruction based on a person's gender, or to prohibit discrimination based on disability, that would be permissible under law.²⁶⁰

Additionally, the Commissioner's Regulations include requirements for appointment of, and dissemination of information regarding, the Dignity Act Coordinator(s). The Dignity Act Coordinator(s) must be approved by the board of education, trustees or board of trustees and "be employed by such school district, BOCES or charter school, as applicable, and be licensed and/or certified by the Commissioner as a classroom teacher, school counselor, school psychologist, school nurse, school social worker, school administrator or supervisor, or superintendent of schools."²⁶¹ Also, their name(s) and contact information must be shared with all personnel, students and parents.

The Regulations require that contact information be disseminated in the following manner:

1. listing the information in the Code of Conduct and updates thereto posted on the school district's website;²⁶²
2. including the information in the plain language summary of the Code of Conduct provided to all parents at the beginning of the year;²⁶³
3. including the information to parents and persons in parental relation at least once per school year in a manner determined by the school, including, but not limited to, through electronic communication and/or sending the information home with students;²⁶⁴
4. posting the information in highly-visible areas of school buildings;²⁶⁵ and
5. making the information available at the school district and at school-level administrative offices.²⁶⁶

²⁵⁹ *Id.* § 100.2(jj)(4)(v).

²⁶⁰ *Id.* § 100.2(jj)(5).

²⁶¹ *Id.* § 100.2(jj)(4)(vi).

²⁶² *Id.* § 100.2(jj)(4)(vii)(a).

²⁶³ *Id.* § 100.2(jj)(4)(vii)(d).

²⁶⁴ *Id.* § 100.2(jj)(4)(vii)(e).

²⁶⁵ *Id.* § 100.2(jj)(4)(vii)(b).

²⁶⁶ *Id.* § 100.2(jj)(4)(vii)(c).

In the event the Dignity Act Coordinator vacates his/her position, another school employee will immediately be designated for an interim appointment as Coordinator, pending approval of a successor Coordinator within thirty (30) days.²⁶⁷

ii. Education Law, Section 801-a

Under Education Law, Section 801-a, school districts are required to provide instruction in civility, citizenship and character education which includes a component instructing students on the principles of honesty, tolerance, personal responsibility, respect for others, observance of laws and rules, courtesy, dignity and other traits that will enhance the quality of students' experiences in, and contributions to, the community.²⁶⁸ The course must also include an additional component which emphasizes discouraging acts of harassment, bullying and discrimination. This component must include instruction of safe, responsible use of the Internet and electronic communications. DASA expands the concepts of "tolerance," "respect for others" and "dignity" by requiring school districts, when providing the required civility, citizenship, and character education, to include in such instruction, raising "awareness and sensitivity to discrimination, bullying or harassment and civility in the relations of people of different races, weights, national origins, ethnic groups, religions, religious practices, mental or physical abilities, sexual orientations, genders, and sexes."²⁶⁹

Commissioner's Regulations

In line with Section 801-a of the Education Law, Section 100.2(c) of the Commissioner's Regulations outlines the required subjects of instruction in elementary and secondary schools.²⁷⁰ The regulation includes a requirement that all public school students, other than students in charter schools, receive instruction in civility, citizenship and character education as required by Section 801-a of the Education Law.

Additionally, the Board of Regents adopted a Regulation that became effective on July 1, 2012, which includes a provision requiring charter schools to provide instruction that supports the development of a school environment free of harassment, bullying, and discrimination as required by DASA.²⁷¹ Charter schools were previously exempt from the requirement. The instruction must contain the same components as the instruction provided by other public schools. However, because it is not necessary for charter schools to provide a curriculum component on civility, citizenship and character education,

²⁶⁷ *Id.* § 100.2(jj)(4)(viii).

²⁶⁸ N.Y. EDUC. LAW § 801-a.

²⁶⁹ *Id.*

²⁷⁰ *See* 8 NYCRR § 100.2(c).

²⁷¹ *See id.* § 119.6.

the instruction must be incorporated into another portion of a charter school's curriculum.²⁷²

iii. Education Law Section 2801 and Codes of Conduct

DASA amended Section 2801 of the Education Law, by requiring school districts to include in their Codes of Conduct provisions in compliance with Article 2 of the Education Law, or DASA. Specifically, Article 2 of the Education Law requires inclusion into a school district's Code of Conduct, a version of the policy prohibiting harassment and bullying of students by employees or students, and/or discrimination by same, based upon a student's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex.²⁷³ The policy must be age appropriate and written in plain language.²⁷⁴ Currently, Education Law § 2801(5) requires school districts to annually review their Codes of Conduct and update them if necessary.²⁷⁵

Commissioner's Regulations

Section 100.2(l)(2) of the Commissioner's Regulations, which sets forth the provisions required to be included in a Code of Conduct, were amended in accordance with DASA. Specifically, the Regulations require that school districts modify their Codes of Conduct to include:

- “provisions prohibiting harassment, bullying and/or discrimination against any student, by employees or students, [on school property and/or at a school function or off school property where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property,] that creates a hostile environment by conduct, [with or without physical contact and/or by verbal] threats, intimidation or abuse, including cyberbullying [of such a severe nature] that either: (1) has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional and/or physical well-being, including conduct, threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause emotional harm; or (2) reasonably causes or would reasonably be expected to cause physical injury to a student to fear for his or her physical safety. ... Such conduct will include, but is not limited to, acts based on a person's

²⁷² See *id.* § 100.2(c)(2); see also *id.* § 119.6.

²⁷³ N.Y. EDUC. LAW § 12; see also N.Y. EDUC. LAW ART. 2.

²⁷⁴ N.Y. EDUC. LAW § 12(2).

²⁷⁵ *Id.* § 2801(5).

actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender, or sex.”²⁷⁶

- “disciplinary measures to be taken for incidents on school property or at school functions involving harassment, bullying and/or discrimination.”²⁷⁷
- “provisions for responding to acts of bullying, harassment and/or discrimination against students by employees or students ... which, with respect to such acts against students by students, incorporate a progressive model of student discipline that includes measured, balanced and age-appropriate remedies and procedures that make appropriate use of prevention, education, intervention and discipline, and considers among other things, the nature and severity of the offending student’s behavior(s), the developmental age of the student, the previous disciplinary record of the student and other extenuating circumstances, and the impact the student’s behaviors had on the individual(s) who was physically injured and/or emotionally harmed. Responses will be reasonably calculated to end the harassment, bullying and/or discrimination, prevent recurrence, and eliminate the hostile environment. The progressive model of student discipline will be consistent with the other provisions of the code of conduct.”²⁷⁸
- “provisions setting forth the procedures by which local law enforcement agencies will be notified promptly of code violations, including but not limited to incidents of harassment, bullying, and/or discrimination, which may constitute a crime.”²⁷⁹
- “a bill of rights and responsibilities of students which focuses upon positive student behavior and a safe and supportive school climate, which will be written in plain-language, publicized and explained in an age-appropriate manner to all students on an annual basis.”²⁸⁰
- “guidelines and programs for in-service education programs for all district staff members to ensure effective implementation of school policy on school conduct and discipline, including but not limited to, guidelines on promoting a safe and supportive school climate while discouraging, among other things, harassment, bullying and discrimination against students by students and/or school employees; and including safe and supportive school climate concepts in the curriculum and classroom management.”²⁸¹

²⁷⁶ 8 NYCRR § 100.2(l)(2)(ii)(b).

²⁷⁷ *Id.* § 100.2(l)(2)(ii)(g).

²⁷⁸ *Id.* § 100.2(l)(2)(ii)(h).

²⁷⁹ *Id.* § 100.2(l)(2)(ii)(l).

²⁸⁰ *Id.* § 100.2(l)(2)(ii)(r).

²⁸¹ *Id.* § 100.2(l)(2)(ii)(s).

- “provisions prohibiting retaliation against any individual who, in good faith, reports or assists in the investigation of harassment, bullying, and/or discrimination.”²⁸²

Furthermore, Section 100.2(l)(2) of the Commissioner’s Regulations also requires Boards of Education and Boards of Cooperative Educational Services to ensure community awareness of their Codes of Conduct by posting the complete Code of Conduct, including any annual updates or amendments thereto, on their website, if they maintain one, and by providing copies of a summary of the Code of Conduct to all students, in an age-appropriate, plain-language version, either at a school assembly held at the beginning of each school year or by mailing it to all persons in parental relation before the beginning of each school year.²⁸³ Additionally, school districts are to provide a complete copy of the Code of Conduct to all existing and new teachers and to make a complete copy available for review by students, parents, other school staff and other community members.²⁸⁴

iv. School Safety Plans

In addition to codes of conduct, school districts must also adopt and amend a comprehensive district-wide school safety plan and building level emergency response plans regarding crisis intervention, emergency response, and management.²⁸⁵ These plans must be developed by a district-wide school safety team and a building level emergency response team.²⁸⁶

Such comprehensive district wide safety plans must include the following:

- 1) Policies and procedures for responding to implied or direct threats of violence by students, teachers, or other school personnel as well as visitors to the school, including threats by students against themselves, including suicide.²⁸⁷
- 2) Policies and procedures for responding to acts of violence by students, teachers, other school personnel, as well as school visitors, including consideration of zero-tolerance policies for school violence.²⁸⁸
- 3) Appropriate prevention and intervention strategies, including:²⁸⁹

²⁸² *Id.* § 100.2(l)(2)(ii)(t).

²⁸³ *Id.* § 100.2(l)(2)(iii)(b).

²⁸⁴ *Id.*

²⁸⁵ N.Y. EDUC. LAW § 2801-a(1) (McKinney 2018).

²⁸⁶ *Id.*

²⁸⁷ *Id.* § 2801-a(2)(a).

²⁸⁸ *Id.* § 2801-a(2)(b).

²⁸⁹ *Id.* § 2801-a(2)(c).

- a) Collaborative arrangements with state and local law enforcement officials, designed to ensure that school safety officers and other security personnel are adequately trained, including being trained to de-escalate potentially violent situations;²⁹⁰
 - b) Non-violent conflict resolution training programs;²⁹¹
 - c) Peer mediation programs and youth courts;²⁹² and
 - d) Extended day and other school safety programs.²⁹³
- 4) Policies and procedures for contacting appropriate law enforcement officials in the event of a violent incident.²⁹⁴
 - 5) Policies and procedures for contacting parents, guardians or persons in parental relation to the students of the district in the event of a violent incident and policies and procedures for contacting parents, guardians, or persons in parental relation to an individual student of the district in the event of an implied or direct threat of violence by such student against themselves, including suicide.²⁹⁵
 - 6) Policies and procedures relating to school building security, including where appropriate the use of school safety officers and/or security devices or procedures.²⁹⁶
 - 7) Policies and procedures for the dissemination of informative materials regarding the early detection of potentially violent behaviors.²⁹⁷
 - 8) Policies and procedures for annual school safety training for staff and students.²⁹⁸
 - 9) Protocols for responding to bomb threats, hostage taking, intrusions, and kidnappings.²⁹⁹
 - 10) Strategies for improving communication among students and between students and staff and reporting of potentially violent incidents, such as the

²⁹⁰ *Id.* § 2801-a(2)(c)(i).

²⁹¹ *Id.* § 2801-a(2)(c)(ii).

²⁹² *Id.* § 2801-a(2)(c)(iii).

²⁹³ *Id.* § 2801-a(2)(c)(iv).

²⁹⁴ *Id.* § 2801-a(2)(d).

²⁹⁵ *Id.* § 2801-a(2)(e).

²⁹⁶ *Id.* § 2801-a(2)(f).

²⁹⁷ *Id.* § 2801-a(2)(g).

²⁹⁸ *Id.* § 2801-a(2)(h).

²⁹⁹ *Id.* § 2801-a(2)(i).

establishment of youth-run programs, peer mediation, conflict resolution, creating a forum or designating a mentor for students concerned with bullying or violence and establishing anonymous reporting mechanism for school violence.³⁰⁰

- 11) A description of the duties of hall monitors and any other school safety personnel.³⁰¹

A building level emergency response plan must include the following elements:

- 1) Policies and procedures for response to emergency situations, such as those requiring evacuation, sheltering, and lock-down.³⁰²
- 2) Designation of an emergency response team comprised of school personnel, law enforcement officials, fire officials, and representatives from local regional and/or state emergency response agencies.³⁰³
- 3) Floor plans, blueprints, schematics, or other maps of the school interior, school grounds and road maps.³⁰⁴
- 4) Establishment of internal and external communication systems in emergencies.³⁰⁵
- 5) Definition of the chain of command in a manner consistent with the national interagency incident management system/incident command system.³⁰⁶
- 6) Coordination of the emergency response plan with the state-wide plan for disaster mental health services to assure that the school has access to federal, state, and local mental health resources.³⁰⁷
- 7) Procedures for review and the conduct of drills and other exercises to test components of the emergency response plan.³⁰⁸
- 8) Policies and procedures for securing and restricting access to the crime scene in order to preserve evidence in cases of violent crimes on school property.³⁰⁹

³⁰⁰ *Id.* § 2801-a(2)(j).

³⁰¹ *Id.* § 2801-a(2)(k).

³⁰² *Id.* § 2801-a(3)(a).

³⁰³ *Id.* § 2801-a(3)(b).

³⁰⁴ *Id.* § 2801-a(3)(c).

³⁰⁵ *Id.* § 2801-a(3)(d).

³⁰⁶ *Id.* § 2801-a(3)(e).

³⁰⁷ *Id.* § 2801-a(3)(f).

³⁰⁸ *Id.* § 2801-a(3)(g).

³⁰⁹ *Id.* § 2801-a(3)(h).

2. Requirements for the Commissioner of Education

DASA requires the Commissioner of Education to provide direction, which may include model policies, to school districts to prevent harassment, bullying, and discrimination.³¹⁰ The Commissioner must also provide grants to school districts to facilitate the implementation of the guidelines.³¹¹ In addition, DASA requires the Commissioner to promulgate regulations to assist school districts in implementing this law, as well as provide guidance related to the application of the regulations. Such regulations will include, “but not [be] limited to, regulations to assist school districts in developing measured, balanced and age appropriate responses to violations of this policy, with remedies and procedures following a progressive model that makes appropriate use of intervention, discipline and education.”³¹²

Additionally, DASA requires the Commissioner to create a procedure so that school districts report to the State Education Department, at least annually, material incidents of discrimination, bullying and harassment on school grounds or at a school function.³¹³ The reports must delineate the specific nature of the incidents of harassment, bullying or discrimination and may comply with the reporting requirements through the use of the existing uniform violent incident reporting system.³¹⁴

Furthermore, the Commissioner must provide school districts with guidance and educational materials relating to best practices in addressing cyberbullying and which help families and communities work cooperatively with schools in addressing cyberbullying, whether it occurs on or off school property, or at or away from a school function.³¹⁵

The Commissioner will also prescribe regulations that require, in addition to all other certification and licensing requirements, that school professionals applying for a certificate or a license, on or after July 1, 2013, have completed training on the social patterns of harassment, bullying and discrimination and the identification and mitigation of same, as well as strategies for effectively addressing problems of exclusion, bias and aggression in educational settings. This includes, but is not limited to, certificates or licenses for service as a classroom teacher, school counselor, school psychologist, school social worker, school administrator or supervisor, or superintendent of schools.³¹⁶

³¹⁰ *Id.* § 14(1).

³¹¹ *Id.* § 14(2).

³¹² *Id.* § 14(3).

³¹³ *Id.* § 15.

³¹⁴ *Id.*

³¹⁵ *Id.* § 14(4).

³¹⁶ *Id.* § 14(5).

Reporting Regulations

The Commissioner has created Regulations amending Section 100.2 of the Commissioner's Regulations to add a Dignity Act reporting requirement. The Regulations require each school district to submit to the Commissioner an annual report of material incidents of discrimination, bullying and harassment that occurred in such school year, in accordance with Education Law Section 15 and the Commissioner's Regulations. The reports will be submitted in a manner prescribed by the Commissioner, on or before the basic educational data system (BEDS) reporting deadline or at such other date as determined by the Commissioner.³¹⁷ The reports will include material incidents of harassment, bullying, and/or discrimination resulting from an investigation of a written or oral complaint made to the superintendent, school principal or their designee, or any other school employee; or are otherwise directly observed by such individuals regardless of whether a complaint is made.³¹⁸

In accordance with the Regulations, a "material incident of harassment, bullying, and/or discrimination" is:

"a single verified incident or a series of related verified incidents where a student is subjected to harassment, bullying, and/or discrimination by a student and/or employee on school property or at a school function. In addition, such terms will include a verified incident or series of related incidents of harassment or bullying that occur off school property, [where such acts create or would foreseeably create a risk of substantial disruption within the school environment, where it is foreseeable that the conduct, threats, intimidation or abuse might reach school property], and is the subject of a written or oral complaint to the superintendent, principal, or their designee, or other school employee. Such conduct will include, but is not limited to, threats, intimidation or abuse based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practices, disability, sexual orientation, gender or sex."³¹⁹ Denials of admission into, or exclusion from a course of instruction, based on gender or disability that would be permissible under law are excluded from this definition.

The report will include: the types of bias involved and where multiple types of bias are involved, all should be reported; whether the incident resulted from student and/or employee conduct; whether the incident involved physical contact and/or verbal threats, intimidation or abuse, including cyberbullying; and the location where the incident occurred.³²⁰

³¹⁷ 8 NYCRR § 100.2(kk)(3)(i).

³¹⁸ *Id.* § 100.2(kk)(3)(ii).

³¹⁹ *Id.* § 100.2(kk)(1)(ix).

³²⁰ *Id.* § 100.2(kk)(3)(iii).

3. Immunity from Liability for Reporting Incidents

DASA provides for immunity for good faith reporting. Specifically, any person having reasonable cause to suspect that a student has been subjected to discrimination, bullying or harassment who, acting reasonably and in good faith, reports such incident to school officials, the Commissioner, or police, or otherwise initiates, testifies, participates or assists in a proceeding, will have immunity from any civil liability that arises from taking of such action. No school district or employee will retaliate against such person.³²¹

Reporting Regulation

The aforementioned Regulation regarding reporting requirements includes a provision protecting good faith reporters and prohibiting retaliation that is directly in line with Article 2 of the Education Law.

4. Application to Charter Schools

Under Regulation 8 NYCRR § 119.6, each charter school must include in its Code of Conduct provisions prohibiting harassment, bullying and discrimination, in accordance with the requirements for public schools.

IV. Sub-Committee Reports and Observations

The readily available research discussed below demonstrates that despite efforts to comply with the mandates of the Education Law, other alternatives are necessary to treat with those unfortunate situations when a chain of events starting with a student suspension lead to the undesirable consequences of the School to Prison Pipeline.

A. Populations Subject to Disparate Treatment

The suspensions or other disciplinary measures currently taken against students pursuant to Education Law Section 3214 is of an extreme disparate nature. The School to Prison Pipeline Report issued by the American Bar Association (hereinafter referred to as “ABA Report”), concludes that students of color, students with disabilities, and LGBTQ students all experience the adverse impacts caused by suspensions and other disciplinary actions at far higher rates than would be expected based on their numbers in the student population.³²² Such disparate treatment of these classes of students is also evident in New York due to the application of Education Law Section 3214.

³²¹ N.Y. EDUC. LAW § 16 (McKinney 2018).

³²² Sarah E. Redfield & Jason P. Nance, *American Bar Association Joint Task Force on Reversing the School-to-Prison-Pipeline*, AMERICAN BAR ASSOCIATION 10-11 (2016), https://www.americanbar.org/content/dam/aba/administrative/diversity_pipeline/stp_preliminary_report_final.authcheckdam.pdf [hereinafter ABA Report].

While the School to Prison Pipeline has been a genuine problem for quite some time, recent data from the U.S. Department of Education’s Civil Rights Data Collection shows that there is significant disparity among certain classes of students. “This disproportionality manifests itself all along the educational pipeline from preschool to juvenile justice and even to adult prison for students of color, for students with disabilities, for LGBTQ students, and for other groups in particular settings. These students are poorly served at every juncture.”³²³

The ABA Report specifically states that “[s]tudents of color are disproportionately:

- lower achievers and unable to read at basic or above [average];
- damaged by lower expectations and lack of engagement[;]
- retained in grade or excluded because of high stakes testing[;]
- subject to more frequent and harsher punishment[;]
- placed in alternative disciplinary schools or settings[;]
- referred to law enforcement or subject to school-related arrest[;]
- pushed or dropping out of school[;]
- failing to graduate from high school[; and]
- feel threatened at school and suffer consequences as victims.”³²⁴

The disproportionality mentioned above also manifests itself in similar ways for students with disabilities, and other factors such as race and ethnicity, gender, and disability compound the disproportionality. Specifically, “[s]tudents with disabilities (or those who are labeled as disabled by the school) are disproportionately:

- students of color, especially in discretionary categories under the Individuals with Disabilities Education Act (IDEA);
- less likely to be academically proficient;
- disciplined, and more harshly so;
- retained in grade, but still dropping out or failing to graduate;
- more likely to be placed in alternative disciplinary schools or settings;
- or otherwise more likely to spend time out of the regular classroom, to be secluded or restrained; and
- referred to law enforcement or subject to school-related arrest and incarceration.”³²⁵

Further, the ABA Report found that the disparities in treatment for student suspensions are also present in the juvenile justice system where youth of color, youth with disabilities, and LGBTQ youth are typically disproportionately arrested, referred, detained (longer),

³²³ *Id.* at 10.

³²⁴ *Id.*

³²⁵ *Id.* at 11.

charged, found delinquent (or transferred to adult court).³²⁶ The juveniles in the system statistically have been disproportionately imprisoned rather than sentenced to a diversion program or probation in order to help rehabilitate the person.³²⁷ As a byproduct, those caught in the School to Prison Pipeline are less likely to have access to meaningful education to enable them to graduate from high school and prepare them for higher education and work opportunities.³²⁸

The ABA Report ultimately concludes that the disproportionality of suspensions among social and racial classes cannot be explained by the notion that “certain groups are more likely to be engaged in bad or delinquent behavior.”³²⁹ Rather, the authors of the ABA report cite major causes of the disparities such as the wide discretion contained in most student discipline codes.³³⁰ Since there is a strong correlation between attendance and academic success, multiple suspensions lead to academic failure and a far higher risk of criminal justice system involvement.³³¹ Most importantly, it is evident from the data that that disciplinary actions, including suspensions, do not lead to better outcomes for students, nor does it help provide for a safer school setting.³³²

The ABA Report detailed the disparate nature of the School to Prison Pipeline on a national level. The national data portrays the use of student suspensions as a tool to support the biases that are held in everyday life. As stated above, this Task Force was tasked with the mission to determine whether such biases and disparate treatments extend to New York State School Districts based on the language of Education Law §3214.

1. Does New York Have a Disparities Problem?

As discussed *infra*, Education Law Section 3214 permits school districts to suspend students as a means of disciplinary action. Such suspensions can be levied by a School Principal of five or less days, or by the Superintendent of Schools, if the suspension is to be longer than five days.³³³ In each type of suspension, the student is entitled to due process in the form of an informal conference, if the suspension is issued by the Principal, or in the form of a Superintendent’s Hearing, if the suspension is issued by the Superintendent. It is apparent from the data regarding out of school suspensions within New York State that the disparities problem explained below is predominant among large urban school districts.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.* at 20.

³³⁰ *Id.* at 18-20.

³³¹ *Id.* at 20-22.

³³² *Id.* at 22-24.

³³³ N.Y. EDUC. LAW § 3214.

During the 2016-2017 school year, there were 35,234 total suspensions in New York City Schools.³³⁴ 25,696 (72.9%) of these suspensions were a short-term principal's suspension while 9,538 (27.1%) of these suspensions were long-term suspensions.³³⁵ Of those suspensions, 46.9% of the suspensions were of black students, even though black students encompassed only 26.5% of the entire student population.³³⁶ 38.9% of the suspensions were students that had an individualized education plan ("IEP"), despite only 19.4% of the entire student population having an IEP.³³⁷ In 2015-2016, nearly 50% of the 37,647 suspensions were Black students, whereas 38.6% of the suspensions were students with an IEP.³³⁸ The student population was only 27.1% Black and 18.7% of students had an IEP.³³⁹ It is evident from this data, that there is clearly a disparity of suspensions for Black students and students with IEPs.

Furthermore, during the 2016-2017 school year, black students in school districts outside of New York City were suspended at a rate of four times more than the suspension of white students.³⁴⁰ Additionally, while the total suspension rate of students was the highest in high schools across New York State, black students in primary and middle schools were suspended nearly five times more than white students.³⁴¹

Research also shows that students of color are more likely to be referred to law enforcement for disciplinary infractions than Caucasian students.³⁴² In the second quarter of 2018, 58% of the law enforcement arrests in New York City schools were black

³³⁴ *Student Safety Act Reporting on Suspensions: 2016-2017 School Year*, NEW YORK CIVIL LIBERTIES UNION, https://www.nyclu.org/sites/default/files/ssa_suspension_factsheet_2016-2017.pdf (last visited Dec. 19, 2018). The total number of suspensions reported by New York City for the 2017-2018 academic year has increased to 36,668 which amounts to a 4.1% from 2016-2017. *Student Safety Act Reporting on Suspensions: 2017-2018 School Year*, NEW YORK CIVIL LIBERTIES UNION, https://www.nyclu.org/sites/default/files/ssa_suspension_fact_sheet_2017-2018.pdf (last visited Dec. 19, 2018).

³³⁵ *Student Safety Act Reporting on Suspensions: 2016-2017 School Year*, NEW YORK CIVIL LIBERTIES UNION, https://www.nyclu.org/sites/default/files/ssa_suspension_factsheet_2016-2017.pdf (last visited Dec. 19, 2018).

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Student Safety Act Reporting on Suspensions: 2015-2016 School Year*, NEW YORK CIVIL LIBERTIES UNION, https://www.nyclu.org/sites/default/files/SSA_Suspension_FactSheet_2015-2016.pdf (last visited Dec. 19, 2018).

³³⁹ *Id.*

³⁴⁰ *Stolen Time: New York State's Suspension Crisis*, THE NEW YORK EQUITY COALITION 4-7 (Dec. 2018), available at <https://s3-us-east-2.amazonaws.com/edtrustmain/wp-content/uploads/sites/5/2018/12/09090556/Stolen-Time.pdf>.

³⁴¹ *Id.*

³⁴² American Civil Liberties Union, *School-to-Prison Pipeline [Infographic]*, ACLU <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline/school-prison-pipeline-infographic> (last visited Dec. 28, 2018).

students while only 6.3% of arrests were white students.³⁴³ As these students are referred to law enforcement, the likelihood of future referrals outside of student code of conduct referrals increases. In a study completed in Texas, students who were suspended or received referrals were three times as likely as a non-suspended student to enter the juvenile system within one year of the disciplinary infraction.³⁴⁴

This nationwide issue also extends to school districts in New York. As stated previously, the data collected by the United States Department of Education, Office of Civil Rights, indicates that school districts suspend students of color and students with disabilities at significantly higher rates than white students and those without disabilities.³⁴⁵ A comprehensive report was completed by a Task Force chaired by former Chief Judge Judith Kaye, which found that in the New York City School District:

- Most suspensions are for minor and common school misbehavior;
- Students of Color and students receiving special education services are suspended in disproportionate numbers;
- There was no evidence that the higher rate of suspensions for students of color was linked to higher rates of misbehavior;
- The disproportionality of suspensions for students of color had increased as the number of suspensions overall had decreased; and
- The majority of suspensions were concentrated among a small number of schools.³⁴⁶

As stated above, across New York State, there is evidence of disparate treatment of suspensions toward minority students and those students with IEPs. The issue of disproportional treatment towards student suspensions in school districts is not limited to New York City. In 2014 the New York State Attorney General's Office entered into consent decrees with the cities of Syracuse³⁴⁷ and Albany³⁴⁸ School Districts in an effort to correct disparate discipline.

³⁴³ New York Civil Liberties Union, *Student Safety Act Reporting*, NYCLU https://www.nyclu.org/sites/default/files/ssa_2018_q2_nyclu.pdf (last visited Dec. 28, 2018).

³⁴⁴ Tony Fabelo et al., *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement*, COUNCIL OF ST. GOV'TS JUST. CENTER, xii (July 2011), available at https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf.

³⁴⁵ U.S. DEP'T OF JUST. & U.S. DEP'T OF EDUC., *supra* note 3.

³⁴⁶ *Keeping Kids In School and Out of Court: New York City School Justice Partnership Task Force Report and Recommendations*, N.Y. ST. PERMANENT JUD. COMMISSION ON JUST. FOR CHILD., 4-6 (2013), <https://www.nycourts.gov/IP/justiceforchildren/PDF/NYC-School-JusticeTaskForceReportAndRecommendations.pdf>.

³⁴⁷ Investigation of Eric T. Schneiderman, Att'y Gen. of the State of N.Y. of Syracuse City Sch. Dist., AOD No. 14-159, (Off. of the Att'y Gen. of the State of N.Y., Civ. Rts. Bureau July 10, 2014), available at https://ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/Syracuse_City_School_District_AOD-Executed.pdf [hereinafter Syracuse City Sch. Dist. Consent Decree].

³⁴⁸ Investigation of Eric T. Schneiderman, Att'y Gen. of the State of N.Y. of the City Sch. Dist. of Albany, AOD No. 15-243, (Off. of the Att'y Gen. of the State of N.Y., Civil Rights Bureau Dec. 4, 2015), available at

In Syracuse, the New York State Attorney General's Office determined that:

[R]acial disparities exist throughout the disciplinary process, as black students are disciplined at higher rates than white students. Overall, during the 2011-2012 school year, almost 44% of black students received at least one teacher referral, while the figure for white students was nearly 26%. For in-school suspensions, nearly 27% of black students received at least one in-school suspension, while 15% of white students received such a suspension. Finally, 25% of black students received at least one suspension out of school, while 12% of white students received at least one such suspension. For black students in middle school grades, 62% received at least one teacher referral, 44% received at least one in-school suspension, and 42% received at least one out-of-school suspension, compared to figures of 41%, 26% and 28% for white students, respectively. Black students were recommended for Superintendent's Hearings—a necessary precursor to Long-Term Suspensions—at twice the rate as white students. During the 2012-2013 school year, one in every ten black students in secondary school (grades 6-12) was recommended for Superintendent's Hearings, whereas one in every twenty white students in secondary school received such a recommendation.³⁴⁹

Additionally, in Albany, the New York State Attorney General's Office determined that there was "significant racial disparities in rates of referral."³⁵⁰

For each school year between August 2009 and May 2014, over 40% of all black students received at least one office referral, compared to 20% of all white students. These disparities result from policies that vest wide discretion in staff to remove students from the classroom without adequate guidance or limitation on exercising that discretion. Since 2012, the District has made concerted efforts to increase training opportunities for staff in classroom management, cultural competency, and positive behavior interventions and supports.³⁵¹

Further, the school district also engaged in disparate treatment towards other minority students, as well as students with disabilities. Such disparate treatment was also seen in gender based cases as well as amongst age groups.

https://www.albanyschools.org/district/Programs/AG_report/2015-16/AG_agreement_12-15.pdf [hereinafter City Sch. Dist. of Albany Consent Decree].

³⁴⁹ Syracuse City Sch. Dist. Consent Decree, *supra* note 347, at 6.

³⁵⁰ City Sch. Dist. of Albany Consent Decree, *supra* note 348, at 8.

³⁵¹ *Id.* at 8-9.

While there are school districts with significant disproportionality among certain student groups when issuing suspensions and are inappropriately influenced by gender, race, disability, there are many school districts that do not administer discipline in a disproportionate manner. This suggests that some school districts within New York State may be models for reform within a district.

2. The Role of Implicit Bias, Coupled with Vague Definitions of Misconduct, in Creating Disparities

The ABA Report,³⁵² and recent reports from the NAACP Legal Defense Fund (“NAACPLDF”)³⁵³ and the U.S Government Accountability Office³⁵⁴ identify the combination of implicit bias and the discretion offered by vaguely defined offenses, like disobedience, defiance and disruption, as factors that permit unintended disparities to be created.

The NAACPLDF Report succinctly explains the interrelationship between implicit bias and vague disciplinary standards:

“The inclusion of discretionary offenses for which students may be suspended has disproportionately harmed Black students even though Black students are not more likely to act out in school. Research has consistently established that Black students do not have higher rates of misconduct than other students. Rather, Black students are disproportionately disciplined for more subjective offenses, such as disrespecting a teacher or being perceived as a threat, than their White counterparts. These disparities result from and perpetuate stereotypes about Black students, specifically the stereotype that they are aggressive and dangerous.

Only recently have we fully understood that not only do such disparities perpetuate stereotypes regarding students of color, but are themselves the product of stereotypes subconsciously present in almost all of us. Every day, each of us is exposed to a variety of media that communicate negative stereotypes about persons of color. These stereotypes, unknowingly, affect behaviors of all people, including teachers. Teachers develop implicit biases that cause them to interpret otherwise innocent behavior as part of a pattern of negative behavior inherent in the student. Paired with disciplinary codes

³⁵² See ABA Report, *supra* note 322, at 18-20, 54-56.

³⁵³ AJMEL QUERESHI & JASON OKONOFUA, LOCKED OUT OF THE CLASSROOM: HOW IMPLICIT BIAS CONTRIBUTES TO DISPARITIES IN SCHOOL DISCIPLINE 4 (Jin Hin Lee et al. eds., 2017), https://www.naacpldf.org/wp-content/uploads/LDF_Bias_Report_WEB-2.pdf [hereinafter NAACPLDF Report].

³⁵⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-258, DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES 4 (2018).

that define misconduct in vague terms, stereotypes significantly shape teacher decisions as to which students they punish. These discriminatory behaviors affect not only teachers, but the students who are their victims. Reacting to years of discriminatory treatment, students may adjust their behavior, reacting coldly to teachers with whom they are not familiar, fearing that the teacher, like others, will unfairly target them for discipline.”³⁵⁵

In order to reduce the disparities in discipline that contribute to the School to Prison Pipeline, school districts need timely and accurate information on the location and populations within their district where disparities are shown to be occurring, and access to research-based tools to remedy them. The Trump Administration’s Federal Commission on School Safety stated in a report issued on December 18, 2018, that the 2014 guidance issued jointly by the U.S. Department of Education and the Department of Justice, which requires schools to monitor and remediate disparities in discipline by race, disabilities and other factors, should be abandoned.³⁵⁶ The New York State Education Department (“NYSED”) already collects information on discipline that can be used to identify disparities by race, gender, and disability (and by combinations of them) at both the district and school level. Since the 2014 Federal guidance forms the basis of NYSED’s requirements,³⁵⁷ the Task Force recommends that NYSED adopt its own disparities regulations that do not depend on the Federal guidance. Since the research discussed above shows that simply reducing the total number of suspensions alone will not cure the disparities problem and may indeed make it worse, an approach that is explicitly targeted at reducing disparities will be needed to actually reduce disparities in discipline across protected groups and to reduce the School-to-Prison Pipeline. One such approach is the use of restorative justice practices which is described below in more detail.

In an effort to achieve an informed approach to the adoption of disparities regulations, the Task Force suggests the New York State Education Department/Board of Regents consider the following regarding the collection of data. While existing data does suggest implicit bias and the resulting disparate treatment of students of color or who have disabilities in the state’s large urban areas, there are hundreds of suburban and rural school districts in the State.

³⁵⁵ NAACPLDF Report, *supra* note 349, at 4 (citations omitted) (internal quotation marks omitted).

³⁵⁶ Federal Commission on School Safety, *Final Report of the Federal Commission on School Safety*, 67-72 (Dec. 18, 2018), available at <https://www2.ed.gov/documents/school-safety/school-safety-report.pdf>.

³⁵⁷ The “2014 School Discipline Guidance Package” issued by the U.S. Department of Education and the U.S. Department of Justice can be found on the U.S. Department of Education’s website. *School Climate and Discipline: Federal Efforts*, U.S. DEPT OF EDUC., <https://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html> (last modified Dec. 8, 2015). The guidance package contains four documents: (1) Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline; (2) Guiding Principles; (3) Directory of Federal School Climate and Discipline Resources; and (4) Compendium of School Discipline Laws and Regulations.

1. The adoption of a standardized methodology for measuring disparities in discipline at both district and school levels across the protected classes of race, gender, disability and, if possible, by LGBTQ status. Annually this information should be reported to Districts and the public. Districts that have district-wide or school disparities above a threshold point set by the State Education Department would be required to develop remedial plans with targets and goals to reduce the disparities below the threshold within a reasonable period of time.
2. Using the current research on strategies that are effective in the reduction of disparities, the State Education Department should consider the development of model materials and processes that districts can use to analyze the root causes of the disparities shown in their data and information on strategies including training, services, courses, materials, consultants, and best practices that have been shown to successfully reduce disparities in discipline.

B. Restorative Justice & Current Productive Practices

Efforts have been made throughout the country regarding utilization of restorative justice as an integral part of the student disciplinary process. New York has been among one of the states to begin exploring the use of restorative justice alternatives rather than only using the traditional punitive model of suspending students for bad behavior. As explained in further detail below, restorative justice alternatives allow for a more instructive and effective model of discipline by permitting students to learn and grow from their mistakes while continuing their educational path.

Restorative justice is an increasingly acknowledged and employed approach to school discipline, behavior, and relationships. Restorative justice operates with an underlying thesis that “human beings are happier, more cooperative and productive, and more likely to make positive changes in their behavior when those in positions of authority do things *with* them, rather than *to* or *for* them.”³⁵⁸ Restorative justice lies at the intersection of criminal justice, school culture, and professional development. As an increasing amount of evidence demonstrates the long-standing system of punitive discipline to be not only ineffective in reducing behavioral incidents but to be detrimental to young people, particularly those of color, school districts are increasingly turning to the research-supported practices of restorative justice.³⁵⁹ In New York State, numerous cities have introduced initiatives to bring restorative justice into their schools. For example, in 2015,

³⁵⁸ Allison Ann Payne & Kelly Welch, *supra* note 7, at 226.

³⁵⁹ VALERIE L. MARSH, BECOMING RESTORATIVE: THREE SCHOOLS TRANSITIONING TO A RESTORATIVE PRACTICES CULTURE (2017), available at http://urcues.org/wp-content/uploads/2017/10/Restorative-Practices-Brief-2_final-25_EDITED.pdf; VALERIE L. MARSH, RESTORATIVE PRACTICES: HISTORY, SUCCESSES, CHALLENGES & RECOMMENDATIONS (2017), available at http://urcues.org/wp-content/uploads/2017/06/Restorative-Practices-Brief-1_final.pdf.

New York City's Department of Education instituted a policy toward behavior that incorporated restorative justice, which was precipitated by a two-decade long rise in student suspensions and an overrepresentation of black students being suspended.³⁶⁰ Similarly, the Rochester City School District has recently reworked its code of conduct with a de-emphasis on suspensions through the use of restorative justice.³⁶¹

The effectiveness of restorative justice is most often measured by quantitative studies that document its repeated success in reducing the severity and frequency of school violations.³⁶² To that end, restorative justice has been found to be an effective means of narrowing the discipline gap that disproportionately punishes students of color,³⁶³ resulting in disruption of the School-to-Prison Pipeline. However, restorative justice is more than a discipline reform. It is also an approach to transforming school culture.³⁶⁴ Studies that include qualitative methods are particularly helpful in learning about how restorative justice affects relationships, especially among students and teachers. These studies show that students prefer restorative justice to traditional punitive measures³⁶⁵

³⁶⁰ SAMANTHA POWNALL, A, B, C, D, STPP: HOW SCHOOL DISCIPLINE FEEDS THE SCHOOL-TO-PRISON PIPELINE, (Johanna Miller et al. eds., 2013), available at https://www.nyclu.org/sites/default/files/publications/nyclu_STPP_1021_FINAL.pdf.

³⁶¹ Justin Murphy, *RCSD Board Approves New Code of Conduct*, DEMOCRAT & CHRONICLE (June 16, 2016), <http://www.democratandchronicle.com/story/news/2016/06/16/rcsd-code-of-conduct-suspensions-restorative/85978032/>.

³⁶² GORDON BAZEMORE & MARA SCHIFF, "NO TIME TO TALK:" A CAUTIOUSLY OPTIMISTIC TALE OF RESTORATIVE JUSTICE AND RELATED APPROACHES TO SCHOOL DISCIPLINE 77 (2010); Thalia González, *supra* note 8; Sarah Guckenberger et al., *Restorative Justice in U.S. Schools: Summary Findings from Interviews with Experts*, WESTED (Oct. 2015), <https://jprc.wested.org/wp-content/uploads/2015/11/1447101213resourcestorerativejusticeinusschoolsummaryfindingsfrominterviewswithexperts.pdf>; David R. Karp & Beau Breslin, *Restorative Justice in School Communities*, 35 YOUTH & SOC'Y 249, 249-72 (2001); Brenda E. Morrison, *Regulating Safe School Communities: Being Responsive and Restorative*, 41 J. OF EDUC. ADMIN. 690, 690-704 (2003); Mara Schiff, *Dignity, Disparity, and Desistance: Effective Restorative Justice Strategies to Plug the "School-to-Prison Pipeline,"* UCLA: THE CIV. RTS. PROJECT (Jan. 2013), <https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/state-reports/dignity-disparity-and-desistance-effective-restorative-justice-strategies-to-plug-the-201cschool-to-prison-pipeline/schiff-dignity-disparity-ccrr-conf-2013.pdf>; Jeanne B. Stinchcomb, et al., *supra* note 9; Ted Wachtel, *Defining Restorative*, INTERNATIONAL INSTITUTE FOR RESTORATIVE PRACTICES (2013), <https://www.iirp.edu/pdf/Defining-Restorative.pdf>.

³⁶³ Anne Gregory et al., *The Promise of Restorative Practices to Transform Teacher-Student Relationships and Achieve Equity in School Discipline*, 26 J. EDUC. AND PSYCHOL. CONSULTATION 325, 325-53 (2016); Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RESEARCHER 59, 59-68 (2010); Mara Schiff, *supra* note 362.

³⁶⁴ Anne Gregory et al., *supra* note 363; Tom Cavanaugh, Patricia Vigil & Estrellita Garcia, *supra* note 7; Allison Ann Payne & Kelly Welch, *supra* note 7.

³⁶⁵ Wendy J. Drewery, *Conferencing in Schools: Punishment, Restorative Justice, and the Productive Importance of the Process of Conversation*, 14 J. COMMUNITY AND APPLIED SOC. PSYCHOL. 332, 332-44 (2004); Barry A. Fields, *Restitution and Restorative Justice in Juvenile Justice and School Discipline*, 22 YOUTH STUD. AUSTL. 44, 44-51 (2003); Anne Gregory et al., *supra* note 363; Jane O'Dea & Craig Loewen, *Life in the hallway: Students' Perceptions of Violent and Disruptive Behaviour in Their Schools*, in BUILDING FOUNDATIONS FOR SAFE AND CARING SCHOOLS: RESEARCH ON DISRUPTIVE BEHAVIOR AND VIOLENCE, 47-82 (Grace Malicky et al. eds., 1999).

and that restorative justice has a large positive impact on the entire school culture. With restorative justice practices in place, students gain a voice in their communities and teachers experience less stress.³⁶⁶

The evidence is clear – restorative justice works as a viable alternative to punitive discipline in schools. In contrast to restorative justice, there is a vast amount of evidence that finds the punitive approach to be ineffective in improving discipline and associated with a constellation of additional problems, such as social justice offenses, fueling the School-to-Prison Pipeline, decreased achievement, increased misbehavior, and increased likelihood that communities both inside and outside the school will suffer. Restorative justice offers more than the traditional punitive discipline, such as community, relationship, repair, decreased incidences of misbehavior, improved school culture, decreased racial discipline gap, and student agency. The road to reform is never easy, nor is it ever quick to achieve effective reform; however, restorative justice provides incentives supported by evidence that school communities can improve the experiences of all members/participants – including staff, parents, teachers, administrators, and especially students.

As mentioned previously, New York has explored the use of restorative justice practices by forming its own School-Justice Partnership which examined the disciplinary challenges in New York referred to above and issued recommendations for addressing disparities in discipline. The Task Force, led by the late Chief Judge Judith S. Kaye and supported by the New York State Permanent Judicial Commission on Justice for Children, issued a comprehensive array of recommendations to combat discipline disparities in New York schools. Among them was a recommendation to use “Restorative Approaches”³⁶⁷ to build the capacity for schools to implement and institutionalize the commitment to use positive interventions with their students. Restorative justice is by no means a new concept, but this was one of the early appearances of the practice in this context in the state of New York.

In New York State as well as many other parts of the country, there has been an increased recognition that punitive disciplinary measures such as school suspensions often cause more problems than they solve and aggravate existing problems. As a result of such recognition, a consensus is growing that the use of more proactive, solution-oriented alternatives are worthwhile. While these alternatives take many forms and the effectiveness of some of them is not yet entirely clear, one common aspect of all of them is that they aim to achieve restorative justice. The various forms of restorative justice seek to bring individuals involved in a conflict together to engage in a constructive dialogue

³⁶⁶ Guckenberger et al., *supra* note 362.

³⁶⁷ *Keeping Kids In School and Out of Court: New York City School Justice Partnership Task Force Report and Recommendations*, *supra* note 346, at 31.

to resolve the conflict at its root, in the belief that by doing so, we will likely reduce future conflict. In other words, each modality of restorative justice shifts the focus of a disciplinary hearing or inquiry toward repairing the harm caused in a conflict and away from punishment as a stand-alone resolution. Inherent in all restorative justice's iterations is a belief that when we do the difficult work of resolving conflict at its root, we reduce future conflict and come away from the process with more empathy and a decreased likelihood of repeating the same mistakes that led to the original conflict.

The use of restorative justice practices has spread across New York schools at an impressive pace. In April 2017, the New York State School Boards Association released a report entitled "Rethinking School Discipline."³⁶⁸ The report advocates for a dramatic shift away from punitive disciplinary practices and toward restorative justice.³⁶⁹ This is but one example of the broad consensus that is building around the effectiveness and importance of using restorative justice practices rather than relying on suspension and expulsion of students to change behavior.

Across the country, restorative justice models adopted by large districts have resulted in dramatic decreases in the numbers of suspensions. In Chicago, for example, upon adoption of a restorative justice approach, school suspensions were reduced from 23 percent of the student body to 16 percent over the course of five academic years.³⁷⁰ Though restorative justice alone does not fully account for the reduction, the shift in focus and goals that it represents appeared to play a significant role.

Various models have been adopted across New York State as well, with varying degrees of success. The Buffalo City School District has included restorative justice in its updated code of conduct and has begun to move some schools within the District towards a restorative model. In New York City, there have been sustained efforts across several boroughs to bring restorative justice into both schools and the juvenile justice system. Some thought leaders have included Common Justice, Brooklyn Restorative Justice Project, and the Red Hook Community Justice Center.

In Syracuse, suspension rates were among the highest in the nation at 35 percent of the District's student population being suspended. Not only was the suspension rate at Syracuse high but the racial disparity among students receiving suspensions was also very high. It was so high that the Attorney General's office took notice and launched an

³⁶⁸ GAYLE SIMIDIAN, *RETHINKING SCHOOL DISCIPLINE* (David Albert ed., 2017), available at https://www.nyssba.org/clientuploads/nyssba_pdf/rethinking-school-discipline-04272017.pdf.

³⁶⁹ *Id.*

³⁷⁰ W. David Stevens et al., *Discipline Practices in Chicago Schools: Trends in the Use of Suspensions and Arrests*, UNIV. OF CHICAGO CONSORTIUM ON CHICAGO SCH. RES. (March 2015), <https://consortium.uchicago.edu/sites/default/files/publications/Discipline%20Report.pdf>

investigation in 2013.³⁷¹ Eventually, the District entered into an “Assurance of Discontinuance” with the Attorney General’s office to implement restorative justice practices along with a host of other adjustments to the District’s disciplinary practices. Despite the School District decreasing the total suspensions in half over a period of three years, the District has been unable to resolve its disproportionality of suspensions, as Black male students are being suspended at a rate that is disproportionate to their peers, rendering them twice as likely to be suspended.

Across the state, smaller school districts have also sought to implement restorative justice practices in their schools. In the Rochester area, Partners in Restorative Initiatives (PIRI) has trained both schools inside the Rochester City School District and schools outside of Rochester and has produced great results. In East High School, located in Rochester, suspensions dropped from 2,541 during the 2015-2016 academic year, to only 909 the following academic year. Again, while this dramatic drop which is the largest in the District cannot be attributed to restorative justice practices alone, it does seem to suggest their utility. Outside of Rochester, PIRI also works in the Avon Central School District in Avon, New York to implement a comprehensive list of restorative options for various challenges in schools. While no empirical data exists as to the efficacy of this program, the school continues to successfully use Community-Building Circles, Talking Circles, Celebration or Honoring Circles, Academic Circles, Circles of Understanding, Healing Circles and Conflict Circles. The District also has a restorative committee and they meet with each building to discuss the progress and success of restorative justice practices. The District has spent time looking at their disciplinary referrals and have found that increasing the number of community building activities such as circles and community-wide assemblies and activities reduces the monthly number of referrals.

The empirical evidence supporting use of restorative justice exists in studies of students in countries outside the United States, but there is still room for a significant amount of analysis of the effectiveness of these programs within the United States. The Federal Office of Juvenile Justice and Delinquency Prevention did complete a study in July of 2017 demonstrating a moderate reduction of recidivism rates in students who participated in restorative justice in comparison to students who were brought through the traditional juvenile justice court system. Additionally, the study confirmed a higher level of victim satisfaction among those victims who participated in restorative justice rather than the traditional criminal justice system. Significantly more research is needed into the various models and their efficacy across the diverse student populations that make up New York State. Thus, as discussed below, the Task Force recommends that any

³⁷¹ Julie McMahon, *Black Students Twice as Likely to be Suspended in Syracuse Despite Discipline Overhaul*, SYRACUSE.COM: THE POST STANDARD (Jan. 12, 2017) https://www.syracuse.com/schools/index.ssf/2017/01/black_students_twice_as_likely_to_be_suspended_in_syracuse_despite_discipline_ov.html.

implemented models also contain a data collection component to allow for evidence-based analysis going forward.

1. Current Productive Practices and School Wide Prevention Models

There are several models and programs that schools may implement as an alternative to traditional punitive models of school discipline. Suspensions are currently the primary means of discipline for student misconduct as set forth in New York State Education Law Section 3214.

Recognizing that suspensions are an exclusionary means of discipline, as explained in more detail below, we recommend that School Districts be provided by statute with the opportunity to use restorative practices in addition to or instead of suspensions. Students who are disconnected from their schools through the use of suspensions are more likely to fall behind academically, become further involved in criminal behavior, and ultimately become more likely to enter the School to Prison Pipeline.

Furthermore, the use of suspensions rarely offers a resolution to behavioral problems. “Exclusionary discipline in the form of suspensions and expulsions harm students academically. Multiple studies show the clear link between missed class time and course failure. Being absent from class is strongly associated with students failing their course work.”³⁷²

In contrast, the use of restorative justice practices offers the benefits of keeping students in school, providing a resolution to the initial misconduct, and promoting positive, prosocial bonds between students and faculty.

The following school response models are options that schools may choose to use in their districts. The following models address the school climate in its entirety, including students, teachers, and administrators, with a focus on building a positive community within the school itself and addressing root causes of disciplinary issues. These models are designed to help address discipline issues prior to an incident occurring and/or prior to escalation. Schools should have the option to choose a model that best fits the needs of their specific community.

One school response model is the Multi-tiered System of Support. The New York State Board of Regents considered a report in May 2018 on Social Emotional Learning (SEL).³⁷³

³⁷² THE CHILDREN’S AGENDA, BREAKING THE SCHOOL-TO-PRISON PIPELINE: HOW IMPROVING SCHOOL CLIMATE SUPPORTS ACADEMIC SUCCESS 9 (2019) (internal citations omitted), available at https://www.thechildrensagenda.org/wp-content/uploads/2019/02/rochester_schoolclimaterreport_FINAL_website.pdf.

³⁷³ N.Y. STATE EDUC. DEP’T, *Introducing New Guidance and Resources for Social Emotional Learning*, (May 2, 2018), available at <http://www.regents.nysed.gov/common/regents/files/518brd1.pdf>.

In accordance with the recommendations of the Safe Schools Task Force, Department staff and the Task Force’s School Climate and Student Engagement Workgroup have developed new SEL guidance materials and are prepared to present benchmarks for voluntary implementation by the field and a framework for SEL implementation in New York State beginning in June 2018. The report focused on a “whole child/whole school approach to supporting and educating young people that are healthy, safe, engaged, and challenged, [which] is the foundation upon which SEL implementation must take place. Such an approach works with the whole school community to integrate SEL principles into the fabric of school life.”³⁷⁴

Facilitating SEL schoolwide involves multiple components of school life including, but not limited to the following: (i) Alignment of district and school support, personnel policies, and existing and new practices in a multi-tiered system of support (MTSS); and (ii) Addressing discipline as an opportunity for social emotional growth that seeks concurrent accountability and behavioral change through SEL-based restorative justice practices.

The system **used for facilitation social emotional learning** is built on a Multi-Tiered System of Support (MTSS) incorporating tiers of intervention and support for both academic instruction and behavioral instruction. The tiers are as follows:

Tier 1: Universal intentions that are school wide in each classroom serving all students. (80% of the total population)

Tier 2: Specialized interventions serving at risk students. (5 - 15% of the total population)

Tier 3: Tertiary Interventions – serves high risk students (1 - 5% of the total population)

MTSS is predicated on five (5) pillars: (i) Social Emotional Learning; (ii) Mental Health Support; (iii) Behavioral Supports and Interventions; (iv) Restorative Practices; and (v) Academic Supports and Interventions/RTI, as seen below on the following chart.

³⁷⁴ N.Y. STATE EDUC. DEP’T, *Social Emotional Learning Essential for Learning, Essential for Life: Attachment 2 May 2018 Regents Item, 22 (May 2, 2018), available at <http://www.regents.nysed.gov/common/regents/files/518brd1.pdf>.*

	SEL	Mental Health Support	Behavioral Supports & Interventions	Restorative Practices	Academic Supports & Interventions/RTI
Tier 3	<ul style="list-style-type: none"> Individual instruction in SEL competencies strategies and skills Practice and coaching 	<ul style="list-style-type: none"> Crisis intervention Individual counseling/ support plan Family Collaborations Referral to services 	<ul style="list-style-type: none"> Wraparound services Functional Behavioral Assessments (FBAs), Behavioral Intervention Plans (BIPs) Faculty/staff mentor Academic and/or behavioral coach 	<ul style="list-style-type: none"> Family Conferences/ Collaborations Formal Restorative Conference(s) 	<ul style="list-style-type: none"> Intensive instruction (1-2 students) After school tutoring Computer-assisted programs Specially-designed instruction (SDI)
Tier 2	<ul style="list-style-type: none"> Targeted explicit instruction in SEL competencies, strategies, and skills Practice and coaching with feedback Peer-to-peer SEL workshops SEL focused community building circles 	<ul style="list-style-type: none"> Individual/small group counseling Support groups (e.g. anger management, etc.) Family Engagement Substance abuse prevention counseling Referral to services 	<ul style="list-style-type: none"> Faculty/staff mentor Daily Check In/Check Out Daily Progress Reports (DPR) Social and Academic Instructional Groups (Small Group) Individual Behavior Contract Academic and/or behavioral coach Targeted afterschool support program(s) 	<ul style="list-style-type: none"> Peer Mediation Restorative Problem-Solving Circles Formal Restorative Conference Community service 	<ul style="list-style-type: none"> Peer Tutoring and Paired Reading Small group supplemental instruction Guided instruction Visual/auditory aids/cues and manipulatives
Tier 1	<ul style="list-style-type: none"> Explicit instruction in SEL Competencies Integration of SEL within the content areas General teaching practices that model and support SEL School climate surveys (student, staff, families) SEL Plan based on survey and other student data Family engagement 	<ul style="list-style-type: none"> Mental health education Mental health screening Prevention/ Intervention supports (e.g. stress management, wellness, drug/substance abuse/ suicide prevention, etc.) Trauma-Informed/ trauma-sensitive approach Peer education 	<ul style="list-style-type: none"> Schoolwide Behavioral Expectations Evidence-based classroom management Guidance conference(s) Training of peer educators Student leadership opportunities Bullying prevention (i.e., DASA) Culturally responsive practices Student government, extracurriculars Afterschool and summer programs Community schools Community service opportunities 	<ul style="list-style-type: none"> Community Building Circles Negotiation Skills Training Peer Mediation Restorative Circles Community service Student circle keeper training Family Engagement Responsive discipline policies 	<ul style="list-style-type: none"> Standards-aligned, differentiated, data informed, cross-curricular, culturally responsive instruction Goal-setting for learning Student self/peer assessments Project based learning/ assessments Family engagement Universal Design for Learning Health Education Coordination

Adapted from Illinois SS/HS State Group and Erie 2 BOCES

A second model is known as the **School Responder Model**, which is a multi-systemic approach to prevention and early intervention for youth at risk of justice involvement. Key components include: Identifying at-risk youth, the implementation of community-based services, and developing a behavioral health team to appropriately respond to students in need of behavioral interventions. This proactive approach recognizes that students with behavior issues may have other underlying issues, such as adverse childhood experiences, learning disabilities, etc., that if appropriately addressed, may help resolve classroom misbehavior.³⁷⁵

2. Restorative Justice Practices as Intervention

In addition to the school wide prevention models discussed above, school districts may also implement restorative justice practices at the intervention point in lieu of suspending students. These restorative justice practices could when appropriate replace the use of suspensions as a means of addressing disciplinary matters. Many of the intervention models outlined below include positive, constructive forms of discipline as the ultimate outcome, such as writing apology letters, performing community service, and staying after school for extra help. These models allow for creative consequences as well. For example, if a student has had issues with cell phone use, perhaps one of the “disciplinary” outcomes for him/her is to turn in their cell phone at the main office each day for the duration of the school day. Another example would be if a student breaks the dress code by wearing a hat, perhaps the student would be remanded to write an essay or report on

³⁷⁵ Jacquelyn Greene & Olivia Allen, *Disrupting School-Justice Pathways for Youth with Behavioral Health Needs*, NAT’L CTR. FOR MENTAL HEALTH AND JUV. JUST. (2017), https://www.ncmhjj.com/wp-content/uploads/2017/10/NCJFCJ_SJP_ResponderModel_Final.pdf.

the safety risks of wearing hats in schools rather than being sent to in-school suspension for the day.

One intervention model that may be used by school districts is Student Court, also known as Teen Court or Peer Court. Student courts are school based intervention programs that utilize trained students to conduct peer led sentencing hearings in place of traditional school-based interventions. This model allows the student who has been charged with behavioral misconduct the opportunity to tell their side of the story. The accuser can also provide their perspective on what happened. After listening to aggravating and mitigating circumstances, student volunteers deliberate on a fair and appropriate consequence for the action. Sentences are meant to be constructive and ultimately reconnect students with their school and student body. This model uses the power of positive peer pressure. It has been long understood that students respond to their peers in a more positive way than they do to adults in authority.³⁷⁶

Another intervention model often used by school districts is Youth Court. Like Student Courts, Youth Courts are peer-led diversion programs. They are an alternative to traditional court-based intervention for incidents that rise to the level of a chargeable offense, and typically include law enforcement and judicial involvement. The Youth Court model can be adapted to be used within the school setting. This restorative justice practice may be used to address issues that go beyond student code of conduct issues, such as possession of drugs, alcohol or weapons on school property. Key tenants to Youth Courts are accountability (acknowledging wrongdoing), restorative justice (incorporating victims and restoring balance after a crime has been committed), and giving young people second chances (everyone makes mistakes – one bad decision should not define a youth forever). When given the opportunity to acknowledge wrongdoing and explain him/herself to their peers, young people learn more from their mistakes and are less likely to repeat those behaviors in the future. According to a 2016 study conducted in Los Angeles County Teen Court, youth who participated in Teen Court were less likely to repeat offend than those who went through formal probation.³⁷⁷ Furthermore, Youth Courts give young people a sense of ownership and control. Involvement fosters a sense of community since teens relate to each other more than they do to adults. Taking that a step further, it builds positive connections between the offender and the community through the completion of community service and other pro-social activities. Student volunteers benefit from civic education and involvement, often garnering lifelong skills, such as public speaking, critical thinking, and communication. Because Youth Courts rely on student volunteers, they are an economically viable option for many communities. Another benefit to the

³⁷⁶ Michael Lynch & Dante Cicchetti, *Children's Relationships with Adults and Peers: An Examination of Elementary and Junior High School Students*, 35 J. SCH. PSYCHOL. 81, 81-99 (1997); see also Sarah D. Sparks, *Teenagers are Wired for Peer Approval*, 32 EDUC. WEEK 8, 8 (2013) (citing Dustin Albert et al., *The Teenage Brain: Peer Influences on Adolescent Decision Making*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 114, 114-20 (2013)).

³⁷⁷ Lauren N. Gase et al., *The Impact of Two Los Angeles County Teen Courts on Youth Recidivism: Comparing Two Informal Probation Programs*, 12 J. EXPERIMENTAL CRIMINOLOGY 105, 105-26 (2016).

implementation of Youth Courts as an alternative to traditional courts is the flexibility and adaptation of each court to fit its community's specific needs. There are a variety of styles of Youth Courts that can be used: peer jury, youth judge, tribunal, and adult judge. This menu of options allows programs to evaluate what will work best in their unique circumstances and setting. When young people are engaged, listened to, and held accountable, especially by their peers, they are much more likely to learn a positive lesson from their mistakes when compared to those who are disciplined/sanctioned in more traditional ways. The benefits of Youth Court intervention/diversion programs are immeasurable due to the far-reaching effects they have on the young offenders, the volunteers, mentors, and the community at large.

Individual youth courts are typically the creation of local communities, which develop and operate youth court programs.³⁷⁸ For example, in 1984 the "Tarrytown Youth Court Program" was established in that village as an alternative to formal family court adjudication of certain offenses committed by minors.³⁷⁹ The program was administered by the village police department. If a youth court does not already exist within the community of a particular school district, a school district may be able to contract with a youth court nearby. Alternatively, multiple school districts may be able to pull together resources to establish a youth court for use by multiple districts.

A third intervention model school districts may consider using is Restorative Conferencing. Restorative conferencing emphasizes the harm done by an offense and works to rebuild or restore the relationship through positive actions. Conference programs are similar to victim-offender reconciliation/mediation programs in that they involve the victim and offender in an extended conversation about the offense and its consequences. However, conferencing may also include the participation of families, community support groups, police, social welfare officials and attorneys. Conference programs demonstrate to the offender that many people care for him/her. All parties arrive at and agree to a plan for reparation, which increases commitment to it as a just resolution. Conferencing is used only when the offender admits guilt. It is not used to determine guilt or innocence.

A fourth intervention model to be considered by school districts is Circles. Circles involve conflict resolution based on Native American principles that emphasize restoring harm and balance through a circular conversation. Participants include the person who committed the harm, the person who was harmed, and members of the community, which can include the student body. Circles hold young people responsible for their actions while working to rebuild positive connections using mutually helpful actions.

³⁷⁸ Margaret Fisher, *Youth Courts: Young People Delivering Justice*, AMERICAN BAR ASSOCIATION, (March 2002) at 8, available at <https://www.ncjrs.gov/pdffiles1/ojdp/196944.pdf>.

³⁷⁹ 1984 N.Y. Op. Att'y Gen. (Inf.) 87, Op. No. 84-12 (Feb. 22, 1984).

Lastly, another intervention model school districts may use instead of student suspension is a model known as **Accountability Boards**. Accountability Boards include a panel of adults who preside over a hearing during which the offender can explain their side of the story. The panel may ask questions of the offender and explore root causes or problems that may have contributed to the behavior. The panel then comes up with a set of recommendations based on restorative principles that will hold the offender accountable but also ultimately help address the underlying problem. For example, if a young person having problems with drug use appears before an Accountability Board, the board may impose a drug and alcohol screening and/or treatment as part of their recommendation.

V. Detailed Recommendation: Amend N.Y. Education Law § 3214 to Include Restorative Justice

Based upon the foregoing research, this Task Force makes the following recommendations to help reduce the disproportionality among students and school suspensions, and to help improve the School to Prison Pipeline.

This Task Force recommends that restorative justice be added to N.Y. Education Law Section 3214 as an available alternative statutory approach to school discipline. Gradually, this approach may eventually replace exclusionary discipline policies (e.g., suspensions and expulsions) with diversion programs (e.g., student court, circles, mediation) that keep students in school. This plan will only be effective if it is well received by school administrators, which means that funding, training, follow through resources, and data collection and reporting must be put in place. Education Law Section 3214 should be modified to allow for restorative justice alternatives to be implemented in New York schools. We recognize that the complete elimination of suspensions and expulsions of students is not feasible. However, we would recommend that those disciplinary options be reserved under limited circumstances and used only after ameliorative alternatives are explored with the student and parent(s).

While the Task Force has been preparing this paper on the School to Prison Pipeline, the Commissioner of Education has adopted an emergency regulation to include out of school suspensions data in determining which schools should be posted on “needs improvement” lists by the State Education Department.³⁸⁰ These regulations, which are set to be approved in final form in February 2019 by the Board of Regents, underscores that the New York State Education Department understands that the suspension of students is an issue that needs to be resolved.³⁸¹

Bills have been introduced in the New York State Legislature seeking to modify Education Law Sections 2801 and 3214 to include restorative justice practices. However,

³⁸⁰ See 8 NYCRR §§ 100.2, 100.21

³⁸¹ *Id.*

in both the Assembly and the Senate these efforts have been unsuccessful.³⁸² The proposed Assembly bills which provide for the use of restorative justice practices, prevention programs, and interventions require the same to be used prior to and in conjunction with suspensions arising from classroom discipline infractions. Furthermore, the proposed bills include a standard for discipline in certain situations in which classroom removal or suspension is basically prohibited including but not limited to tardiness, unexcused absences from class or school, leaving school without permission, violation of school dress code, and lack of identification upon request of school personnel.

While the Task Force understands and endorses the need for wider use of restorative justice practices, it is also aware of the good faith efforts of school administrators in the administration of school discipline. The Assembly and Senate bills would impose significant restrictions on school district administrators' discretion in treating with student misconduct. These include limiting suspensions to a maximum of twenty days, unless mandated by law (e.g., bringing a firearm to school), and the exclusion of certain grades from suspension. Even though it would be beneficial for the State Education Department to review alternative approaches to suspending students in grades Kindergarten through third grade, this proposal, along with the suspension cap, is not a change recommended by the Task Force at this time. Rather, the Task Force has taken a more tempered approach to introduce statutory restorative justice as an option for school districts to embrace.

Further, it would be nearly impossible for the use of restorative justice practices in the proposed bills to be successful without sufficient additional funding for school district staff to be trained to use restorative justice effectively.

While the Task Force commends the proponents of the Assembly and Senate bills for understanding and appreciating the grave results of the School to Prison Pipeline, mandating school districts to use restorative justice practices ignores those situations when a suspension or a removal of a student may be appropriate and necessary. Rather, the Task Force recommends modifying Section 3214 to expressly endorse greater school district use of restorative justice practices as an alternative to the suspension of students by expressly providing in the law the option for school districts to implement restorative justice practices when appropriate and suitable for the student. This permits tailored introduction of restorative justice based on local needs. It avoids the "stigma" of a mandate.

The Task Force appreciates the fact that school districts do not need legislative authority to implement restorative justice practices. However, school districts are creatures of statute – i.e., municipal corporations guided by the express provisions of New York's

³⁸² N.Y. Assem. 3873, 240th Leg. Session, Reg. Session (N.Y. 2017). It is important to note that such bills have been reintroduced during the 2019-2020 legislative session. *See* N.Y. Assem. 1981, 242nd Leg. Session, Reg. Session (N.Y. 2019).

Education Law. The Task Force believes that the absence of a statutory endorsement of restorative justice has led to less than robust use of restorative justice by New York school districts. The Task Force believes that inclusion of restorative justice in Section 3214 of the Education Law will lead to the salutary result of expansive use of restorative justice by school districts electing its use. Further, our proposed legislation does require parental involvement in the use of restorative justice.

As noted previously, several school districts have already begun to introduce the use of restorative justice practices. This Task Force has attached, in Appendix C³⁸³ of this Report, two example codes of conduct from certain school districts which currently include the use of restorative justice practices. These school districts should be commended for their forward thinking in an attempt to help reverse the School to Prison Pipeline.

For example, suspensions have reduced significantly in the Rochester City School District (“Rochester”) since the implementation of its new Code of Conduct, which includes restorative justice practices as an alternative to suspensions. Since the implementation of Rochester’s Code of Conduct, student suspensions have decreased by approximately 28%.³⁸⁴

Most importantly the Task Force believes that the endorsement by the State Legislature of the proposed statutory amendment to Section 3214 of the Education Law to include the use of restorative justice practices in lieu of suspending students will highlight and underscore the success of these school based strategies. It will further support voluntary utilization of restorative justice efforts that will lead to these students who have been charged with code of conduct violations to remain in the classroom where they belong and where they have the best chance to avoid the “School to Prison Pipeline.” This Task Force’s grave concern regarding long term suspensions is that students who are already susceptible to bad influences, whether drugs, alcohol, violence or other behaviors, will be more susceptible to these influences without being able to attend class while serving a suspension. This is how the School to Prison Pipeline begins, and is the premise for this Task Force’s recommendation to include the use of restorative justice practices in Education Law Section 3214 for student discipline proceedings. This Task Force believes that the School to Prison Pipeline can be alleviated, if not reversed, by our proposed modification to Education Law Section 3214, which provides additional protections to students during the disciplinary phase by incorporating the permissive use of restorative justice practices if such use is justified. This Task Force’s suggested modification to Education Law Section 3214 is attached hereto as Appendix A.

³⁸³ Appendix C is included for the sole purpose of providing illustrative examples of restorative justice practices in school district Codes of Conduct. The use of the attached Codes of Conduct in this Report should not be viewed as an endorsement of the entire Code of Conduct.

³⁸⁴ THE CHILDREN’S AGENDA, *supra* note 372, at 10.

By providing school districts with statutorily endorsed alternative measures such as restorative justice practices, the loss of students to the lifelong negative vagaries of the School to Prison Pipeline will be alleviated.

Ideally, the implementation of restorative justice practices will eventually take the place of suspensions and expulsions for most disciplinary cases. The imposition of restorative justice as a substitute for existing disciplinary procedures would be met with significant opposition among the over seven hundred school districts in the State of New York because it will be viewed as another State mandate on our already taxed school district resources. Restorative justice should not be the object of grudging acceptance by school districts. Even though not mandatory, we are hopeful that the recommendation of this report will be viewed in a solitary manner by our K-12 educational system.

The source of reluctance of the implementation of restorative justice is the significant financial limitations imposed by the state through the existing tax cap legislation. This limitation on school district resources severely hinders our already highly taxed school districts and imposes a reluctance to innovate. The State of New York must allocate sufficient funding to those school districts that embrace restorative justice techniques. When compared to the expenditure of limited tax dollars arising from prosecution and incarceration of unfortunate youth who find themselves on the "other" end of the School to Prison Pipeline the investment reaps incalculable benefits.

The New York State Education Department should give consideration to the creation of State funded training programs, teaching personnel how to guide, support, and help navigate the accused student through the restorative justice process.

The Task Force is cognizant that its recommendation focusing on a modification of the New York statute is simply a start to reform student disciplinary proceedings. However, our proposed statutory enactment will underscore the State's recognition of the severe societal concerns with the existing structure of student discipline in our public schools. It will bring expanded interest and public comment on the use of restorative justice and hopefully it will spur increased allocation of already scarce dollars to support this effort to keep students in an educational setting and to reverse the School to Prison Pipeline.

In addition to the foregoing, the Task Force was initially tasked with recommending policy regarding the use of School Resource Officers ("SROs").

Some school districts, in conjunction with the local police department, employ an SRO through the local police department. An SRO is used in some school districts to assign an on-duty police officer from the local police department in a school building. The police officer is typically not employed by the school district and officers are required to adhere to traditional standards for searches and seizures when investigating criminal activity. An SRO acts as a liaison between the police department and the school district, and the

scope of its duties is determined mutually by the parties. Hence, in instances where an SRO is utilized, an agreement between the school district and the local law enforcement department is put in place.

The use of SROs in school districts is an important issue that this Task Force considered in the drafting of this Report; however, it was unable to reach a conclusion for a recommendation. Nevertheless, it is a subject that requires further review and consideration by another committee or study group, possibly in conjunction with the Criminal Justice section of the New York State Bar Association.

VI. Conclusion

The School to Prison Pipeline has been and will continue to be a serious problem in New York due to the rigidity of Education Law §3214. School Districts across New York State have been issuing suspensions in accordance with Education Law §3214 in a disparate manner towards minorities and students with disabilities. As a result, these populations have been forced out of the educational setting and in an environment where they are succumbing to negative societal influences. The pipeline will continue to grow if everyone sits idly by. By amending Education Law §3214 formally endorsing use of restorative justice practices in the administration of discipline for student code of conduct violations, this Task Force believes an important first step will have been taken to cure this problem.



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #7

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Attorney Professionalism.

In 1997, the New York court system adopted Standards of Civility as an appendix to the then-Code of Professional Responsibility, 22 NYCRR Part 1200 (now the Rules of Professional Conduct). The Standards are intended to be “principles of behavior to which the bar, the bench and court employees should aspire” and are not intended to be used for sanctioning or disciplining attorneys. The adoption of standards originally was proposed in a November 1995 report by the Chief Judge’s Committee on the Profession and the Courts; in a report presented to the House of Delegates in January 1996 and approved in principle, the NYSBA Review Committee on the Profession and the Courts endorsed the adoption of civility standards.

Last year, the Committee on Attorney Professionalism undertook a review of the Standards with a view toward updating and modernizing them. Attached is the committee’s proposed revision of the Standards; as the committee notes, the tone and format of the revision is unchanged, but the Standards are modernized, particularly with respect to communication. In a change, however, the committee proposes the addition of a second section, applicable to non-litigation settings. The committee notes that this section is intended to be read in conjunction with the existing Standards.

The report was presented to the Executive Committee on an informational basis at the January 2019 meeting and was posted in the Reports Community on February 11. No comments have been received with respect to this report, although as noted in the report the Committee on Professional Ethics commented on an earlier draft of the revised standards.

Andrew L. Oringer, chair of the Committee on Attorney Professionalism, together with committee member Robert I. Kantowitz, will present the report at the April 13 meeting.

Report of the
New York State Bar Association (“NYSBA”)
Committee on Attorney Professionalism

on

Revision of the N.Y. Standards of Civility

February 8, 2019

This Report of the Committee on Attorney Professionalism (the “CAP”) relates to proposed changes to the N.Y. Standards of Civility (the “Standards”).*

I. Introduction

Approximately 20 years ago, the Chief Judge of the N.Y. Court of Appeals promulgated the Standards for the legal profession. As stated in the Preamble of the Standards:

The New York State Standards of Civility for the legal profession set forth principles of behavior to which the bar, the bench and court employees should aspire. They are not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules Governing Judicial Conduct, the Code of Professional Responsibility and its Disciplinary Rules [as then known], or any other applicable rule or requirement governing conduct. Instead they are a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession’s rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course.

In 2016, the Chief Judge and the then-chair of the CAP, Lillian Moy, had discussions regarding whether the Standards should be updated, modernized or amended in any way. Those discussions led to the establishment of the Subcommittee on Civility of the CAP and, more generally, the CAP’s consideration of possible revisions to the Standards. Attached hereto is a proposed revision of the Standards (the “Proposed Revision”), and a second copy thereof marked to show changes from the existing Standards.

* The primary authors of this Report are Andrew L. Oringer, chair of the CAP, and Robert Kantowitz, chair of the Subcommittee on Civility of the CAP. Helpful comments were received from Richard Rifkin.

II. The Proposed Revision

A. In General

The CAP is aware of the considerable negotiation and effort that resulted in the existing Standards. Thus, the tone, format and content of the Proposed Revision generally are essentially unchanged from the existing Standards. However, much has changed in the over 20 years since the initial adoption of the standards, and efforts have been made to modernize the Standards in several places - in particular regarding communications, where technological advances have been substantial.

B. Application to Non-Litigation Settings

There is a significant addition, which appears towards the end of the Proposed Revision. The new section addresses transactional and other non-litigation work. The new section is intended to be read in conjunction with the Standards as a whole such that all the provisions of the Standards are to be used both together as a source of guidance in the non-litigation context.

In deciding to address the non-litigation context, the CAP had become aware of efforts by certain other bar associations to cause civility (or civility-type) standards to be applicable outside of the litigation process. In addition, it is noted that the President of the NYSBA has expressed support for the expansion of the Standards to non-litigation settings, and, indeed, has advocated for the effectuation of that expansion in a manner that is contained directly within the text of the Standards (rather than, for example, by attaching a supplement to the Standards).

III. Process

It would seem worthwhile to discuss briefly the process that resulted in the Proposed Revision. The Proposed Revision is the product of the work that the Civility Subcommittee of CAP undertook over the past two years. The process was a rigorous one. The drafting involved numerous drafts and evolved substantially over the course of the CAP's robust discussions. As a general matter, the CAP ultimately chose to pursue surgically a series of minor refinements rather than a course of major change, essentially to tweak and modernize the standards.

When the draft got to the initial vote within the Committee, there were three dissenting votes. We proceeded to solicit comments from a variety of other NYSBA committees, and reflected those comments in the drafting to varying degrees. As a result of changes made during that phase, a revised draft received the unanimous approval of the Committee (among those voting), with one express abstention. Thus, the draft was not produced lightly, and eventually consensus was achieved.

An exception to the CAP's narrow approach involves the expansion of the standards to the non-litigation setting, noted above. It is acknowledged that this proposed expansion has drawn a negative comment from the Committee on Professional Ethics (the "CPE"). The CPE notes that there are rules that cover the kinds of aspirational standards we have here. The CAP's view is

that the CPE's comments argue against having civility standards at all. In this regard, it is noted that the Court of Appeals has already approved the existing Standards.

The final draft of the Proposed Revision was presented to the Executive Committee by CAP representatives on January 17, 2019 at the NYSBA's 2019 annual meeting.

IV. Conclusion

The CAP is grateful to have the opportunity to participate in this important project. Representatives of the CAP are to be available at the April 2019 meeting of the House of Delegates to present the Proposed Revision and answer any questions.

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STANDARDS OF CIVILITY

PREAMBLE

The New York State Standards of Civility for the legal profession set forth principles of behavior to which the bar, the bench and court employees should aspire. (The term “court” as used herein also may refer to any other tribunal, as appropriate.) They are not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules Governing Judicial Conduct, the Rules of Professional Conduct or any other applicable rule or requirement governing conduct. Instead they are a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession’s rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course.

The Standards of Civility are divided into two main sections, one that is generally applicable but also contains a number of items specifically directed to the litigation setting, and one that is more specifically directed to transactional and other non-litigation settings. The first section, in turn, is divided into four parts: lawyers’ duties to other lawyers, litigants, witnesses and others; lawyers’ duties to the court and court personnel; court’s duties to lawyers, parties and witnesses; and court personnel’s duties to lawyers and litigants. There is also a Statement of Client’s Rights appended to the Standards of Civility.

As lawyers, judges, court employees and officers of the court, and as attorneys generally, we are all essential participants in the judicial process. That process cannot work effectively to serve the public unless we first treat each other with courtesy, respect and civility.

SECTION 1 – GENERAL STANDARDS

LAWYERS’ DUTIES TO OTHER LAWYERS, LITIGANTS WITNESSES AND CERTAIN OTHERS

I. Lawyers should be courteous and civil in all professional dealings with other persons.

A. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others.

B. Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel, parties or witnesses.

C. Lawyers should not engage in conduct intended primarily to harass or humiliate witnesses.

D. Lawyers should require that persons under their supervision conduct themselves with courtesy and civility.

II. When consistent with their clients' interests, lawyers should cooperate with opposing counsel in an effort to avoid litigation and to resolve litigation that has already commenced.

A. Lawyers should avoid unnecessary motion practice or other judicial intervention by negotiating and agreeing with other counsel whenever it is practicable to do so.

B. Lawyers should allow themselves sufficient time to resolve any dispute or disagreement by communicating with one another and imposing reasonable and meaningful deadlines in light of the nature and status of the case.

III. A lawyer should respect the schedule and commitments of opposing counsel, consistent with protection of the client's interests.

A. In the absence of a court order, a lawyer should agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of the client will not be adversely affected.

B. Upon request coupled with the simple representation by counsel that more time is required, the first request for an extension to respond to pleadings ordinarily should be granted as a matter of courtesy.

C. A lawyer should not attach unfair or extraneous conditions to extensions of time. A lawyer is entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize, and may request, but should not unreasonably insist on, reciprocal scheduling concessions.

D. A lawyer should endeavor to consult with other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts. A lawyer should likewise cooperate with opposing counsel when scheduling changes are requested, provided the interests of his or her client will not be jeopardized.

E. A lawyer should notify other counsel and, if appropriate, the court and other persons at the earliest possible time when hearings, depositions, meetings or conferences are to be canceled or postponed.

IV. Responding to communications.

A lawyer should promptly return telephone calls and electronic communications and answer correspondence reasonably requiring a response, as appropriate. (For the avoidance of doubt, the foregoing refers to communications in connection with matters in which the lawyer is engaged, not to unsolicited communications.) A lawyer has broad discretion as to the manner and time in which to respond and need not necessarily follow the same means or format as the original communication or the manner requested in the original communication.

V. The timing and manner of service of papers should not be designed to cause disadvantage to the party receiving the papers.

- A. Papers should not be served in a manner designed to take advantage of an opponent's known absence from the office.
- B. Papers should not be served at a time or in a manner designed to inconvenience an adversary.
- C. Unless specifically authorized by law or rule, a lawyer should not submit papers to the court without serving copies of all such papers upon opposing counsel in such a manner that opposing counsel will receive them before or contemporaneously with the submission to the court.

VI. A lawyer should not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or for the purpose of unnecessarily prolonging litigation or increasing litigation expenses.

- A. A lawyer should avoid discovery that is not necessary to obtain facts or perpetuate testimony or that is designed to place an undue burden or expense on a party.
- B. A lawyer should respond to discovery requests reasonably and not strain to interpret the request so as to avoid disclosure of relevant and non-privileged information.

VII. In depositions and other proceedings, and in negotiations, lawyers should conduct themselves with dignity and refrain from engaging in acts of rudeness and disrespect.

- A. Lawyers should not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.
- B. Lawyers should advise their clients and witnesses of the proper conduct expected of them in court, depositions and conferences, and make reasonable efforts to prevent clients and witnesses from causing disorder or disruption.
- C. A lawyer should not obstruct questioning during a deposition or object to deposition questions unless necessary.
- D. Lawyers should ask only those questions they reasonably believe are necessary for the prosecution or defense of an action. Lawyers should refrain from asking repetitive or argumentative questions and from making self-serving statements.

VIII. A lawyer should adhere to all express promises and agreements with other counsel, whether oral or in writing, and to agreements implied by the circumstances or by local customs.

IX. Lawyers should not mislead.

A. A lawyer should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.

B. A lawyer should not ascribe a position to another counsel that counsel has not taken or otherwise seek to create an unjustified inference based on counsel's statements or conduct.

C. In preparing written versions of agreements and court orders, a lawyer should attempt to correctly reflect the agreement of the parties or the direction of the court.

X. Lawyers should be mindful of the need to protect the standing of the legal profession in the eyes of the public. Accordingly, lawyers should bring the New York State Standards of Civility to the attention of other lawyers when appropriate.

LAWYERS' DUTIES TO THE COURT AND COURT PERSONNEL

I. A lawyer is both an officer of the court and an advocate. As such, the lawyer should always strive to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court.

A. Lawyers should speak and write civilly and respectfully in all communications with the court and court personnel.

B. Lawyers should use their best efforts to dissuade clients and witnesses from causing disorder or disruption in the courtroom.

C. Lawyers should be punctual and prepared for all court appearances; if delayed, the lawyer should notify the court and counsel whenever possible.

II. Court personnel are an integral part of the justice system and should be treated with courtesy and respect at all times.

JUDGES' DUTIES TO LAWYERS, PARTIES AND WITNESSES

I. A Judge should be patient, courteous and civil to lawyers, parties and witnesses.

A. A Judge should maintain control over the proceedings and insure that they are conducted in a civil manner.

B. Judges should not employ hostile, demeaning or humiliating words in opinions or in written or oral communications with lawyers, parties or witnesses

C. Judges should, to the extent consistent with the efficient conduct of litigation and other demands on the court, be considerate of the schedules of lawyers, parties and witnesses when scheduling hearings, meetings or conferences.

D. Judges should be punctual in convening all trials, hearings, meetings and conferences; if delayed, they should notify counsel when possible.

E. Judges should make all reasonable efforts to decide promptly all matters presented to them for decision.

F. Judges should use their best efforts to insure that court personnel under their direction act civilly toward lawyers, parties and witnesses.

DUTIES OF COURT PERSONNEL TO THE COURT, LAWYERS AND LITIGANTS

I. Court personnel should be courteous, patient and respectful while providing prompt, efficient and helpful service to all persons having business with the courts.

A. Court employees should respond promptly and helpfully to requests for assistance or information.

B. Court employees should respect the judge's directions concerning the procedures and atmosphere that the judge wishes to maintain in his or her courtroom.

SECTION 2 - STANDARDS FOR TRANSACTIONAL/NON-LITIGATION SETTINGS

INTRODUCTION

Section 1 of the Standards of Civility, while in many respects applicable to attorney conduct generally, in certain respects addresses the practice of law in the setting of litigation and other formal adversary proceedings, where conduct is governed by a variety of specific procedural rules of order and may be supervised by a judge or other similar official. This Section 2, which is more directed to transactional and other non-litigation settings, should be read with Section 1 as one integrated whole for a profession that has multiple facets and spheres of activity.

The differences in practice between lawyers' roles and the expectations in litigation and other settings can sometimes be significant. Although fewer formal rules of conduct and decorum apply outside of the litigation setting, lawyers conducting transactional work should keep Section 1 of Standards of Civility in mind, along with the following additional items.

ADDITIONAL TRANSACTIONAL/NON-LITIGATION STANDARDS

I. A lawyer should balance the requirements and directions of the client in terms of timing with a reasonable solicitude for other parties. Unless the client specifically instructs to the contrary, a lawyer should not impose deadlines that are more onerous than necessary or appropriate to achieve legitimate commercial and other client-related outcomes.

II. A lawyer should focus on the importance of politeness and decorum, taking into account all relevant facts and circumstances, including such elements as the formality of the setting, the sensitivities of those present and the interests of the client.

III. Where an agreement or proposal is tentative or is subject to approval or to further review by a lawyer or by a client, the lawyer should be careful not to proceed without proper authorization or otherwise imply that authority from the client has been obtained when such is not the case.

STATEMENT OF CLIENT'S RIGHTS

1. You are entitled to be treated with courtesy and consideration at all times by your lawyer and the other lawyers and personnel in your lawyer's office.
2. You are entitled to an attorney capable of handling your legal matter competently and diligently, in accordance with the highest standards of the profession. If you are not satisfied with how your matter is being handled, you have the right to withdraw from the attorney-client relationship at any time (court approval may be required in some matters and your attorney may have a claim against you for the value of services rendered to you up to the point of discharge).
3. You are entitled to your lawyer's independent professional judgment and undivided loyalty uncompromised by conflicts of interest.
4. You are entitled to be charged a reasonable fee and to have your lawyer explain at the outset how the fee will be computed and the manner and frequency of billing. You are entitled to request and receive a written itemized bill from your attorney at reasonable intervals. You may refuse to enter into any fee arrangement that you find unsatisfactory.
5. You are entitled to have your questions and concerns addressed in a prompt manner and to have your telephone calls returned promptly.
6. You are entitled to be kept informed as to the status of your matter and to request and receive copies of papers. You are entitled to sufficient information to allow you to participate meaningfully in the development of your matter.
7. You are entitled to have your legitimate objectives respected by your attorney, including whether or not to settle your matter (court approval of a settlement is required in some matters).
8. You have the right to privacy in your dealings with your lawyer and to have your secrets and confidences preserved to the extent permitted by law.
9. You are entitled to have your attorney conduct himself or herself ethically in accordance with the Rules of Professional Conduct.
10. You may not be refused representation on the basis of race, creed, color, religion, sex, sexual orientation, age, national origin or disability.



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #8

REQUESTED ACTION: Approval of the report and recommendations of the Task Force on Wrongful Convictions.

Attached is a report from the Task Force on Wrongful Convictions. The Task Force was appointed in 2018 to follow up on the 2009 report of the original Task Force on Wrongful Convictions, recognizing the significant changes in the criminal justice community over the past ten years with respect to wrongful convictions. In this report, the Task Force has examined the following issues: conviction integrity units; forensic issues; actual innocence; the implementation of statewide legislation; and the use of jailhouse informants.

The report references several appendices. For the sake of reproduction, the appendices are not included in the printed materials, but may be accessed online at [Wrongful Convictions](#).

The Task Force's report was published in the Reports Community on February 8. Attached is a letter from the New York County Lawyers Association indicating support for the report.

The report will be presented at the April 13 meeting by Task Force co-chairs Hon. Barry Kamins and Hon. Robert S. Smith.

New York State Bar Association

Report of Task Force on Wrongful Convictions

February 8, 2019

Opinions expressed are those of the Section/Committee preparing this report and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

Introduction

INTRODUCTION

A decade ago, Former President Bernice Leber established the Task Force on Wrongful Convictions which issued a ground-breaking report in 2009. In the report, the Task Force examined fifty-three cases of wrongful convictions in New York State and identified six causes that were primary factors responsible for wrongful convictions: identification procedures; mishandling of forensic evidence; use of false confessions; errors by law enforcement, including prosecutors; defense practices; and the use of jailhouse informants. Some of these recommendations resulted in legislation addressing the root causes of wrongful convictions.

In the ten years since the report was issued, much has changed in the criminal justice community and progress has been made with respect to wrongful convictions. In New York alone, the number of exonerations has doubled from 125 to 253 and nationally, the total number of exonerations has increased from 1,095 to 2,366. A decade ago, only seven states had instituted statewide reform in the area of wrongful convictions and that number has tripled over the last ten years. At the time the original task force report was written, no state in the country had created a statutory mechanism to allow defendants back into court to prove their innocence by scientific evidence. Today, five states have done so: California, Texas, Wyoming and Connecticut through legislation, and Michigan through a court rule.

There is no question that over the last decade, there had been an increased awareness of wrongful convictions. When the first task force report was issued there were thirty-four organization members of the Innocence Network. Today there are fifty-seven in the United States, including four in New York alone.

The progress in New York over the last decade has been mixed. Some legislation has been passed, most notably laws relating to video recording of custodial interrogations and blind lineups.

Recognizing that much more had to be accomplished in New York, State Bar President Michael Miller announced the formation of a second task force on wrongful convictions. The task force, chaired by former judges Barry Kamins and Robert S. Smith, was formed in June, 2018. Its mission was to review developments over the last ten years and to make recommendations.

The task force is comprised of three sitting District Attorneys, academics, criminal practitioners, representatives from the Legal Aid Society, defender offices, the Attorney General's office and a United States District Court Judge from the Southern District of New York.

The task force was divided into four subcommittees that addressed critical issues that have arisen since the first task force report: conviction integrity units; forensic issues; actual innocence; the implementation of new statewide legislation; and the use of jailhouse informants.

Each subcommittee drafted a report to the entire task force detailing its specific proposals and the corresponding reasoning for each. The Task Force met on January 24, 2019 and carefully reviewed and discussed each proposal submitted by the four subcommittees. At the end of each discussion, a vote was taken of those present and the following recommendations were passed for consideration of the House of Delegates at its meeting on April 13, 2019:

I. CONVICTION INTEGRITY UNITS

A. Summary of Recommendations

1. Each District Attorney's Office in the State of New York establish a Conviction Integrity Unit or, where not feasible, create a program for conviction review (such units and programs referred to as "CIUs" or "Units").

2. Each CIU should adopt and implement the best practices described in Section IB.

3. New York should help fund the creation and development of additional CIUs as described in Section IC.

4. New York should enact legislation granting to the judiciary the power to issue investigative subpoenas upon application by an established CIU in connection with any ongoing review. The legislation should contain privacy protections and notice to the convicted person.

B. Recommended Best Practices

1. The CIU Should Be Independent and Qualified

a. The CIU should be led by a prosecutor, preferably one with criminal defense experience, who is widely respected by attorneys throughout the jurisdiction's criminal justice community. In jurisdictions that do not have resources to establish units or programs, conviction reviews should be conducted under the supervision of a person who has firsthand prosecutorial or criminal defense experience and is widely respected by attorneys throughout the jurisdiction's criminal justice community.

b. The head of the CIU or, in jurisdictions without a formal unit, the person responsible for review of a conviction should report directly to the District Attorney or to a designee who bears no responsibility for other appellate or post-conviction review in the office.

c. The CIU should guard against cognitive or confirmatory biases and appear to be guarding against biases by attempting to include the perspective of at least one external criminal defense attorney in the process of the Unit's policy definition, case screening, case investigation, and recommendations for action.

d. Where feasible, the CIU should be comprised of attorneys, investigators and staff for whom CIU cases have clear priority above other office matters, with sufficient personnel and budget resources to enable timely investigations and thorough and thoughtful recommendations.

e. CIU personnel should be trained on an ongoing basis on the need to approach each review from the perspective that the petitioner in fact may be wrongfully convicted and on specific topics relevant to the work of the Unit. These topics include but are not limited to:

- 1) Errors in criminal justice known to be factors in inaccurate convictions;
- 2) “Human factors” and emerging issues in forensic science that may impact past convictions secured by the use of older scientific methods; and
- 3) Specific investigative techniques useful for “cold cases.”

f. The CIU should exclude personnel who participated in an underlying case under review from the CIU’s decision-making regarding the case, limiting participation in such cases to the provision of historical information; and

g. The CIU should establish a clear written policy on when and how to refer to appropriate authorities any credible allegations of official misconduct by prosecutors or law enforcement personnel identified in the course of a case review.

2. The CIU Should Be Flexible

a. The CIU should develop policies and procedures designed to ensure flexibility of operations and encourage the submission of petitions for review.

b. The CIU should accept for review any and all cases for which (i) the defendant has a facially plausible claim of factual innocence or (ii) there are other significant concerns about the integrity of the conviction, including but not limited to insufficient evidence of guilt beyond a reasonable doubt, or claims (ineffective assistance of counsel, newly discovered evidence, official misconduct, etc.) that taint the integrity of the fact-finding process.

c. The CIU should consider all petitions on their factual merits, including:

- 1) Petitions in which the Petitioner pled guilty to the charges;
- 2) Petitions where the sentence has been completed; and
- 3) Petitions based on a current understanding of the totality of the circumstances now known, rather than what could have been presented or known by defense counsel during the pendency of the

original case.

d. The CIU should allow for resubmission of a petition when additional credible evidence is brought to light.

e. The CIU should recommend vacating each conviction where there is clear and convincing evidence of actual innocence or the CIU otherwise no longer has confidence in the integrity of the verdict or plea. This may include recommending vacatur where the investigation reveals facts, circumstances and/or events which so grossly corrupted the fact-finding process as to deny the petitioner a fair adjudication of his/her guilt or innocence at trial, and/or, if the conviction was obtained by a guilty plea, prevented the petitioner from making a knowing and voluntary decision to plead guilty. Such facts, circumstances and events include, but are not limited to: police investigative error or misconduct, prosecutorial error or misconduct, ineffective performance and assistance of trial counsel for petitioner, forensic art or science analytical error, repudiation or modification of forensic art or science, judicial error or misconduct, juror misconduct, witness misconduct and witness error, whether occurring singly or in combination one with another. Such determinations may be made with deference, but not absolute deference, to previous adjudication(s) denying a petitioner's claim of a due process violation based upon the same or similar facts circumstances or events.

f. Following a CIU's decision to vacate on grounds other than established factual innocence, the CIU should recommend refiling charges only in cases where there remains substantial admissible evidence of guilt following the investigation of the petition.

3. The CIU Should Be Transparent

a. The CIU should make public:

- 1) How to submit a claim;
- 2) That claims may be filed by any person;
- 3) The types of cases accepted for review;
- 4) Its final decisions after case review and the supporting rationales for that decision; and
- 5) The ability of Petitioner to revisit the review process after any final decision.

b. The CIU should track and report publicly on its activity at least annually.

Such reports should include at least the following categories of information:

- 1) The number of petitions received;

- 2) The number of petitions reviewed;
- 3) The number of petitions accepted for additional review;
- 4) The number of petitions as to which a final determination was reached following review;
- 5) The number of exonerations, and of convictions vacated on grounds other than established factual innocence;
- 6) The reasons for rejecting reviews; and
- 7) The types of issues confronted in the cases reviewed.

c. The CIU should minimize barriers to the participation of the Petitioner and Petitioner's counsel in the case review and should encourage an open exchange of information and ideas regarding the case review between the Petitioner and the CIU, including open file discovery and contemporaneous disclosure of information discovered in the CIU investigation (other than CIU work product information and information that could endanger third parties), as appropriate.

d. The CIU should communicate in an ongoing and timely fashion to Petitioner or Petitioner's counsel concerning case review, and it should explain the actions taken and conclusions drawn from the review.

e. The CIU should establish a clear policy regarding sharing evidence and other information with the Petitioner and Petitioner's counsel, including privilege waivers, as appropriate. The policy should include a requirement of reasonable justification for withholding relevant information from the Petitioner and Petitioner's counsel.

f. The CIU should make all physical evidence available for testing by either party, including re-testing of a previously tested object if the proposed method of testing can provide additional information.

g. The CIU should provide testing of evidence that may provide conclusive evidence of innocence at no cost to Petitioner.

4. The CIU Should Encourage Measures to Prevent Future Wrongful Convictions

a. The CIU should establish internal training sessions after each exoneration to discuss lessons learned.

b. The CIU should determine the effect of the error upon other convictions in that jurisdiction.

c. The CIU should identify improved policies and procedures that might prevent the recurrence of the error(s) that permitted the flawed conviction to occur; and

d. The CIU should construct a process to implement, publicize and evaluate those modifications throughout the jurisdiction.

C. State Funding to Support the Creation and Development of Additional CIUs

1. New York should establish a statewide fund to support conviction review programs (the “Conviction Review Fund”).

2. District Attorney’s Offices that require assistance with funding should be able to apply for state funding to establish a CIU or at least for state funding to review individual cases.

3. The Conviction Review Fund should require District Attorney’s Offices to agree to abide by the best practices set forth in Section II above to the extent feasible as a condition for funding.

4. In districts where it is not feasible to create a CIU program, further study and analysis is essential to develop structures and program to accomplish the goals of a CIU program. Options may include the development of a process to conduct reviews by organizations such as the New York State District Attorneys Association or New York State and local bar associations; a pool of volunteer lawyers; or the establishment of a regional office. The reviewing attorneys would report directly to the local District Attorney, who would retain the power to accept or reject their recommendations.

D. Investigative Subpoena Authority for Ongoing CIU Review

New York should adopt statewide legislation to grant to the judiciary the power to issue investigative subpoenas upon application by an established CIU in connection with any ongoing review. The legislation should include privacy protections including notice to the convicted person and his or her counsel of the subpoena and should specify that the legislation does not extend to a subpoena of trial counsel’s file or to compel testimony from the defendant or defense witnesses.

II. ACTUAL INNOCENCE

The Task Force recommends a statutory change to CPL § 440.10(1) to add a new section (h) that would permit a newly discovered evidence claim after a guilty plea. While current section (1)(g) (convictions after trial) requires a “**probability** that had such evidence been received at the trial the verdict would have been more favorable to the defendant,” we recommend that where a defendant pled guilty, a newly discovered evidence claim requires “a **substantial** probability that **the defendant was actually innocent of the offense of which he or she was convicted.**”

III. FORENSIC ISSUES

The Task Force proposes legislation to improve the quality of forensic science admitted into evidence in New York State courts. The proposed statute would be applicable only in criminal case, and would leave the law of evidence unchanged as it applies to civil cases.

NEW CPL § 60.80: Rules of evidence; Testimony by Expert Witnesses

A. A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify at trial in the form of an opinion or otherwise if:

1. The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
2. The testimony is based on sufficient facts or data, provided that such facts or data must be available to both parties as set forth in section 240.20(1)(c) of this chapter;
3. The testimony is the product of reliable principles and methods; and
4. The expert witness must reliably apply the principles and methods of the area of expertise to the facts of the case.

B. When testimony is offered as scientific, the witness' method, to be considered reliable, must be shown to be reproducible and accurate for its intended use, as shown by empirical studies conducted under conditions appropriate to the intended use.

IV. IMPROVING IMPLEMENTATION OF LAWS REGARDING EYE WITNESS IDENTIFICATION AND RECORDING OF INTERROGATIONS

The Task Force recommends further and more robust collection of data statewide to better understand matters critical to the faithful implementation of the new laws. It further recommends the creation of a diverse stakeholder advisory group, including representation from: Division of Criminal Justice Services (DCJS); the New York Police Chiefs Association; the New York State Sheriffs Association; the New York State Association of Criminal Defense Lawyers (NYSACDL); the New York State Defenders Association (NYSDA); the Innocence Project; affected people from both the innocence and victims community; the academic community with an expertise in both criminology and statistical analysis; and the District Attorneys Association of the State of New York (DAASNY), to be convened by NYSBA, and with resources available to enable this work, to get a deeper understanding of how implementation is working.

V. RECOMMENDATIONS REGARDING JAILHOUSE INFORMANTS

The Task Force recommends the implementation – at the county level – of the Model Policy for the county-based tracking and disclosure of jailhouse informant information and testimony, after the Subcommittee conducts further study to determine whether additional protections to ensure informant safety are needed. Further, the Task Force recommends further study by the New York State Bar Association before it makes final recommendations regarding the establishment of a statewide tracking system by an as-yet-to-be-determined centralized entity (e.g., DCJS, AG, OCA, etc.) to ensure that data collected in connection with jailhouse informants at the county level is available to district attorneys throughout New York State, and addresses the confidentiality and cost/resource issues raised during the deliberations of the 2019 Task Force discussion.

The Task Force is truly indebted to the many individuals and institutes that generously assisted it in completing its work. Specifically the Task Force would like to thank:

- Weil, Gotshal & Manges LLP – Benjamin Marks, Miriam Buhl, Taylor Dougherty, Jessica Djilani
- Innocence Project – Barry Scheck, Rebecca Brown, Nina Morrison, Karen Newirth, Vanessa Potkin, Sarah Chu, Chris Fabricant, Leslie Rider and Sajia Hanif
- District Attorney’s Association of New York – Kristine Hamann, Morgan Bitton
- New York State Association of Criminal Defense Lawyers – Andy Kossover
- New York State Defenders Association – Al O’Connor
- Legal Aid Society – Terri Rosenblatt
- New York City Police Department – Dr. Monica Brooker
- Morrison & Foerster, LLP – Monica Chan

CONCLUSION

Any wrongful conviction erodes the public’s confidence in our state’s criminal justice system. It is equally clear that improper convictions can destroy the lives of innocent men and women. We have the ability to learn from our mistakes and avoid these miscarriages of justice. For these and for the multitude of other reasons presented in this report, the Task Force on Wrongful

Convictions respectfully urges the House of Delegates to pass the specific proposals presented herein at its meeting on April 13, 2019.

Respectfully submitted,

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Hon. Robert Smith

Co-Chairs, Task Force on Wrongful
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Report of Subcommittee on Conviction Integrity Units

**NEW YORK STATE BAR ASSOCIATION
WRONGFUL CONVICTIONS TASK FORCE**

FINAL REPORT OF THE SUBCOMMITTEE ON CONVICTION INTEGRITY UNITS

I. Introduction

The New York Rules of Professional Conduct recognize that “a prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” New York Rules of Prof’l Conduct R. 3.8 cmt. (2017). As part of this bedrock principle to seek justice, New York adopted post-conviction innocence rules. The New York Rules require that “[w]hen a prosecutor knows of clear and convincing evidence that a defendant was convicted, in a prosecution by the prosecutor’s office, of a crime that the defendant did not commit, the prosecutor shall seek a remedy consistent with justice, applicable law, and the circumstances of the case.” *Id.* at R. 3.8(d). In addition, “[w]hen a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted,” the prosecutor has an ethical obligation “to undertake or make reasonable efforts to cause to be undertaken such further inquiry or investigation as may be necessary to provide a reasonable belief that the conviction should or should not be set aside.” *Id.* at R. 3.8(c). The American Bar Association’s Model Rules of Professional Conduct recognize similar ethical obligations for a prosecutor to seek justice, and not just to convict. *See* American Bar Association Model Rules of Prof’l Conduct R. 3.8(g)-(h).

To ensure the integrity of convictions and to exonerate the wrongfully convicted when the interests of justice require, dozens of prosecutors’ offices around the country, including those for most major metropolitan area, have established Conviction Integrity Units (“CIUs” or

“Units”) over the past 12 years, including 7 CIUs in New York alone.¹ Over the past several years, the work of CIUs around the nation has led to hundreds of exonerations of wrongfully convicted individuals, and the number of exonerations is increasing each year as more and more jurisdictions create CIUs.

CIUs conduct extra-judicial, fact-based review of convictions to investigate plausible allegations of actual innocence or other circumstances indicative of a wrongful conviction. CIUs play a critical *complementary* role in promoting the interests of justice to the work done by appellate reviews and the exercise of prosecutorial discretion in the first instance. Because CIUs operate within a non-adversarial framework and, properly constructed, include fresh perspectives, they are uniquely suited to evaluate plausible claims of wrongful conviction and identify and correct historical errors when they occur and prevent future ones. District Attorney’s Offices with CIUs acknowledge the importance of overcoming cognitive biases, motivated reasoning, and groupthink that can affect prosecutorial outcomes. By including the Petitioner or his or her representatives in the review process, CIUs help promote trust and confidence in the administration of justice.

CIUs are typically part of a local prosecutor’s office and staffed by full-time employees of that office, although they need not necessarily be. While some small prosecutors’ offices may lack the resources to create a formal, separately staffed CIU within the office, there are alternative means available to provide independent review of plausible claims of wrongful conviction, including shared resources across multiple offices and the use prosecutors and other attorneys as designated by the New York State District Attorneys Association, New York State or local bar associations or of ad hoc panels of local volunteer attorneys from outside the office.

¹ Bronx County, Erie County, Kings County, Nassau County, New York County, Oneida County, and Suffolk County have established CIUs.

The development of conviction review programs for offices where it is not feasible to establish a CIU needs further study.

To date, each jurisdiction in New York that has created a CIU has independently defined the scope and structure of its unit and the policies pursuant to which it will operate. There is, however, a consistent message emanating from offices with CIUs: the programs are valuable, they promote the interests of justice, and all prosecutors' office should implement at least some form of extrajudicial conviction review. As Barry Scheck, the co-founder of the Innocence Project, has observed: "the perception that prosecutors themselves are fair, trustworthy, and primarily interested in just outcomes is critical to the system being regarded as legitimate."²

Following extensive study of CIUs operating today, including interviews with the leaders of each of the CIUs operating in New York, the Subcommittee makes the following recommendations:

1. Each District Attorney's Office in the State of New York establish a CIU or, where not feasible, create a program for conviction review.
2. Given the wide variety in the size of District Attorney's Offices in New York and in the communities they represent, there is no one-size-fits-all solution to optimize conviction review. Affording District Attorneys some measure of flexibility in how they implement conviction review programs is likely to promote the interests of justice. However, best practices have emerged from the experience of existing CIUs, and the Subcommittee recommends that each CIU adopt the practices described in Section II.

² Barry C. Scheck, "Conviction Integrity Units Revisited," 14 Ohio St. J. Crim. Law. 705, 710 (2017).

3. A significant barrier to the creation and development of a CIU in some jurisdictions is the lack of available funds. The Subcommittee recommends that New York help fund the creation and development of additional CIUs as described in Section III.

4. CIUs do not currently have the ability to use subpoenas in connection with their post-conviction investigations, which may limit the efficacy of those investigations in some circumstances. To promote accurate fact-finding in conviction review, New York should enact legislation granting to the judiciary the power to issue subpoenas with specified protections for the convicted person upon application by a CIU in connection with an ongoing review as described in Section IV.

II. Recommended Best Practices

A. The CIU Should Be Independent and Qualified

Independence

While prosecutors' offices that have created CIUs typically reserve for the District Attorney the discretion to make final determinations on whether to vacate a conviction or afford other post-conviction relief, the CIU should be independent in the exercise of its investigative role and in making recommendations to the District Attorney. The leaders of existing CIUs report that the full support they have received from the District Attorneys for their respective offices for their mission of objective, independent, fact-based review is a critical factor in the operation of a successful Unit. Moreover, the CIU must operate in a manner consistent with the reality that mistakes may have been made and wrongful convictions may have been secured.

To ensure that the CIU is operating independently, District Attorneys should adopt the following measures whenever feasible:

- The head of the CIU should report directly to the District Attorney or a designee who bears no responsibility for other appellate or post-conviction review in the office;
- The CIU should exclude personnel who participated in an underlying case under review from the CIU's decision-making regarding the case, limiting participation in such cases to the provision of historical information;
- The CIU should guard against cognitive or confirmatory biases by including the perspective of at least one external criminal defense attorney in the process of the Unit's policy definition, case screening, case investigation, and recommendations for action;
- Where feasible, the CIU should be comprised of attorneys, investigators and staff for whom CIU cases have clear priority above other office matters, with sufficient personnel and budget resources to enable timely investigations and thorough and thoughtful recommendations; and
- The CIU should establish a clear written policy on when and how to refer to appropriate authorities any credible allegations of official misconduct by prosecutors or law enforcement personnel identified in the course of a case review.

Qualification

Also essential for the success of the CIU is that the members of the Unit be qualified for their role. Accordingly, the CIU should be led by a prosecutor, preferably with criminal defense experience, who is widely respected by attorneys throughout the jurisdiction's criminal justice community. Where it is not feasible to create a CIU, the attorney responsible for the conviction review should be an attorney who is widely respected in the criminal justice community.

Where feasible, the CIU should be comprised of attorneys, investigators and staff for whom CIU cases have clear priority above other office matters, with sufficient personnel and budget

resources to enable timely investigations and thorough and thoughtful recommendations. The CIU personnel should not be those who work in any appellate or other post-conviction review in that office. And CIU personnel should be trained on an ongoing basis on specific topics relevant to the work of the Unit and the need to approach each review from the perspective that the petitioner in fact may be wrongfully convicted.³ These include issues such as the types of errors in criminal justice known to be factors in inaccurate convictions; “human factors” and emerging issues in forensic science that may impact past convictions secured by the use of older scientific methods; and specific investigative techniques useful for “cold cases.”

B. The CIU Should Be Flexible

CIUs that maximize their flexibility with respect to the types of cases eligible for review, the criteria used to determine which petitions for review will be accepted, the scope of investigation, the degree of external participation and cooperation with the petitioner and his or her representatives, and recommendations for relief are most likely to achieve the goal of identifying and redressing wrongful convictions. Accordingly, the CIU should develop policies and procedures designed to ensure flexibility of operations and encourage the submission of petitions for review.

Review should not be limited to particular categories of cases. Rather, the CIU should accept for review any and all cases for which the defendant has a plausible or colorable claim of factual innocence for the conviction obtained or for which there were other concerns about the

³ CIUs should operate from a presumption of innocence, in contrast to the traditional post-conviction review conducted by appellate lawyers within a prosecutor’s office, who operate from a presumption of guilt. Prosecutors who have worked in successful CIUs and have participated in many re-investigations that have led to exonerations, confirmations of guilt, and uncertain outcomes have developed a different perspective and different set of ingrained expectations than the ordinary line prosecutor or defense attorney. Barry C. Scheck, “Conviction Integrity Units Revisited,” 14 Ohio St. J. Crim. Law. 705, 741 n.13 (2017).

integrity of the conviction, including but not limited to insufficient evidence of guilt beyond a reasonable doubt. Where feasible, the CIU should review all petitions on their factual merits, including:

- Reviewing petitions in which the Petitioner plead guilty to the charges;
- Reviewing petitions where the sentence has been completed;
- Evaluating claims based on a current understanding of the totality of the circumstances now known, rather than what could have been presented or known by defense counsel during the pendency of the original case; and
- Reviewing cases where due process claims (ineffective assistance of counsel, newly discovered evidence, official misconduct, etc.) affect the integrity of the fact-finding process.

Prior submission of a petition for review should not be a disqualifier; rather, the CIU should allow for resubmission of a petition whenever additional credible evidence is brought to light.

The CIU should have the flexibility to consider the totality of information and circumstances, whether newly discovered or not, and whether admissible as evidence in court or now. This aspect of CIU review is another distinguishing feature from the work of appellate prosecutors who are limited to the evidentiary and procedural record of the case.

For petitions accepted for review, following the conclusion of the investigation, the CIU should recommend vacating each conviction where there is clear and convincing evidence of actual innocence or the CIU otherwise no longer has confidence in the integrity of the verdict of guilt. This may include recommending vacatur of convictions where the investigation reveals facts, circumstances and/or events which so grossly corrupted the fact-finding process as to deny the petitioner a fair adjudication of his/her guilt or innocence at trial, and/or, if the conviction

was obtained by a guilty plea, prevented the petitioner from making a knowing and voluntary decision to plead guilty. Such facts, circumstances and events include, but are not limited to: police investigative error or misconduct, prosecutorial error or misconduct, ineffective performance and assistance of trial counsel for petitioner, forensic art or science analytical error, repudiation or modification of forensic art or science, judicial error or misconduct, juror misconduct, witness misconduct and witness error, whether occurring singly or in combination one with another. Such determination may be made with deference to, but notwithstanding a previous adjudication denying a petitioner's claim of a due process violation based upon the same or similar facts circumstances or events.

Following a CIU's decision to vacate on grounds other than established factual innocence, the CIU should recommend refiling charges only in cases where there is substantial evidence of guilt notwithstanding evidence gathered during the investigation of the petition.

C. The CIU Should Be Transparent

To facilitate the submission of petitions for review and to promote public confidence in the integrity of the post-conviction review process, the CIU should be transparent about their operations.

As an initial matter, to facilitate submissions, the CIU make public how to submit a petition for review, that petitions may be filed by any person, and the types of cases accepted for review.

If a petition is accepted for review, and unless disclosure would jeopardize the integrity of the investigation or endanger third parties, the CIU should be transparent during the investigation with the petitioner and his or her representatives about the progress of the case review. The CIU should minimize barriers to the participation of the Petitioner and Petitioner's

counsel in the review and should encourage an open exchange of information and ideas regarding the case review between the Petitioner and the CIU, including open file discovery and contemporaneous disclosure of information discovered in the CIU investigation (other than CIU work product information and information that could endanger third parties), as appropriate. The CIU should establish a clear policy regarding sharing evidence and other information with the Petitioner and Petitioner's counsel, including privilege waivers, as appropriate. The policy should include a requirement of reasonable justification for withholding relevant information from the Petitioner and Petitioner's counsel. The CIU should make all physical evidence available for testing by either party, including re-testing of a previously tested object if the proposed method of testing can provide additional information. The CIU should provide testing of evidence that may provide conclusive evidence of innocence at no cost to Petitioner.

In addition to communicating in an ongoing and timely fashion with Petitioner or Petitioner's counsel during case review, the CIU should explain the actions taken and conclusions drawn from the review. The CIU should also disclose any ability of the Petitioner to revisit the review process after any final decision.

To promote accountability and to inspire confidence in the integrity of any review, following any final determination by the District Attorney, the CIU should make public the District Attorney's decision and the supporting rationales for that decision. The CIU also should track and report publicly on the extent of its activities at least annually. Such reports should include at least the following categories of information:

- The number of petitions received;
- The number of petitions reviewed;
- The number of petitions accepted for additional review;
- The number of petitions as to which a final determination was reached following review;

- The number of exonerations;
- The reasons for rejecting reviews; and
- The types of issues confronted in the cases reviewed.

D. The CIU Should Encourage Measures to Prevent Future Wrongful Convictions

While some exonerations are the result of truly unique circumstances with little application to other cases, most create opportunities to consider measures that would assist in detecting additional wrongful convictions or preventing future wrongful convictions. For example, if a witness provided false testimony in one case that led to a wrongful conviction, he or she may have provided false testimony in other cases and may be considered an unreliable witness in future cases. If retesting of physical evidence reveals laboratory error led to a wrongful conviction, similar errors from the same laboratory may have affected other cases and there may be ways to prevent the recurrence of similar errors in the future.

Accordingly, after each exoneration, the CIU should establish internal training sessions to discuss lessons learned. As part of the review, the CIU should determine the effect of the error upon other convictions in that jurisdiction. As appropriate, the CIU should identify improved policies and procedures that might prevent the recurrence of the error or errors that permitted the flawed conviction to occur, and the CIU should recommend a process to implement, publicize and evaluate those modifications throughout the jurisdiction.

III. State Funding to Support the Creation and Development of Additional CIUs

The success of any conviction review process is dependent upon the support of the local District Attorney. District Attorneys, in turn, must be provided with sufficient resources to encourage the formation of and support for CIUs, including funding for personnel, investigation-related expenses, forensic testing, clerical support, and other assistance. The Subcommittee recognizes that not all jurisdictions have sufficient funds available at present to support and

sustain a CIU and recommends that New York establish a statewide fund to support the creation and development of additional CIUs in the State of New York (a “Conviction Review Fund”).

District Attorney’s Offices that require assistance with funding should be able to apply for state funding to establish a CIU or at least for state funding to review individual cases, provided, however, that the Conviction Review Fund should require District Attorney’s Offices to agree to abide by the best practices set forth in Section II above to the extent feasible as a condition for funding.

Structures and personnel for post-conviction review of credible petitions in jurisdictions that do not have their own CIU require further study. Options for such programs may include the development of a process and of personnel to conduct that review from organizations such as the New York State District Attorneys Association, New York State and local bar associations, a panel of volunteer lawyers of distinguished attorneys or from the development of a regional office. The reviewing attorneys would report directly to the local District Attorney, who would retain the power to accept or reject their recommendations. The reviewing attorneys would report directly to the local District Attorney, who would retain the power to accept or reject their recommendations.

IV. Investigative Subpoena Authority for Ongoing CIU Review

The Subcommittee members recommend that New York adopt statewide legislation to grant to the judiciary the power to issue investigative subpoenas upon application by an established CIU in connection with any ongoing review. The legislation should include privacy protections including notice to the convicted person and his or her counsel of the subpoena and should specify that the legislation does not extend to a subpoena of trial counsel’s file or to compel testimony from the defendant or defense witnesses.

Leaders of CIUs report that the present inability to use subpoenas to compel the disclosure of relevant documents and other information from third parties, including both public and private entities, is a significant obstacle in some instances in the search for truth. A process requiring judicial oversight of the subpoena power will help to ensure that the tool is used only in appropriate circumstances where less burdensome means of obtaining the information may be available. Specific privacy protections including notice to the convicted person and his or her counsel provides protection for the process and permits the convicted person to challenge the scope of investigative subpoenas. An effective process requires that the legislation protect trial counsel's files from investigative subpoena and prohibit compelled testimony from the defendant or defense witnesses.

State	County	Conviction Unit Name	Structure & Staffing	Claim Process	Review Criteria
California	Los Angeles	Conviction Review Unit (CRU)	CRU has its own team of attorneys and investigators who are assigned to investigate the claims received.	The person convicted of a crime (or his/her attorney), a family member, or Innocence project working on behalf of the convicted person can submit a claim. A CRU request form must be completed and submitted.	To qualify for review, the following criteria must be met: -The convicted person must still be in custody; -The crime must have been violent or serious felony, and -There must be new credible evidence of innocence.
California	San Diego	District Attorney Conviction Review Unit (CRU)		Applicants or their representatives must complete a submission form.	Defendants making a claim of innocence must meet the following prerequisites: -The conviction must have occurred in San Diego County Superior Court; -Applicant must still be in custody, serving time on the sentence for which he/she was convicted; -The conviction must be for a violent and/or serious felony; -The application for review must be based on credible and verifiable evidence of innocence; and -Applicant agrees to fully cooperate with the District Attorney's Office, which includes providing disclosure of all relevant information during the review process.
Florida	Fourth Judicial Circuit (Clay, Duval, and Nassau Counties)	Conviction Integrity Review Division (CIR)		To initiate a review, a petition must be completed. Once CIR receives a petition, it will communicate with the defendant to let him/her know that the submission has been received.	To have a case reviewed by the CIR: -Defendant must have been convicted of a felony in the Fourth Judicial Circuit; -Defendant must present a claim of actual innocence; -The claim must be supported by information or evidence not previously litigated before the original trier of fact (jury or bench trial); -The claim must be capable of being investigated and resolved, and if substantiated, would bear directly on the issue of innocence; and -The direct appeal has become final, the mandate has issued, and there is no pending litigation.
Illinois	Cook County	Conviction Integrity Unit (CIU)	CIU is an independent division within the State's Attorney's Office, and functions outside the Criminal Prosecutions Bureau. Recommendations of the CIU are brought directly to the Chief Ethics Officer at the State's Attorney's Office. CIU is staffed with Assistant State's Attorneys and investigators assigned to the CIU.	Claimants are encouraged to use the CIU form, or provide the data requested by the CIU form on a written document, although use of the form is not required. Upon receipt of a written claim, CIU conducts an initial screening process to determine if the claim is eligible for consideration. If this initial review shows that the claim is not eligible, the claimant is notified in writing of that determination. If the review shows the claim eligible for review, CIU will notify the claimant that it intends to investigate the factual merits of the claim. Claimants will be informed of conclusions reached by CIU about their claims. Claimants may request to meet with the Director of the CIU to discuss its conclusions and the recommendations CIU intends to forward to the Chief Ethics Officer. There is no right to appeal the CIU's determinations. Anyone can file a claim with CIU, including the defendant (or his/her lawyer), family member or friend, as long as the defendant authorizes the filing.	CIU investigates claims that meet two essential criteria: -Claimant must assert "actual innocence," which means that there must be conclusive evidence available showing that the defendant was wrongfully convicted; and -The claim of actual innocence must be based on evidence that was not considered by the trier of fact during the proceedings that led to conviction. CIU may also investigate claims of actual innocence based on a showing that the investigative or fact-finding process that led to the conviction was so fundamentally flawed that the guilty verdict cannot reasonably be relied upon as accurate.
Illinois	Lake County	Case Review Panel and Prosecution Protocol and Conviction Review Unit	The CIU is comprised of the following sections: -Case Review Panel: comprised of volunteer attorneys, not employed by the Lake County State's Attorney's Office; -Conviction Review Panel -Conviction Review Unit (CRU): comprised of the Division Chief (responsible for overseeing the overall case process); a Record Supervisor, an Investigator, and three experienced Assistant State's Attorneys. The Division Chief reports directly to the State's Attorney.	Initial requests received by the Lake County State's Attorney's Office are forwarded to the Chief of the CRU, and an acknowledgement letter will be sent to the defendant with a recommendation to contact the Innocence Project (referrals and contact information are provided). If the defendant still wishes to contact the CRU directly, an application for review with a waiver and consent form are forwarded to the defendant for signature. If the CRU accepts an application for review, it is forwarded to the Conviction Review Panel, which will review concurrent with, but independent from, the continuing CRU evaluation. Requests and referrals for review can be made by the defendant (or his/her attorney), family member, or the Innocence Project.	The general accepted criteria in order to be accepted for review by the CIU: -The conviction must have originated from Lake County; -The offender must be a living person; -There must be a claim of actual innocence; -The claim must not be patently frivolous; -There must be new and credible evidence offered
Michigan	Wayne County	Conviction Integrity Unit (CIU)	Claims brought to the CIU are reviewed and investigated by Assistant Wayne County Prosecutors and investigators assigned to the Conviction Integrity Unit. Assistant Prosecutors and Investigators in the CIU work full-time in CIU and will not be involved in the investigation or prosecution of any pending criminal cases CIU is an independent division within the Prosecutor's office Recommendations from the CIU will be brought directly to the Prosecutor	Anyone associated with the convicted person or the case may petition for relief based on innocence from a case prosecuted by the Wayne County Prosecutor's Office, as long as the defendant authorizes the filing Although CIU will accept any writing that provides the necessary information, claimants are encouraged to use the CIU form, or to provide the data requested by the CIU form on a written document. CIU reviews a claim to confirm the person's eligibility for consideration. If the claim is not eligible for consideration, the claimant is notified in writing of that determination. If the review shows the claim is eligible for review, CIU will notify the claimant that it intends to investigate the factual merits of the claim. Claimants will be informed of the conclusions reached by CIU about their claim. Claimants may request to meet with the Director of the CIU to discuss its conclusions and the recommendations CIU intends to forward to the Prosecutor. There is no right to appeal the CIU's determinations.	CIU investigates claims that meet two essential criteria: -The claimant must assert "actual innocence" -For the CIU to recommend that the conviction be overturned, the investigation must lead to the discovery of new evidence that was not considered by the trier of fact during the proceedings that led to the conviction. -CIU may also, in its discretion, investigate other claims of actual innocence and/or wrongful conviction in extraordinary circumstances

State	County	Conviction Unit Name	Structure & Staffing	Claim Process	Review Criteria
New York	Erie County	Conviction Integrity Unit (CIU)	Assistant District Attorney Sara Dee is the office's Conviction Integrity Officer.	When new evidence or information surfaces on a case, Ms. Dee will review the entire case, reevaluate its merits, and if necessary, take appropriate action.	
Ohio	Cuyahoga County	Conviction Integrity Unit (CIU)	<p>CIU is composed of a Conviction Integrity Unit Chief, a Conviction Integrity Unit Coordinator, a Conviction Integrity Board, and an Independent Review Panel (IRP).</p> <p>The Chief and the Coordinator organize the work of the CIU and lead all case investigations that present a credible claim of actual innocence or claim that compelling evidence demands the CIU's review.</p> <p>The CIU Board consists of a combination of Assistant Prosecuting Attorneys and at least one outside volunteer attorney.</p> <p>The IRP is comprised of a minimum of four volunteer members who are completely independent of the Cuyahoga County Prosecutor's Office. The IRP members may include well respected volunteers from the community including, but not limited to, outside attorneys, community leaders, civic leaders, residents, business leaders, clergy, and/or legal scholars/experts</p>	<p>Requests for review must be submitted in writing to the CIU.</p> <p>Applicant may submit an application to the CIU on his/her own, or through his/her attorney.</p> <p>After receiving a written request, the Conviction Integrity Coordinator will preliminarily review the application and supporting documentation. If the prerequisites are not met, the applicant will be notified that no further action will be taken.</p> <p>If the prerequisites are met, the CRU Chief and/or the Conviction Integrity Coordinator will designate a CIU APA or another APA to review the innocence claim. The designated APA will prepare for the CIU, a memorandum outlining the merits of the claim and all other pertinent information.</p> <p>The CIU Chief and/or the CIB board will make a final recommendation to the Cuyahoga County Prosecutor.</p> <p>The IRP will conduct an independent review of the CIB's findings, and if the IRP deems it necessary, will remand the matter back to the CIB for further review or investigation. Following this procedure, the IRP will make a final recommendation to the Cuyahoga County Prosecutor.</p>	<p>In order for the Conviction Integrity Unit to conduct a preliminary review of a conviction, applicants making a claim of innocence or a compelling claim must meet the following prerequisites:</p> <ul style="list-style-type: none"> -The conviction must have been in Cuyahoga County Common Pleas Court; -The applicant must currently be a living person presenting his or her claim of innocence or an otherwise compelling claim; -There must be a claim of actual innocence or otherwise compelling claim and not solely a legal issue (previously raised and/or could have been raised at trial on during the appellate process); -New and credible evidence of innocence must exist; -The claim must not be frivolous; and -The applicant must sign a written "limited" waiver of certain procedural safeguards and privileges, agrees to cooperate with the CIU, and agrees to provide full disclosure regarding all requirements of the Conviction Integrity Unit.
Pennsylvania	Philadelphia	Conviction Integrity Unit (CIU)	Staffed with dedicated Assistant District Attorneys, support staff and investigators.	<p>Requests to the CIU must be submitted by the petitioner (or his/her attorney) using the CIU Submission Form.</p> <p>Requests will not be accepted by third-parties, including friends and family members.</p> <p>The CIU does not send confirmation upon receipt of submission forms.</p>	<p>The general review criteria in order to be accepted for review by the CIU:</p> <ul style="list-style-type: none"> -The conviction must have been in the Philadelphia County Court of Common Pleas (First Judicial District); -There must be a claim of actual innocence or wrongful conviction; and -The claim must not be frivolous.
Tennessee	Davidson County	Conviction Review Unit (CRU)	<p>CRU is part of the Davidson County District Attorney's Office, and consists of the following:</p> <ul style="list-style-type: none"> -CRU Screening Leader, -the CRU Panel (which consists of members of Davidson County District Attorney's Office, and meets monthly to discuss pending CRU cases) -investigation teams (comprising of a CRU Assistant District Attorney General working with a District Attorney General's Office Investigator). 	<p>Claimant must submit a Conviction Review Request Form, or, if the claim is submitted by someone other than a convicted defendant, the defendant must provide written approval of the claim.</p> <p>Once a case is referred to the CRU, the CRU Screening Team Leader will review the request and either request additional information, determine that further review is needed, decline review if no new evidence is indicated, or refer the case to the CRU Panel to explore the option of a full investigation.</p> <p>If the case is referred to the CRU Panel, it will either proceed with a full investigation with a CRU Assistant District Attorney General working with a District Attorney General's Office Investigator to fully investigate the case, or determine that no further action is needed. The results of this investigation will be reported to the CRU Panel for a recommendation, which is then forwarded to the District Attorney General for a Review and decision.</p> <p>If the CRU Panel decides to proceed with a full investigation, the Office of the District Attorney General will notify the victims of the case.</p> <p>The CRU will maintain records of cases reviewed and the decision resulting from those reviews in CRU case management system, and</p>	<p>To be eligible for review, the following criteria must be met:</p> <ul style="list-style-type: none"> -The conviction must have occurred in Davidson County -The application must be based on new credible and verifiable evidence of innocence -The applicant must agree to cooperate with the CRU.
Texas	Dallas County	Conviction Integrity Unit (CIU)	<p>CIU is a special unit in the Dallas County District Attorney's Office.</p> <p>CIU has been led by Cynthia Garza, Chief/Special Fields Bureau Chief, since 2017.</p> <p>CIU is currently comprised of three Assistant District Attorneys, an administrative legal assistant, and a dedicated investigator.</p> <p>Chief / Special Fields Bureau Chief of the CIU reports directly to the District Attorney.</p>	<p>CIU is primarily dedicated to reviewing cases involving allegations of actual innocence, but it also reviews cases involving instances of wrongful conviction as a result of systematic errors.</p> <p>Claimant or his/her "loved one" may write a letter to the CIU request review of the case.</p> <p>Claimants will be notified of receipt of submission within 14 days of receiving it.</p> <p>All letters received by the CIU go through an initial screening process and are assigned to a CIU prosecutor for preliminary review. If the CIU makes a preliminary decision to re-open an investigation into the case, the request will be placed on a waiting-list in the order it was received. If the CIU is unable to reopen an investigation into the case, the claimant will be notified of alternative options.</p>	<p>CIU is primarily dedicated to reviewing cases involving allegations of actual innocence, but it also reviews cases involving instances of wrongful conviction as a result of systematic errors.</p>

State	County	Conviction Unit Name	Structure & Staffing	Claim Process	Review Criteria
Texas	Tarrant County	Conviction Integrity Unit (CIU)	In order to be considered for submission, an intake form and associated documents, as well as a completed waiver must be submitted.		The CIU will review cases that meet the following criteria: -The conviction must arise from a Tarrant County court; -A claim must not be frivolous, but procedural bars will not prohibit review; -Records and evidence necessary for review must be available; -The applicant must present a new and credible claim of actual innocence; and -The applicant and convicted person must fully and openly cooperate with the unit.

Report of Subcommittee on Actual Innocence

ACTUAL INNOCENCE

I. OVERVIEW

The Task Force recommends an amendment to CPL Section 440.10(g) to permit claims of newly-discovered evidence by defendants who pleaded guilty. It is well-established that, unfortunately, innocent people sometimes plead guilty and that those defendants may have no legal remedy under New York law to challenge their convictions when material credible evidence comes to light that demonstrates actual innocence. Thus, it seems equitable, fair, and necessary to amend CPL Section 440.10(g) to allow those defendants convicted after pleading guilty to challenge their convictions based on newly-discovered evidence.

Moreover, Rule 3.8(c) of the New York Rules of Professional Conduct require that when a prosecutor is aware of new, credible, and material evidence that creates a likelihood that a convicted defendant did not commit the offense for which the defendant was convicted, the prosecutor shall within a reasonable time:

- (1) Disclose that evidence to an appropriate court or prosecutor's office; or
- (2) If the conviction was obtained by that prosecutor's office,
 - (A) notify the appropriate court and the defendant that the prosecutor's office possess such evidence unless a court authorizes delay for good cause shown;
 - (B) disclose that evidence to the defendant unless the disclosure would interfere with an ongoing investigation or endanger the safety of a witness or other person, and a court authorizes delay for good cause shown; and
 - (C) undertake or make reasonable efforts to cause to be undertaken such further inquiry or investigation as may be necessary to provide a reasonable belief that the conviction should or should not be set aside.

Rule 3.8(c) of the New York Rules of Professional Conduct.¹ Given these ethical duties that apply to prosecutors, the lack of a procedural vehicle for a court to address and remedy a wrongful conviction in cases where a defendant entered a plea of guilty but there is newly

¹ An Ethics Opinion of the Association of the Bar of the City of New York, Formal Opinion 2018-2, interprets Rules 3.8(c) and (d) of the New York Rules of Professional Conduct and states that the terms "new" "material" and "evidence" should "have their ordinary, everyday meanings and were not meant to incorporate legal standards derived from procedural rules, statutes or constitutional decisions." Formal Opinion 2018-2 (available at <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2018-2-prosecutors-post-conviction-duties-regarding-potential-wrongf>). Under such an interpretation, "new" evidence may "include previously unknown evidence that might have been available to the defense at the time of trial if only defense counsel had exercised due diligence." Formal Opinion 2018-2 discusses other ways in which Rules 3.8(c) and (d) might be implicated including where the defendant pled guilty.

discovered evidence frustrates the intent of the ethical rule, which is not limited to convictions after trial.

While the Task Force considered whether to recommend an amendment to CPL Section 440.10 to permit a free-standing claim of actual innocence, it ultimately decided not to do so principally for three reasons set forth below:

1. All four Appellate Division departments have held that the current statute permits defendants who were convicted at trial to assert claims of actual innocence under 440.10(1)(h). These claims may be raised despite procedural bars and thus there is no statutory barrier that prevents defendants convicted at trial from raising an actual innocence claim.
2. There was no consensus as to whether CPL Section 440.10 should be amended to allow defendants who pleaded guilty to assert a free-standing actual innocence claim. In addition, there was no consensus as to whether there should be different burdens of proof based on the manner of conviction (trial or guilty plea) or as to the appropriate remedy (vacatur of the conviction or vacatur of the plea).
3. Recommending codification of a free-standing actual innocence claim likely would face substantial opposition from prosecutors and thus reduce the chance of any proposed legislative amendment being enacted.

II. BACKGROUND

A. Relevant Statutory Provision:

CPL § 440.10(1) provides ten specific grounds upon which a defendant may move to vacate a judgment of conviction. The relevant provisions state:

At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that . . .

(g) **New evidence has been discovered** since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence; or

(g-1) **Forensic DNA testing** of evidence performed since the entry of a judgment, (1) in the case of a defendant convicted after a guilty plea, the court has determined that the defendant has demonstrated a substantial probability that the defendant was actually innocent of the offense of which he or she was convicted, or (2) in the case of a defendant convicted after a trial, the court has determined that there exists a reasonable

probability that the verdict would have been more favorable to the defendant.

(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

B. Legal Precedent

1. Freestanding Actual Innocence Claim and Hamilton

Subdivision (1)(h) of CPL § 440.10(1) is the statutory provision under which a defendant can assert that there was a constitutional deprivation in obtaining the conviction, such as ineffective assistance of counsel, Brady, and any other claim that would violate the due process rights of the defendant.

Subdivision (1)(h) of CPL § 440.10(1) also is the basis for “freestanding” actual innocence as recognized by the Second Department in People v. Hamilton, 115 A.D.3d 12 (2d Dep’t 2014). In that decision, the Hamilton court specifically relied upon the New York State Constitution’s due process clause and the prohibition against cruel and unusual punishment.

As explained in Hamilton,

Since a person who has not committed any crime has a liberty interest in remaining free from punishment, the conviction or incarceration of a guiltless person, which deprives that person of freedom of movement and freedom from punishment and violates elementary fairness, runs afoul of the Due Process Clause of the New York Constitution . . .

Moreover, because punishing an actually innocent person is inherently disproportionate to the acts committed by that person, such punishment also violates the provision of the New York Constitution which prohibits cruel and unusual punishments

115 A.D.3d at 26.

The court concluded that “a freestanding claim of actual innocence may be addressed pursuant to CPL 440.10(1)(h), which provides for vacating a judgment which was obtained in violation of an accused's constitutional rights.” Id. at 26.

Under CPL 440.30(6), the standard of proof imposed upon a defendant challenging a conviction is “proof by a preponderance of the evidence.” With respect to a claim of actual innocence as a ground for vacating the conviction, as distinguished from a specific constitutional violation, however, vacatur would be required only if there is clear and convincing evidence that the defendant is innocent.

The remaining three Appellate Divisions all have adopted the Hamilton standard and have recognized a free-standing actual innocence claim in trial cases grounded in due process. See

People v. Jimenez, 142 A.D.3d 149 (1st Dep’t 2016); People v. Mosley, 155 A.D.3d 1124 (3d Dep’t 2017); People v. Pottinger, 156 A.D.3d 1379 (4th Dep’t 2017).

III. SUPPORT FOR RECOMMENDATION

A. Barriers to Litigating 440 Motions Following Guilty Pleas

On its face, 440.10(g) is restricted to newly discovered evidence “after trial,” thereby precluding a (1)(g) claim where a defendant has pled guilty. But not all provisions of the statute contain similar constraints. For example, the forensic testing provision under (1)(g-1) permits a claim after a guilty plea with a higher standard, namely, that a defendant must show a “substantial probability” of actual innocence, as opposed to a “reasonable probability” of actual innocence as is required for trial cases.

Despite the lack of any language in 440.10(1)(h) restricting it to trial cases, unlike subsection (1)(g) and (1-g), the Court of Appeals, in People v. Tiger, 32 N.Y.3d 91 (2018), found that a “freestanding” claim of actual innocence under 440.10(1)(h) was precluded by a guilty plea. In Tiger, the defendant moved pursuant to CPL 440.10(1)(h) to vacate the judgment alleging (1) that her guilty plea was unconstitutionally obtained due to ineffective assistance of counsel; and (2) a claim of actual innocence relying on Hamilton. Addressing the defendant’s claim that “despite her guilty plea, . . . she is entitled to a hearing on the evidence of her guilt or innocence[.]” the Court held that “CPL 440.10(1)(h) does not provide for such relief.” Id. at 98.

The Court in Tiger noted the language in CPL 440.10(1)(h) requiring a defendant to show “the judgment *was obtained* in violation of a defendant’s state or federal constitutional right,” while subdivision (1)(g) only applies to “*entry of a judgment based upon a verdict of guilty after trial.*” Id. at 99 (emphasis in original). The Court also noted that the 2012 legislative carve-out in subdivision (1)(g-1) is the only provision that refers to actual innocence and contains a higher standard for convictions obtained after guilty pleas. Id. at 99-100. The Court found this “lends support to the conclusion that CPL 440.10 does not contemplate a separate constitutional claim to vacate a guilty plea based on new evidence as to guilt or innocence.” Id. at 100. The Court further noted that the statutory framework evidenced a legislative purpose that the principle that “a voluntary and solemn admission of guilt in a judicial proceeding is not cast aside in a collateral motion for a new factual determination of the evidence of guilt.” Id. Accordingly, the Court held, “a guilty plea entered in proceedings where the record demonstrates the conviction was constitutionally obtained will presumptively foreclose an independent actual innocence claim.” Id. at 102.

The Tiger decision acknowledged that a defendant may raise a 440.10(1)(h) claim in a plea case based on ineffective assistance of counsel and ruled that the defendant's ineffective assistance of counsel claim should proceed to an evidentiary hearing. Id. at 99 ("Subdivision (1)(h) imposes no time limitation in bringing the motion and is applicable to judgments obtained both through guilty pleas and upon verdict in a trial"); id. at 102 ("Since the evidence put forth in support of defendant's actual innocence claim was discoverable before the guilty plea had her attorney pursued that course of investigation, defendant's challenge to her conviction falls squarely within CPL 440.10(1)(h) and will necessarily be addressed as part of her ongoing ineffective assistance of counsel claim.").

B. Need for Legislative Fix

Under the current legislative scheme and existing case law, a defendant who pleads guilty *cannot* raise a 440 claim under (1)(g) – based on the statutory language – or as a freestanding (Hamilton) claim under (1)(h) – based on Tiger. It is well-established that the vast majority of cases are resolved by guilty plea. "More than 90 percent of felony convictions in state courts across the U.S. are obtained by guilty plea." Innocence Project website (available at <https://www.innocenceproject.org/an-end-to-plea-bargains/>). Unfortunately, as also has been well established, individuals who actually are innocent sometimes plead guilty. Of the 363 wrongful convictions overturned in the United States by DNA testing, 41 defendants pleaded guilty to crimes they did not commit. See Innocence Project website (available at <https://www.innocenceproject.org/all-cases/#exonerated-by-dna>).

The forensic evidence provision in (1)(g-1) provides a method for raising actual innocence for those individuals who were convicted upon a guilty plea, but this provision limited to cases where DNA testing exonerates an individual. DNA exonerations are the basis of many, but not all, wrongful convictions. See University of Michigan Law School's National Registry of Exonerations (known to be the most comprehensive database in the country). The NRE defines an exoneration as "when a person who has been convicted of a crime is officially cleared based on new evidence of innocence." (The database is searchable by name, county, and other criteria. Available at <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (listing exonerations based on Perjury or False Accusation, Official Misconduct, Mistaken Witness Identification, False or Misleading Forensic Evidence, etc.).

Whether the result of a guilty plea or a trial, the criminal justice system should be equally concerned with wrongful convictions. Conviction Integrity Units at prosecutors' offices are a potential avenue for catching wrongful convictions, but as addressed herein, are not an error-proof method. Moreover, many prosecutors' offices throughout New York State do not have Conviction Integrity Units and defendants convicted in those jurisdictions should have a statutory means by which to assert their innocence.

Newly discovered evidence often is the key to unearthing a claim of actual innocence. For example, a defendant who entered a guilty plea might discover that a cooperator with another prosecution agency has identified someone other than the defendant as the actual perpetrator, (*see Man Convicted In Club Death is Acquitted at Second Trial*, New York Times, December 7, 2007, available at: <https://www.nytimes.com/2007/12/07/nyregion/07palladium.html>), that there were improprieties in the crime laboratory that tested the evidence (see Nassau County Shuts

Down Crime Lab, New York Times, February 19, 2011, available at: <https://www.nytimes.com/2011/02/19/nyregion/19nassau.html>), or that advancements in science cast doubt on the theory upon which the crime was predicated (see People v. Bailey, 144 A.d.3d 1562 (4th Dep’t 2016)).

In none of these examples above would a defendant who entered a plea of guilty be able to challenge their conviction based on newly-discovered evidence. A subdivision (1)(h) ineffective assistance of counsel claim likely would not provide relief in these scenarios. Claims alleging a failure to investigate or a failure to challenge invalidated forensic science rarely succeed largely because a criminal defense lawyer need only provide “objectively reasonable” or “meaningful” representation. Nor would defense counsel be able to know that the real perpetrator has admitted guilt in a proffer session with a law enforcement agency.

Accordingly, there is a need for a legislative amendment to permit 440 claims based on newly discovered evidence following a guilty plea under subdivision (g). Yet, it makes sense to have a heightened standard for such claims as opposed to those that are the result of a trial verdict. As noted, the sole provision currently permitting a 440 claim after a guilty plea -- (g-1) -- includes a higher standard requiring a defendant to show a “substantial probability” of actual innocence, as opposed to a “reasonable probability that the verdict would have been more favorable to the defendant” as is required for trial cases. In Tiger, the Court of Appeals explained the legislative rationale for the inclusion of this higher standard in (g-1) as follows, “In recognition of the import of a guilty plea conviction that was constitutionally obtained, the legislature enacted different standards that must be satisfied as between a defendant who has pleaded guilty and one who has been convicted upon a verdict after trial.” Tiger, 32 N.Y.3d at 99.

The Court in Tiger also explained that the historic importance of plea agreements and finality supported this higher standard: “The plea process is integral to the criminal justice system and we have observed that there are significant public policy reasons for upholding plea agreements, including conserving judicial resources and providing finality in criminal proceedings.” Id. at 101 (citing People v Keizer, 100 NY2d 114, 118 (2003)). These same concerns apply to newly discovered evidence claims under subdivision (g) following a guilty plea and warrant a higher standard as well. A higher standard also would recognize the difficulty of prosecutors defending against 440 claims in plea cases where there has not been a fact finding proceeding (trial).

Finally, under the existing statutory scheme, CPL 440.30(2) and (4) provide that a court may summarily deny a motion without a hearing. The same provisions would apply to newly discovered evidence claims following a guilty plea under (g). It is not anticipated that there need be a hearing in every case where a motion is made as judges would retain the discretion to decide the motion on the papers. Where a hearing was granted, CPL 440.30(6), would impose the same standard of proof upon the defendant of proof by a preponderance of the evidence.

IV. RECOMMENDATION

A. Legislative Amendment to CPL § 440.10(1) to add § 440.10(1)(h)

The Task Force recommends a statutory change to CPL § 440.10(1) to add new section (h) that would permit a newly discovered evidence claim after a guilty plea. Whereas (1)(g) for

convictions after trial requires a “**probability** that had such evidence been received at the trial the verdict would have been more favorable to the defendant,” the showing for guilty pleas is recommended to be “a **substantial** probability that **the defendant was actually innocent of the offense of which he or she was convicted.**”

Current Language of CPL § 440.10(1)(g):

(g) **New evidence has been discovered** since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.

Recommended Amendment to CPL § 440.10(1) to add (1)(h):
(redlined to show difference from (1)(g))

(h) **New evidence has been discovered** since the entry of a judgment based upon a ~~verdict of guilty after trial~~ **guilty plea**, which could not have been produced by the defendant at the ~~trial~~ **time of the plea**, even with due diligence on his part and which is of such character as to create a **substantial probability that the defendant was actually innocent of the offense of which he or she was convicted** ~~probability that had such evidence been received at the trial, the verdict have been more favorable to the defendant;~~ provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence.

B. Further Study of Possible Legislative Action to Create a Free-Standing Claim of Actual Innocence

The Task Force spent a substantial amount of time discussing whether or not to recommend legislation that would create a free standing claim of actual innocence thereby essentially codifying Hamilton as well as permitting such a claim for those who pled guilty thus creating a legislative fix for Tiger. Ultimately, the Task Force declined to make such recommendation for the reasons stated above but agreed that further study and a legislative drafting effort related to this issue are warranted. Such a study should include, at a minimum, what standard of proof would apply to such claims, what the remedy would be for a successful claim, *e.g.*, vacatur of the plea or dismissal, and whether “newly” discovered evidence should be interpreted consistently with “new” evidence in the Ethics Opinion referenced above in note 1.

Report of Subcommittee on Forensic Science

Proposal for Reform:

The Sub-Committee on Forensic Science proposes legislation to improve the quality of forensic science admitted into evidence in New York State courts. The proposed statute would be applicable only in criminal cases, and would leave the law of evidence unchanged as it applies to civil cases.

NEW CPL § 60.80: Rules of evidence; Testimony by Expert Witnesses

- (1) A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify at trial in the form of an opinion or otherwise if:
 - a. the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
 - b. the testimony is based on sufficient facts or data, provided that such facts or data must be available to both parties as set forth in section 240.20(1)(c) of this chapter;
 - c. the testimony is the product of reliable principles and methods; and
 - d. the expert witness must reliably apply the principles and methods of the area of expertise to the facts of the case.
- (2) When testimony is offered as scientific, the witness' method, to be considered reliable, must be shown to be reproducible and accurate for its intended use, as shown by empirical studies conducted under conditions appropriate to the intended use.

PRACTICE COMMENTARY

Unreliable forensic evidence is one of the major causes of wrongful convictions. The Innocence Project reports that “misapplication of forensic science is the second most common contributing factor to wrongful convictions, found in nearly half (45%) of DNA exoneration cases.” (www.innocenceproject.org/causes/misapplication-forensic-science/). Moreover, unreliable science can be admitted into evidence at trial in a variety of ways. The forensic scientists or technicians collecting, analyzing and testing crime scene evidence might use unreliable techniques, or misapply reliable techniques, or testify incorrectly about the significance of the evidence collected. For example, the FBI reported that in a remarkable 96% of cases reviewed, in which its experts offered opinions about “scientifically” matched hair samples at trial, the experts’ opinions were either entirely or partly inaccurate.¹ Further, science which was once determined to be valid and reliable can be proved unreliable or even false by new scientific inquiry.

¹ *FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review*, FBI.GOV, <https://bit.ly/1NaXfmH> (last visited Nov. 16, 2018).

All of these errors are often undetected by adversaries presenting and resisting introduction of scientific evidence. Courts making admissibility decisions can be impaired not only by inadequacy of counsels' arguments and the paucity of pre-trial discovery, but also through operation of precedent. However, "it is the Court's role to ensure that a given discipline does not falsely lay claim to the mantle of science, cloaking itself with the aura of unassailability that the imprimatur of 'science' confers and thereby distorting the truthfinding process. There have been too many pseudo-scientific disciplines that have since been exposed as profoundly flawed, unreliable, or baseless for any Court to take this role lightly." *Almeciga v Ctr for Investigative Reporting*, 185 F Supp 3d 401 (2016).

In New York, as in other states where the standard for admissibility of scientific evidence is or was governed by *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), much evidence has been admitted into trial even though it does not comport with the scientific method and is often little better than guesswork.² See *Ex Parte Chaney*, 2018 WL 6710279 at 32 ("The body of scientific knowledge underlying the field of bitemark comparisons has evolved since his trial in a way that contradicts the scientific evidence relied on by the State at trial. New peer-reviewed studies discredit nearly all the testimony given by [forensic dentists] about the mark on [the victim's] left forearm and [Petitioner] being a "match.")

In New York State, the courts' interpretation of *Frye* is even more problematic because, unlike almost every other jurisdiction, New York has no codified rules for the introduction of scientific evidence. The absence of statutory guidance discourages independent judicial analysis and encourages reliance on precedent, where past judicial reliability determinations are not re-assessed by examining the current state of science, but simply quoted to re-affirm admissibility of scientific evidence. The Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) encouraged trial court to rigorously examine proffered scientific evidence before admission of the evidence at trial to ensure it meets the criteria scientists themselves apply.

To encourage judicial scrutiny of proffered scientific evidence, this statute tracks Rule 702 of the Federal Rules of Evidence and comparable state rules and statutes. It is similar to statutes enacted by most states. The statutes also incorporate the lessons of the 2016 PCAST report on forensic feature-comparison methods.³ As set forth in that report, there are two types of scientific validity: foundational validity and validity as applied.⁴

"Foundational validity" requires that the method relied upon by the expert has been subject to empirical testing by experts under conditions appropriate to its intended use. The empirical testing must demonstrate that the method is repeatable and reproducible, and the testing results must contain valid estimates of the method's positive and negative error rates.

² Michael J. Saks, et. al., *Forensic Bitemark Identification: Weak Foundations, Exaggerated Claims*, JOURNAL OF LAW AND THE BIOSCIENCES (2016), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5570687/>.

³ President's Council of Advisors on Science and Technology, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (Sept. 2016), <https://tinyurl.com/j29c5ua>.

⁴ *Id.* at 43.

“Validity as applied” follows a two-part test. First, the examiner must demonstrate a capability for reliably applying the method and having done so in the past. Second, the examiner’s assertions about the probative value of proposed evidence must report the overall false-positive rate and sensitivity established by the studies of foundational validity, and must establish that the samples used in the foundational studies are relevant to the facts of this particular case. This statute suggests the court look to both foundational validity and validity as applied in making admissibility determinations.

Generally, when determining whether any particular testimony is the product of reliable principles and methods (1)(c), a court should like to see if the principles are repeatable, reproducible and accurate. In the scientific literature, repeatable means that, with known probability, an examiner obtains the same result, when analyzing samples from the same sources. Reproducible means that, with known probability, different examiners obtain the same result, when analyzing the same samples. Accuracy means, that, with known probabilities, an examiner obtains correct results both (1) for samples from the same source and (2) for samples from different sources.

Furthermore, this statute anticipates that, in testimony, experts shall not be permitted to make claims or implications that go beyond the empirical evidence and the applications of valid statistical principles to that evidence. For example, where a witness provides testimony based on a forensic examination conducted to determine whether an evidentiary sample is similar or identical to a source sample, the witness must provide an explanation for the assertion of similarity, and support for the experts’ use of any expression of confidence in the assertion of similarity.⁵

⁵ See, Lander, Eric S., *Fixing Rule 702: The PCAST Report and Steps to Ensure the Reliability of Forensic Feature-Comparison Methods in the Criminal Courts*, 86 *Fordham L. Rev.* 1661, 1677 (2018).

**Survey of Other States
Admissibility Standards for
Scientific Evidence**

Memorandum

October 8, 2018

Weil Draft

To NYSBA Wrongful Convictions Task Force, Subcommittee on Forensic Science	From Benjamin E. Marks Jessica N. Djilani	CC
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Re Survey of States' Admissibility Standard(s) for Scientific Evidence

In response to a request from Adele Bernhard and the NYSBA Wrongful Task Force Subcommittee on Forensic Science, this memorandum provides a summary of the admissibility standards and rules in all 50 states and case law interpreting such admissibility statutes. As requested, the Appendix contains a copy of the cases discussed herein.

* * *

I. Summary Table of the Admissibility Standards and State Rule of Evidence for Each State

Below is a summary table of each state's rule of evidence governing the admission of scientific evidence and the applicable standard for the admission of scientific evidence.

As shown in the table below, 38 states apply the admissibility standard set out in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) ("*Daubert*") or a very similar standard, and eight states (including New York) apply the standard set out in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) ("*Frye*"). The remaining four states apply a standard other than *Daubert* or *Frye*.

As also shown in the table below, 44 states have state rules of evidence that match, or are very similar to, the 1975, 2000, or current version of Federal Rule of Evidence 702, while six states (including New York) have a rule of evidence that materially differs from Rule 702.

The original version of Federal Rule of Evidence 702, enacted in 1975 ("1975 FRE 702") provided:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Federal Rule of Evidence 702 (as amended in 2000) (“2000 FRE 702”) provided:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if

- (1) the testimony is based upon sufficient facts or data,
- (2) the testimony is the product of reliable principles and methods, and
- (3) the witness has applied the principles and methods reliably to the facts of the case.

The current version of Federal Rule of Evidence 702 (as amended in 2011) (“current FRE 702”), provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

No.	State	Standard ¹	State Rule of Evidence	Relationship to FRE 702
1	Alabama	<i>Daubert</i>	Alabama Code 12-21-60	Hybrid of 1975 FRE 702 and 2000 FRE 702
2	Alaska	<i>Daubert</i>	Alaska Rule of Evidence 702	Matches 1975 FRE 702
3	Arizona	<i>Daubert</i>	Arizona Rule of Evidence 702	Matches current FRE 702
4	Arkansas	<i>Daubert</i>	Arkansas Rule of Evidence 702	Matches 1975 FRE 702
5	California	<i>Frye*</i>	California Evidence Code 702	Differs from FRE 702
6	Colorado	<i>Daubert</i>	Colorado Rule of Evidence 702	Matches 1975 FRE 702
7	Connecticut	<i>Daubert</i>	Connecticut Code of Evidence § 7-2	Hybrid of 1975 FRE 702 and current FRE 702

¹ The standard applicable in each state is organized into categories, which have the following explanations:

- **Daubert:** States that have explicitly adopted the *Daubert* standard;
- **Frye:** States that have explicitly adopted the *Frye* standard;
- **Daubert*:** States that apply the *Daubert* factors (or *Daubert*-like factors), but have not explicitly adopted *Daubert*;
- **Frye*:** States that apply the *Frye* factors (or *Frye*-like factors), but have not explicitly adopted *Frye*; and
- **Neither:** States that apply a unique standard (neither *Frye* nor *Daubert* nor any similar factors).

No.	State	Standard ¹	State Rule of Evidence	Relationship to FRE 702
8	Delaware	<i>Daubert</i> *	Uniform Rule of Evidence 702	Matches 2000 FRE 702
9	Florida	<i>Frye</i>	Florida Statute § 90.702	Matches 2000 FRE 702
10	Georgia	<i>Daubert</i>	Georgia Code § 24 – 7 – 702	Contains 2000 FRE 702
11	Hawaii	<i>Daubert</i> *	Hawaii Revised Statute § 33 – 626 – 702	Contains 1975 FRE 702
12	Idaho	<i>Daubert</i> *	Idaho Rule of Evidence 702	Hybrid of 1975 FRE 702 and 2000 FRE 702
13	Illinois	<i>Frye</i>	Illinois Rule of Evidence 702	Contains 1975 FRE 702
14	Indiana	<i>Daubert</i> *	Indiana Rule of Evidence 702	Hybrid of 1975 FRE 702 and 2000 FRE 702
15	Iowa	<i>Daubert</i>	Iowa Rule of Evidence 5.702	Matches 1975 FRE 702
16	Kansas	<i>Daubert</i>	Kansas Statutes Annotated 60 – 456 (b)	Matches 2000 FRE 702
17	Kentucky	<i>Daubert</i> *	Kentucky Rule of Evidence 702	Matches 2000 FRE 702
18	Louisiana	<i>Daubert</i>	Louisiana Code of Evidence 702	Matches 1975 FRE 702
19	Maine	<i>Daubert</i> *	Maine Rule of Evidence 702	Hybrid of 1975 FRE 702 and 2000 FRE 702
20	Maryland	<i>Frye</i>	Maryland Rule of Evidence 5 – 702	Differs from FRE 702
21	Massachusetts	<i>Daubert</i>	Massachusetts Rule of Evidence 702	Matches 2000 FRE 702
22	Michigan	<i>Daubert</i>	Michigan Rule of Evidence 702	Similar to 2000 FRE 702
23	Minnesota	<i>Frye</i> *	Minnesota Rule of Evidence 702	Contains 1975 FRE 702
24	Mississippi	<i>Daubert</i>	Mississippi Rule of Evidence 702	Matches current FRE 702
25	Missouri	<i>Daubert</i> *	Missouri Revised Statute § 490.065	Contains 1975 FRE 702
26	Montana	<i>Daubert</i> *	Montana Rule of Evidence 702	Matches 1975 FRE 702
27	Nebraska	<i>Daubert</i> *	Nebraska Revised Statute 27 – 702	Matches 1975 FRE 702
28	Nevada	<i>Daubert</i> *	Nevada Revised Statute 50.275	Similar to 1975 FRE 702
29	New Hampshire	<i>Daubert</i>	New Hampshire Rule of Evidence 702	Matches current FRE 702
30	New Jersey	Neither, <i>Rubanick</i>	New Jersey Rule of Evidence 702	Matches 1975 FRE 702
31	New Mexico	<i>Daubert</i> *	New Mexico Rule of Evidence 11 – 702	Hybrid of 1975 FRE 1975 and current FRE 702
32	New York	<i>Frye</i>	New York Civil Practice Law and Rules 4515	Differs from FRE 702
33	North Carolina	<i>Daubert</i>	North Carolina Rule of Evidence 702	Matches 2000 FRE 702
34	North Dakota	Neither, <i>Hernandez</i>	North Dakota Rule of Evidence 702	Hybrid of 1975 FRE 702 and current FRE 702
35	Ohio	<i>Daubert</i> *	Ohio Rule of Evidence 702	Differs from FRE 702
36	Oklahoma	<i>Daubert</i>	Oklahoma Statute § 12 – 2702	Matches 2000 FRE 702

No.	State	Standard ¹	State Rule of Evidence	Relationship to FRE 702
37	Oregon	<i>Daubert</i> *	Oregon Rule of Evidence 40.41 0 702	Matches 1975 FRE 702
38	Pennsylvania	<i>Frye</i>	Pennsylvania Rule of Evidence 702	Differs from FRE 702
39	Rhode Island	<i>Daubert</i>	Rhode Island Rule of Evidence 702	Similar to 1975 FRE 702
40	South Carolina	Neither, <i>Jones</i>	South Carolina Rule of Evidence 702	Matches 1975 FRE 702
41	South Dakota	<i>Daubert</i>	South Dakota Codified Law 19 – 19 – 702	Matches current FRE 702
42	Tennessee	<i>Daubert</i> *	Tennessee Rule of Evidence 702	Matches 1975 FRE 702
43	Texas	<i>Daubert</i> *	Texas Rule of Evidence 702	Hybrid of 1975 FRE 702 and 2000 FRE 702
44	Utah	Neither, <i>Rimmasch</i>	Utah Rule of Evidence 702	Differs from FRE 702
45	Vermont	<i>Daubert</i>	Vermont Rule of Evidence 702	Matches 2000 FRE 702
46	Virginia	<i>Daubert</i> *	Virginia Rule of Evidence 702	Contains 1975 FRE 702
47	Washington	<i>Frye</i>	Washington Rule of Evidence 702	Matches 1975 FRE 702
48	West Virginia	<i>Daubert</i>	West Virginia Rule of Evidence 702	Contains 2000 FRE 702
49	Wisconsin	<i>Daubert</i>	Wisconsin Statute § 907.02	Contains 2000 FRE 702
50	Wyoming	<i>Daubert</i>	Wyoming Rule of Evidence 702	Matches 1975 FRE 702

II. State-By-State Analysis of Admissibility Standards for Scientific Evidence and Relevant Statutes

1 Alabama

The Alabama Legislature has expressly adopted the *Daubert* standard. See *Turner v. State*, 746 So.2d 355 (Ala. 1998). For a recent case discussing the application of the *Daubert* factors in Alabama, please see *Mazda Motor Corporation v. Hurst*, 2017 WL 2888857 (Jul. 7, 2017).

Alabama Code 12-21-160 provides:

- (a) *Generally*. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
- (b) *Scientific evidence*. In addition to requirements set forth in subsection (a), expert testimony based on a scientific theory, principle, methodology, or procedure is only admissible if:

- (1) The testimony is based on sufficient facts or data,
- (2) The testimony is the product of reliable principles and methods,
and
- (3) The witness has applied the principles and methods reliably to
the facts of the case.²

Paragraph (a) of this statute matches the 1975 version of FRE 702, while paragraph (b) sets out the factors enumerated in the 2000 version of FRE 702.

2 Alaska

In the case of *State v. Coon*, 974 P.2d 386 (Alaska 1999), the Alaska Supreme Court adopted the *Daubert* standard.

Alaska Rule of Evidence 702(a) provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.³

This statute matches the 1975 version of FRE 702.

3 Arizona

In 2010, the Arizona Legislative House Bill 492 changed the admissibility standard used for scientific evidence from the *Frye* standard to the *Daubert* standard, and Arizona courts now apply *Daubert*. See *State v. Salazar-Mercado*, 325 P.3d 996 (Ariz. 2014).

Arizona Rule of Evidence 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods;

and

² <http://judicial.alabama.gov/docs/library/rules/ev702.pdf>

³ <https://public.courts.alaska.gov/web/rules/docs/ev.pdf>

(d) the expert has reliably applied the principles and methods to the facts of the case.⁴

This statute matches the current version of FRE 702.

4 Arkansas

The Arkansas Supreme Court adopted the *Daubert* standard in 2000. See *Farm Bureau Mut. Ins. Co. of Ark., Inc. v. Foote*, 14 S.W. 3d 512 (Ark. 2000).

Arkansas Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.⁵

This statute matches the 1975 version of FRE 702.

5 California

In *People v. Leahy*, 882 P.2d 321 (Cal. 1994), the California Supreme Court considered whether to modify the *Frye* standard adopted in *People v. Kelly*, 549 P.2d 1240 (Cal. 1976) in light of the *Daubert* decision by the Supreme Court of the United States. The court held that the *Kelly/Frye* formulation “should remain a prerequisite to the admission of expert testimony regarding new scientific methodology in the state.” *Id.* at 591; see also *People v. Daveggio*, 415 P.3d 717 (Cal. 2018) (upholding the *Kelly/Frye* standard as applicable in California state courts). More recently, in *Sargon Enterprises, Inc. v. University of Southern California*, 288 P.3d 1237 (2012), the court recognized—citing *Daubert*—that a judge’s role as a “gatekeeper” of the evidence is to focus “solely on principles and methodology, not the on the conclusions that they generate.” However, the court explicitly declined to adopt *Daubert*, and stated that nothing in *Sargon* altered its analysis under *Leahy*. The court further observed that, in considering “scientific controversies,” the court “conducts a ‘circumscribed inquiry’ to ‘determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert’s general theory or technique is valid.’” *Id.* at 633 (citations omitted).

California Evidence Code 702 provides:

(a) Subject to 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter.

⁴ [https://govt.westlaw.com/azrules/Document/N88060EA0E7DA11E0B453835EEBAB0BCD?viewType=FullText&originati onContext=documenttoc&transitionType=DocumentItem&contextData=\(sc.Default\)](https://govt.westlaw.com/azrules/Document/N88060EA0E7DA11E0B453835EEBAB0BCD?viewType=FullText&originati onContext=documenttoc&transitionType=DocumentItem&contextData=(sc.Default))

⁵ <https://www.arcourts.gov/rules-and-administrative-orders/court-rules/rule-702-testimony-experts>

Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.

(b) A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony.⁶

This statute differs from all versions of FRE 702.

6 Colorado

The Colorado Supreme Court adopted the *Daubert* standard in *People v. Shreck*, 22 P.3d 68, 70 (Colo. 2001).

Colorado Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.⁷

This statute matches the 1975 version of FRE 702.

7 Connecticut

The Connecticut Supreme Court adopted the *Daubert* standard in *State v. Porter*, 698 A.2d 739 (Conn. 1997).

Connecticut Code of Evidence § 7-2 provides:

A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue.⁸

This statute is a hybrid of the 1975 version and the current version of FRE 702.

⁶ http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=EVID§ionNum=702

⁷ http://www.xprolegal.com/rules/Rules_Colorado.pdf

⁸ https://www.jud.ct.gov/Publications/PracticeBook/Code_of_Evidence_7927.pdf

8 Delaware

In *Nelson v. State*, 628 A.2d 69 (Del. 1993), the Delaware Supreme Court determined that the Delaware Rules of Evidence and decisions in Delaware's precedent cases were consistent with *Daubert*. The Delaware Uniform Rule of Evidence 702 provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if

- (1) the testimony is based upon sufficient facts or data,
- (2) the testimony is the product of reliable principles and methods, and
- (3) the witness has applied the principles and methods reliably to the facts of the case.⁹

This statute matches the 2000 version of FRE 702.

9 Florida

In *Brim v. State*, 695 So.2d 268 (Fla. 1997), the Florida Supreme Court emphasized that the *Frye* test is used in Florida, despite the federal adoption of *Daubert*. The *Frye* standard applies notwithstanding the *Daubert*-type language that appears in the relevant Florida state statute. However, the Supreme Court of Florida revisited the question of whether *Frye* or *Daubert* should govern the admissibility of scientific evidence in the case of *DeLisle v. Crane Company*, which was argued in the Florida Supreme Court in the summer of 2018. As of the date of this memorandum, a final decision had not yet been issued.

Florida Statute § 90.702 provides:

Testimony by experts.—If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.¹⁰

⁹ <https://courts.delaware.gov/forms/download.aspx?id=39388>

¹⁰ <https://www.flsenate.gov/Laws/Statutes/2016/90.702>

This statute matches the 2000 version of FRE 702.

10 Georgia

The relevant section of the Georgia code states that the courts of Georgia should not be viewed as “open to expert evidence that would not be admissible in other states,” and therefore counsels that the *Daubert* standard should be applied as the evidentiary standard. The *Daubert* admissibility standard was applied by the Supreme Court of Georgia in the case of *HNTB Georgia, Inc. v. Hamilton-King*, 697 S.E.2d 770 (Ga. 2010).

Georgia Code § 24-7-702 provides, in relevant part:

(a) Except as provided in Code Section 22-1-14 and in subsection (g) of this Code section, the provisions of this Code section shall apply in all civil proceedings. The opinion of a witness qualified as an expert under this Code section may be given on the facts as proved by other witnesses.

(b) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods;
and
- (3) The witness has applied the principles and methods reliably to the facts of the case which have been or will be admitted into evidence before the trier of fact . . .

(f) It is the intent of the legislature that, in all civil proceedings, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.¹¹

Subsection (b) of this statute contains the 2000 version of FRE 702.

¹¹ <https://law.justia.com/codes/georgia/2014/title-24/chapter-7/section-24-7-702/>

11 Hawaii

In *State v. Montalbo*, 828 P.2d 1274 (Haw. 1992), the Hawaii Supreme Court used a test of reliability factors very similar to that of *Daubert*, but it did not explicitly adopt the *Daubert* standard. The Supreme Court again declined to adopt the *Daubert* test in the case of *State v. Vliet*, 19 P.3d 42 (Haw. 2001).

Hawaii Revised Statute § 33 – 626 – 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.¹²

This statute contains the 1975 version of FRE 702.

12 Idaho

In *State v. Merwin*, 962 P.2d 1026 (Idaho 1998), the Idaho Supreme Court adopted parts of the *Daubert* standard. However, in more recent cases, such as *Weeks v. Eastern Idaho Health Services*, 153 P.3d 1180 (Idaho 2007), the Idaho Supreme Court has stated that it has “not adopted the *Daubert* standard for admissibility of an expert’s testimony but has used some of *Daubert*’s standards in assessing whether the basis of an expert’s opinion is scientifically valid.” *Id.* at 1184 (citations omitted).

Idaho Rule of Evidence 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.¹³

This statute is a hybrid of the 1975 version and the current version of FRE 702.

13 Illinois

In *People v. McKown*, 924 N.E.2d 941 (Ill. 2010), the Illinois Supreme Court applied the *Frye* standard that “scientific evidence is admissible at trial only ‘if the methodology or scientific principle upon which

¹² <https://law.justia.com/codes/hawaii/2016/title-33/chapter-626/rule-702>

¹³ <https://isc.idaho.gov/ire702>

the opinion is based is ‘sufficiently established to have gained general acceptance in the particular field in which it belongs.’” *Id.* at 283 (citations omitted).

Illinois Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs.¹⁴

This statute contains the 1975 version of FRE 702.

14 Indiana

Although Indiana courts have not explicitly adopted *Daubert*, the Indiana Supreme Court noted in the case of *Turner v. State*, 953 N.E.2d 1039 (Ind. 2011) that the “concerns driving *Daubert* coincide with the express requirement” of the Indiana Rules of Evidence that the trial court be satisfied with the reliability of the scientific principles involved, and instructed that the courts could “consider the *Daubert* factors in determining reliability.” *Id.* at 1050.

Indiana Rule of Evidence 702 provides:

- (a) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
- (b) Expert scientific testimony is admissible only if the court is satisfied that the expert testimony rests upon reliable scientific principles.¹⁵

Subsection (a) is a hybrid of the 1975 version and current version of FRE 702.

¹⁴ <http://www.illinoiscourts.gov/SupremeCourt/Evidence/Evidence.htm#702>

¹⁵ <https://www.in.gov/judiciary/rules/evidence/>

15 Iowa

The Iowa Supreme Court has explicitly abandoned the *Frye* test and adopted the *Daubert* test. See *Williams v. Hedican*, 561 N.W.2d 817 (Iowa 1997).

Iowa Rule of Evidence 5.702 provides:

Testimony by experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.¹⁶

This statute matches the 1975 version of FRE 702.

16 Kansas

Kansas has adopted the *Daubert* standard and the Kansas statute governing admissibility of evidence has been amended to coincide with Federal Rule of Evidence 702. This amendment abrogated Kansas court's long-held reliance on the *Frye* test for scientific evidence. See *City of Topeka v. Lauck*, 401 P.3d 1064 (Kan. Ct. App. 2017).

Kansas Statutes Annotated 60 – 456(b) provides:

(b) If scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if:

- (1) The testimony is based on sufficient facts or data;
- (2) the testimony is the product of reliable principles and methods;

and

- (3) the witness has reliably applied the principles and methods to the facts of the case.¹⁷

This statute matches the 2000 version of FRE 702.

¹⁶ <https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/06-30-2014.5.pdf>

¹⁷ <http://rvpolicy.kdor.ks.gov/Pilots/Ntrntpil/IPILv1x0.NSF/ae2ee39f7748055f8625655b004e9335/145fefe6fe7d4de586257d90005a5e37?OpenDocument>

17 Kentucky

In 2007, the Kentucky rules of evidence were amended to follow and adopt the language of Federal Rule of Evidence 702. Cases decided after 2007 instruct that a trial court *may* consider the *Daubert* factors in assessing the reliability of scientific evidence. *See Garrett v. Commonwealth*, 534 S.W.3d 217 (Ky. 2017).

Kentucky Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data;
- (2) The testimony is the product of reliable principles and methods;
- and
- (3) The witness has applied the principles and methods reliably to the facts of the case.¹⁸

This statute matches the 2000 version of FRE 702.

18 Louisiana

In *State v. Foret*, 628 So.2d 1116 (La. 1993), the Louisiana Supreme Court adopted the *Daubert* standard.

Louisiana Code of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.¹⁹

This statute matches the 1975 version of FRE 702.

19 Maine

In *State v. Williams*, 388 A.2d 500 (Me. 1978), the Maine Supreme Judicial Court held that it would no longer accept the *Fyre* standard for admissibility of scientific evidence. In the 2005 case of *Searles v. Fleetwood Homes of Pennsylvania, Inc.*, 878 A.2d 509 (Me. 2005), the Supreme Judicial Court used the

¹⁸ <http://www.lrc.ky.gov/statutes/statute.aspx?id=20402>

¹⁹ <https://law.justia.com/codes/louisiana/2009/ce/ce702.html>

Daubert standard to determine the admissibility of scientific evidence, though it did not explicitly adopt *Daubert*.

Maine Rule of Evidence 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if such testimony will help the trier of fact to understand the evidence or to determine a fact in issue.²⁰

This statute is a hybrid of the 1975 version and current version of FRE 702.

20 Maryland

In *Reed v. State*, 893 A.2d 1067 (Md. 1978), the Maryland Court of Appeals adopted the *Frye* test, but in the recent case of *Savage v. State*, 166 A.3d 183 (Md. 2017), the Court of Appeals noted that since adopting the *Frye* standard, Maryland courts have often elaborated on the development and application of such the standard. *See, e.g., Blackwell v. Wyeth*, 971 A.2d 235 (Md. 2009).

Maryland Rule of Evidence 5 – 702 provides:

Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine

- (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education,
- (2) the appropriateness of the expert testimony on the particular subject, and
- (3) whether a sufficient factual basis exists to support the expert testimony.²¹

This statute differs from all versions of the FRE 702.

21 Massachusetts

In *Commonwealth v. Lanigan*, 641 N.E.2d 1342 (Mass. 1994), the Massachusetts Supreme Judicial Court adopted the *Daubert* standard.

²⁰ http://www.courts.maine.gov/rules_adminorders/rules/text/mr_evid_2015-9-1.pdf

²¹ [https://govt.westlaw.com/mdc/Document/N667CBCA09CEB11DB9BCF9DAC28345A2A?transitionType=Default&contextData=\(sc.Default\)](https://govt.westlaw.com/mdc/Document/N667CBCA09CEB11DB9BCF9DAC28345A2A?transitionType=Default&contextData=(sc.Default))

Massachusetts Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if

- (a) the testimony is based upon sufficient facts or data,
- (b) the testimony is the product of reliable principles and methods, and
- (c) the witness has applied the principles and methods reliably to the facts of the case.²²

This statute matches the 2000 version of FRE 702.

22 Michigan

Recent decisions by the Michigan Supreme Court, including *Edry v. Adelman*, 786 N.W.2d 567 (Mich. 2010) and *Elher v. Misra*, 878 N.W.2d 790 (Mich. 2016), apply the *Daubert* standard.

Michigan Rule of Evidence 702 provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if

- (1) the testimony is based on sufficient facts or data,
- (2) the testimony is the product of reliable principles and methods, and
- (3) the witness has applied the principles and methods reliably to the facts of the case.²³

This statute matches the 2000 version of FRE 702 except for the phrase “If the court determines.”

23 Minnesota

In *State v. Mack*, 292 N.W. 2d 764 (Minn. 1980), the Minnesota Supreme Court applied the *Frye* standard and held that the expert’s technique must be based on a foundation that is “scientifically reliable.” In the case of *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000), the Supreme Court

²²

http://masslitapp.com/html/Massachusetts_Guide_to_Evidence/022014/Massachusetts_Guide_to_Evidence_022014702_Testimony_by_Experts.html

²³ <http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan%20Rules%20of%20Evidence.pdf>

expressly reaffirmed its adherence to the *Fyre-Mack* standard and rejected *Daubert*. Therefore, when novel scientific evidence is offered, Minnesota state courts must determine whether it is generally accepted in the relevant scientific community and the scientific evidence must be shown to have a foundational reliability. The evidence must also satisfy the requirements of Minnesota Rule of Evidence 702. *Id.* at 814.

Minnesota Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. The opinion must have foundational reliability. In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.²⁴

This statute contains the 1975 version of FRE 702.

24 Mississippi

In *Mississippi Transportation Commission v. McLemore*, 863 So.2d 231 (Miss. 2003), the Mississippi Supreme Court abandoned the *Frye* test and adopted the *Daubert* standard.

Mississippi Rule of Evidence 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods;
- and
- (d) the expert has reliably applied the principles and methods to the facts of the case.²⁵

This statute matches the current version of FRE 702.

²⁴ https://www.revisor.mn.gov/court_rules/ev/id/702/

²⁵ <https://courts.ms.gov/research/rules/msrulesofcourt/Restyled%20Rules%20of%20Evidence.pdf>

25 Missouri

In March 2017, the Missouri Governor signed House Bill 153 into law repealing Section 490.065 of the Missouri Revised Statute and replacing it with admissibility standards mirroring those of *Daubert*. There has not yet been a court case interpreting the new admissibility standard in Missouri.

Missouri Revised Statute § 490.065 provides

1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
2. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.
4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.²⁶

Subsection (a) of this statute matches the 1975 version of FRE 702.

26 Montana

Recent Supreme Court cases in Montana, such as *State v. Damon*, 119 P.3d 1194 (Mont. 2005), have applied the *Daubert* standard.

Montana Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.²⁷

²⁶ <https://law.justia.com/codes/missouri/2005/t33/4900000065.html>

²⁷ https://leg.mt.gov/bills/mca/title_0260/chapter_0100/part_0070/section_0020/0260-0100-0070-0020.html

This statute matches the 1975 version of FRE 702.

27 Nebraska

In the case of *Schafersman v. Agland Coop*, 631 N.W. 2d 862 (Neb. 2001), the Supreme Court of Nebraska adopted the *Daubert* standard.

Nebraska Revised Statute 27 – 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.²⁸

This statute matches the 1975 version of FRE 702.

28 Nevada

In *Higgs v. State*, 222 P.3d 648 (Nev. 2010), the Nevada Supreme Court held that “to the extent that *Daubert* espouses a flexible approach to the admissibility of expert witness testimony, the court has held it persuasive.” *Id.* at 657. The Supreme Court further stated that “to the extent that courts have construed *Daubert* as a standard that requires mechanical application of its factors, we decline to adopt it.” *Id.* 657-58.

Nevada Revised statute 50.275 provides:

Testimony by experts. If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.²⁹

This statute is similar to the 1975 version of FRE 702.

29 New Hampshire

In *Baker Valley Lumber, Inc. v. Ingersoll-Rand Company*, 813 A.2d 409 (N.H. 2002), the New Hampshire Supreme Court adopted *Daubert*.

²⁸ <https://nebraskalegislature.gov/laws/statutes.php?statute=27-702>

²⁹ <https://www.leg.state.nv.us/NRS/NRS-050.html#NRS050Sec275>

New Hampshire Rule of Evidence 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.³⁰

This statute matches the current version of FRE 702.

30 New Jersey

The New Jersey Supreme Court has expressly stated that it has have shifted from “exclusive reliance on a ‘general acceptance’ [*Frye*] standard for testing the reliability of scientific expert testimony to a methodology-based approach.” *In re Accutane Litig.* 2018 WL 3636867, at *1 (N.J. Aug. 1, 2018). Under this “methodology-based approach,” the New Jersey Supreme Court has stated that a “theory of causation that had not yet reached general acceptance in the scientific community may be found to be sufficiently reliable if it is based on a sound, adequately-founded scientific methodology involving data and information of the type reasonably relied on by experts in the field.” *Kemp ex rel Wright v. State*, 809 A.2d 77, 85 (N.J. 2002) (citing *Rubanick v. Witco Chem. Corp.*, 593 A.2d 733 (N.J. 1991)). In toxic tort cases in particular, New Jersey courts will take “a more flexible approach to the admission of causation theories,” due to the “extraordinary and unique burdens” toxic tort plaintiffs face when they try to prove medical causation in such cases. *Id.*

New Jersey Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.³¹

This statute matches the 1975 version of FRE 702.

³⁰ <https://www.courts.state.nh.us/rules/evvid/evvid-702.htm>

³¹ <https://www.njcourts.gov/attorneys/assets/evidence/evidence7.pdf?cacheID=EUULzK2>

31 New Mexico

In *State v. Alberico*, 861 P.2d 192 (N.M. 1993), the New Mexico Supreme Court abandoned *Frye*, and applied the *Daubert* factors in assessing the validity of scientific evidence under New Mexico Rule of Evidence 11 – 702. However, in *Alberico*, and in subsequent cases such as *State v. Torres*, 976 P.2d 20 (N.M. 1999), the New Mexico Supreme Court continues to consider the *Frye* “general acceptance” factor in order to determine whether certain scientific evidence is admissible.

New Mexico Rule of Evidence 11 – 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.³²

This statute is a hybrid of the 1975 version and current version of FRE 702.

32 New York

In *People v. Wesley*, 633 N.E.2d 451 (N.Y.1994) the New York Court of Appeals reinforced the *Frye* standard in New York, holding that, in determining whether scientific evidence is admissible, the “particular procedure need not be ‘unanimously indorsed’ by the scientific community but must be ‘generally acceptable as reliable.’” *Id.* at 454 (citation omitted).

Civil Practice Law and Rules 4515 provides:

Form of expert opinion. Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion.

This statute differs from all versions of FRE 702.

33 North Carolina

In *State v. McGrady*, 787 S.E.2d 1 (N.C. 2016), the North Carolina Court of Appeals stated that the 2011 amendment to the North Carolina rules of evidence “incorporates the standard from the *Daubert* line of cases.” *Id.* at 5.

³² <http://swrtc.nmsu.edu/files/2014/12/New-Mexico-Rules-of-Evidence.pdf>

North Carolina Rule of Evidence 702 provides, in relevant part:

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.³³

This statute matches the 2000 version of FRE 702.

34 North Dakota

In *State v. Hernandez*, 707 N.W. 2d 449 (N.D. 2005), the North Dakota Supreme Court stated that North Dakota courts never explicitly adopted *Daubert* or *Kumho Tire*, but that expert admissibility is, instead, governed by North Dakota Rule of Evidence 702. That rule allows “generous allowance of the use of expert testimony if the witness is shown to have some degree of expertise in the field in which the witness is to testify.” *Id.* at 453. The Supreme Court of North Dakota has stated that under North Dakota Rule of Evidence 702, “expert testimony is admissible whenever specialized knowledge will assist the trier of fact” and that this rule “envisions generous allowance of the use of expert testimony if the witness is shown to have some degree of expertise in the field in which she is to testify.” *Gonzalez v. Tounjian*, 665 N.W.2d 705, 714 (N.D. 2003)

North Dakota Rule of Evidence 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.³⁴

This statute is a hybrid of the 1975 version and current version of FRE 702.

35 Ohio

In *Miller v. Bike Athletic Company*, 687 N.E.2d 735 (Ohio 1998), the Supreme Court of Ohio cited *Daubert* in assessing the admissibility of scientific evidence. In particular, it noted that the “intent of *Daubert* [was to] make it easier to present legitimate conflicting views of experts for the jury’s consideration,” and therefore “a trial court’s role in determining whether an expert’s testimony is

³³ https://www.ncleg.net/EnactedLegislation/Statutes/PDF/ByChapter/Chapter_8C.pdf

³⁴ <https://www.ndcourts.gov/court/rules/evidence/rule702.htm>

admissible” under the Ohio Rule of Evidence 702 focuses on “whether the opinion is based upon scientifically valid principles.” *Id.* at 614.

Ohio Rule of Evidence 702 provides:

A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.³⁵

This statute differs from all versions of FRE 702.

36 Oklahoma

The Oklahoma Supreme Court has determined that *Daubert* is the standard that applies to assess the admissibility of scientific evidence. *See Christian v. Gray*, 65 P.3d 591 (Okla. 2003).

Oklahoma Statute § 12 – 2702 provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise, if:

1. The testimony is based upon sufficient facts or data;

2. The testimony is the product of reliable principles and methods;
and

3. The witness has applied the principles and methods reliably to the facts of the case.³⁶

³⁵ <http://www.supremecourt.ohio.gov/LegalResources/Rules/evidence/evidence.pdf>

This statute matches the 2000 version of FRE 702.

37 Oregon

In *State v. O'Key*, 899 P.2d 663 (Or. 1995) the Oregon Supreme Court applied most of the *Daubert* factors to evaluate the admissibility of scientific evidence, and in *State v. Henley*, 422 P.3d 217 (Or. 2018), the Supreme Court of Oregon expressly declined to adopt the *Frye* test.

Oregon Rule of Evidence 40.41 0 702 provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.³⁷

This statute matches the 1975 version of FRE 702.

38 Pennsylvania

Pennsylvania state courts continue to follow *Frye*, after the Pennsylvania Supreme Court reasoned that *Frye*'s "general acceptance" test is a "proven and workable rule, which when faithfully followed, fairly serves its purpose of assisting the courts in determining when scientific evidence is reliable and should be admitted." *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038 (Pa. 2003).

Pennsylvania Rule of Evidence 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
- (b) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
- (c) the expert's methodology is generally accepted in the relevant field.³⁸

This statute differs from all versions of FRE 702.

³⁶ <https://law.justia.com/codes/oklahoma/2014/title-12/section-12-2702/>

³⁷ <https://www.oregonlaws.org/ors/40.410>

³⁸ <https://www.pacode.com/secure/data/225/chapter7/s702.html>

39 Rhode Island

In *Raimbeault v. Takeuchi Manufacturing (U.S.) Ltd.*, 772 A.2d 1056 (R.I. 2001), the Rhode Island Supreme Court “recognized the applicability of *Daubert* to situations in which scientific testimony is proposed in Rhode Island state courts (that is, where Rule 702 of the Rhode Island Rules of Evidence comes into play).” *Id.* at 1061 (citing *DiPetrillo v. Dow Chemical Co.*, 729 A.2d 677 (R.I. 1999)).

Rhode Island Rule of Evidence 702 provides:

Testimony by experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of fact or opinion.

This statute matches the 1975 version of FRE 702 except for the phrase “form of fact or opinion.”

40 South Carolina

The South Carolina Supreme Court has explicitly stated that it has not adopted *Daubert*, and has stated that the proper analysis for determining admissibility of scientific evidence is under South Carolina Rule of Evidence 702, which states that the trial judge “must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.” *State v. Council*, 515 S.E.2d 508, 518 (S.C. 1999). The South Carolina Supreme Court further instructs that trial courts should apply the factors set out in *State v. Jones* to determine reliability, which include “(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (3) the consistency of the method with recognized scientific laws and procedures.” *Id.* at 517; *see also State v. White*, 642 S.E.2d 607 (S.C. 2007).

South Carolina Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.³⁹

This statute matches the 1975 version of FRE 702.

³⁹ <https://www.sccourts.org/courtReg/displayRule.cfm?ruleID=702.0&subRuleID=&ruleType=EVD>

41 South Dakota

In *State v. Hofer*, 512 N.W.2d 482 (S.D. 1994), the South Dakota Supreme Court adopted the *Daubert* standard. For a recent case applying these factors, please see *State v. Lemler*, 744 N.W.2d 272 (S.D. 2009).

South Dakota Codified Law 19 – 19 – 702:

Testimony by expert. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) The testimony is based on sufficient facts or data;
- (c) The testimony is the product of reliable principles and methods; and
- (d) The expert has reliably applied the principles and methods to the facts of the case.⁴⁰

This statute matches the current version of FRE 702.

42 Tennessee

In *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (Tenn. 1997), the Tennessee Supreme Court declined to expressly adopt *Daubert*, but instructed that the *Daubert* “non-exclusive list of factors to determine reliability are useful in applying” Tennessee Rule of Evidence 702. *Id.* at 266. The Supreme Court instructed, however, that a Tennessee court may still consider “whether, as formerly required by *Frye*, the evidence is generally accepted in the scientific community.” *Id.*

Tennessee Rule of Evidence 702:

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.⁴¹

This statute matches the 1975 version of FRE 702.

⁴⁰ https://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=19-19-702

⁴¹ <http://tncourts.gov/rules/rules-evidence/702>

43 Texas

In *E.I. du Pont de Nemours & Company v. Robinson*, 923 S.W.2d 549 (Tex. 1995), the Texas Supreme Court cited the *Daubert* factors as being “persuasive.” Texas state courts also cite to *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992), which holds that scientific evidence offered pursuant to Rule 702 of the Texas Rules of Criminal Evidence must be relevant and reliable.

Texas Rule of Evidence 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.⁴²

This statute is a hybrid of the 1975 version and current version of FRE 702.

44 Utah

In *State v. Rimmasch*, 775 P.2d 388 (Utah 1989), the Utah Supreme Court set out the standard for admitting scientific evidence under Utah Rule of Evidence 702. In *Rimmasch*, the Supreme Court abandoned exclusive reliance on the “general acceptance” test under *Frye* and adopted an “inherent reliability” standard. *State v. Crosby*, 927 P.2d 638, 640 (Utah 1996). The “inherent reliability” standard requires a showing of general acceptance of the principal or technique in the relevant scientific community, or a sufficient foundation to demonstrate the inherent reliability of under the underlying principles and techniques. *State v. Brown*, 948 P.2d 337, 340 (Utah 1997).

Utah Rule of Evidence 702 provides:

(a) Subject to the limitations in paragraph (b), a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

(b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony

(1) are reliable,

(2) are based upon sufficient facts or data, and

(3) have been reliably applied to the facts.

(c) The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of

⁴² <http://www.txcourts.gov/media/921665/tx-rules-of-evidence.pdf>

facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.⁴³

This statute differs from all versions of FRE 702.

45 Vermont

In *State v. Brooks*, 643 A.2d 226, 229 (Vt. 1993), the Vermont Supreme Court held that because Vermont's rule of evidence were "essentially identical" to the federal ones, it should therefore apply the federal principles of *Daubert* governing admissibility of expert testimony. For a recent case applying the *Daubert* standard, please see *985 Associates, Ltd. v. Daewoo Electronics America, Inc.*, 945 A.2d 208 (Vt. 2008)

Vermont Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if

- (1) the testimony is based upon sufficient facts or data,
- (2) the testimony is the product of reliable principles and methods, and
- (3) the witness has applied the principles and methods reliably to the facts of the case.⁴⁴

This statute matches the 2000 version of FRE 702.

46 Virginia

The Virginia Supreme Court has not expressly adopted the framework for admissibility of scientific evidence provided in *Daubert*. Rather, the Supreme Court has stated that "[w]hen scientific evidence is offered, the court must make a threshold finding of fact with respect to the reliability of the scientific method offered, unless it is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system." *Dowdy v. Comm.*, 686 S.E.2d 710, 723 (Va. 2009). In addition, the Supreme Court counsels, "when the scientific method has been found reliable, either by familiarity or a specific finding, a trial court must then find that the expert testimony is based on adequate foundation." *Id.* (changes and citations omitted).

⁴³ <https://www.utcourts.gov/resources/rules/ure/0702.htm>

⁴⁴ https://www.americanbar.org/content/dam/aba/publications/litigation_committees/trialevidence/vermont2014.authcheckdam.pdf

Virginia Rule of Evidence 702 provides:

(a) *Use of Expert Testimony.*

(i) In a civil proceeding, if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

(ii) In a criminal proceeding, expert testimony is admissible if the standards set forth in subdivision (a)(i) of this Rule are met and, in addition, the court finds that the subject matter is beyond the knowledge and experience of ordinary persons, such that the jury needs expert opinion in order to comprehend the subject matter, form an intelligent opinion, and draw its conclusions.

(b) *Form of opinion.* Expert testimony may include opinions of the witness established with a reasonable degree of probability, or it may address empirical data from which such probability may be established in the mind of the finder of fact. Testimony that is speculative, or which opines on the credibility of another witness, is not admissible.⁴⁵

Subsection (a)(1) of this statute contains the 1975 version of FRE 702. .

47 Washington

Washington state courts use the *Frye* standard. The Supreme Court of Washington has observed that “*Daubert* has drawbacks which [the Court] declines to import into [Washington’s] standards for admissibility.” *State v. Copeland*, 922 P.2d 1304 (Wash. 1996).

Washington Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.⁴⁶

This statute matches the 1975 version of FRE 702.

⁴⁵ <http://www.courts.state.va.us/courts/scv/rulesofcourt.pdf>

⁴⁶ https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=er&ruleid=gaer0702

48 West Virginia

The West Virginia Supreme Court of Appeals adopted *Daubert* in the case of *Wilt v. Buracker*, 443 S.E.2d 196 (W. Va. 1994). The Supreme Court counseled that when scientific evidence is proffered, West Virginia state courts “must engage in a two-part analysis in regard to the expert testimony. First the . . . court must determine whether the expert testimony reflects scientific knowledge, whether the findings are derived by scientific method, and whether the work product amounts to good science. Second, the . . . court must ensure that the scientific testimony is relevant to the task at hand.” *Gentry v. Mangum*, 486 S.E.2d 171 (W. Va. 1995).

West Virginia Rule of Evidence 702 provides:

- (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
- (b) In addition to the requirements in subsection (a), expert testimony based on a novel scientific theory, principle, methodology, or procedure is admissible only if:
 - (1) the testimony is based on sufficient facts or data;
 - (2) the testimony is the product of reliable principles and methods;
 - and
 - (3) the expert has reliably applied the principles and methods to the facts of the case.⁴⁷

This statute contains the 2000 version of FRE 702.

49 Wisconsin

The Supreme Court of Wisconsin has instructed that the reliability standard of *Daubert* governs in Wisconsin. See *Seifert v. Balink*, 888 N.W.2d 816 (Wis. 2017).

Wisconsin Statute § 907.02 provides:

- (1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

⁴⁷ <http://www.courtswv.gov/legal-community/court-rules/evidence-rules/evidence-articles.html>

(2) Notwithstanding sub. (1), the testimony of an expert witness may not be admitted if the expert witness is entitled to receive any compensation contingent on the outcome of any claim or case with respect to which the testimony is being offered.⁴⁸

Subsection (1) of this statute contains the 2000 version of FRE 702.

50 Wyoming

In *Bunting v. Jamison*, 984 P.2d 467 (Wyo. 1999), the Wyoming Supreme Court adopted *Daubert*.

Wyoming Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.⁴⁹

This statute matches the 1975 version of FRE 702.

* * *

Please let us know if we can be of further assistance.

B.E.M./J.N.D.

⁴⁸ <https://docs.legis.wisconsin.gov/statutes/statutes/907/02>

⁴⁹ https://www.courts.state.wy.us/wp-content/uploads/2017/05/WYOMING_RULES_OF_EVIDENCE.pdf

Report of Subcommittee on Implementation

I. The Committee had two main charges:

- 1) To study implementation of the new laws regarding Eyewitness Identification and Recording of Interrogations and make recommendations to ensure complete implementation; and
- 2) To review the status of regulations/laws/rules regarding use of jailhouse informants and make recommendations for further reforms/steps that New York State might take to minimize the contribution of jailhouse informants to wrongful convictions in New York State.

- A. Summary of Recommendations for Improving Implementation of Laws Regarding Eyewitness Identification and Recording of Interrogations, and For a Proposed Jailhouse Informant Tracking System.

Recommendations for Improving Implementation of Laws Regarding Eyewitness Identification and Recording of Interrogations

The Committee sought to examine three leading contributing factors to wrongful convictions: eyewitness misidentification; false confessions; and unreliable jailhouse informant testimony.

Laws became effective in 2017 and 2018, respectively, that were designed to improve the reliability of eyewitness identification testimony and to mandate the recording of custodial interrogations in specified crime categories in New York State. The Task Force was interested in gaining a better understanding of the laws' implementation to determine if additional training or resources are needed and to ascertain if these forms of evidence are being collected in a way that ensures that the intent of the laws is being realized.

It is the Committee's opinion that this critical information regarding the laws' implementation should be collected uniformly across the state using scientifically-supported best practices. Preliminary data and anecdotal interviews, which will be described in greater detail in the body of this report, do not allow us to conclude with confidence that the laws have been implemented as intended.

The Committee, therefore, recommends further and more robust collection of data statewide to better understand matters critical to the faithful implementation of the new laws. It further recommends the creation of a diverse stakeholder advisory group, including representation from: Division of Criminal Justice Services (DCJS); the New York Police Chiefs Association; the New York State Sheriffs Association; the New York State Association of Criminal Defense Lawyers (NYSACDL); the New York State Defenders Association (NYSDA); the Innocence Project; affected people from both the innocence and victims community; the academic community with an expertise in both criminology and

statistical analysis; and the District Attorneys Association of the State of New York (DAASNY), to be convened by NYSBA, and with resources available to enable this work, to get a deeper understanding of how implementation is working.

Review of such information should be used to: address obstacles to implementation through additional resources; identify those law enforcement agencies that require training, either because those agencies have yet to receive training or to supplement existing training; identify any existing obstacles in inter-agency protocols and/or practice (e.g. when small police agencies rely on or partner with larger agencies to meet the requirements of the laws); and to determine whether there is a failure to uniformly follow the intent of the laws because of how they were drafted or for other reasons. To the extent the stakeholder group determines that there is a failure to uniformly implement the laws because of how the laws are drafted, it is recommended that the New York State Bar Association re-convene these stakeholders to revisit the laws' provisions.

Recommendations Regarding Jailhouse Informants

The Committee contemplated implementation – at the county level – of a model policy that is attached in Appendix I for the county-based tracking and disclosure of jailhouse informant information and testimony. Further, the Committee considered the establishment of a statewide tracking system by an as-yet-to-be-determined centralized entity (e.g. DCJS, Office of the Attorney General, Office of Court Administration, etc.) to ensure that data collected in connection with jailhouse informants at the county level could be made available to district attorneys throughout New York State. However, some members of the Task Force expressed trepidation about maintaining the confidentiality of informants in the county and state-based tracking systems as well as resource and logistical concerns related to the maintenance of a statewide tracking system.

Therefore, the Committee recommends the implementation – at the county level – of the Model Policy for the county-based tracking and disclosure of jailhouse informant information and testimony, after the Subcommittee conducts further study to determine whether additional protections to ensure informant safety are needed. Further, the Committee recommends further study by the New York State Bar Association before it makes final recommendations regarding the establishment of a statewide tracking system by an as-yet-to-be-determined centralized entity (e.g. DCJS, AG, OCA, etc.) to ensure that data collected in connection with jailhouse informants at the county level is available to district attorneys throughout New York State, and addresses the confidentiality and cost/resource issues raised during the deliberations of the 2019 Task Force discussion.

II. Implementation of Eyewitness Identification and Recording of Interrogation Laws

A. Eyewitness Identification and False Confessions in New York State Exoneration Cases

Eyewitness misidentification and false confessions have proven to be leading contributing factors to wrongful conviction. According to the Innocence Project, which tracks wrongful convictions revealed through post-conviction DNA testing, 70% of the nation's more than 360 DNA-based exonerations involved at least one misidentification and 28% involved a false confession. In New York State specifically, of the thirty DNA-based exonerations, 16 (53%) cases involved at least one misidentification and 14 (47%) involved a false confession.

The National Registry of Exonerations tracks all wrongful convictions nationally, revealed by both DNA and non-DNA evidence, and identified 253 New York State-based exonerations in total. Of them, 88 cases (or 35%), involved a misidentification, and 39 cases (or 15%) involved a false confession. The 'Registry' figures are proportionally lower than the Innocence Project's DNA-based data because the non-DNA cases, in many instances, include crime categories that are not a serious and/or where eyewitness identification and confessions are not regularly evidence in the case.

B. New York State Laws Guiding Eyewitness Identification and Confession Evidence

Eyewitness Identification Statute

Eyewitness memory is often unreliable and can be contaminated by "estimator variables" at the crime scene that cannot be controlled such as lighting, distance and cross-racial factors. Memory can also be impacted by "system variables" that can be controlled, such as the way that lineup procedures are administered.

The 2017 law sought to modify police practice relating to system variables to ensure the adoption of evidence-based lineup procedures that have been proven to enhance the accuracy of witness identifications. The National Academy of Sciences, the nation's leading scientific entity, the International Association of Chiefs of Police, the American Bar Association and many other organizations have recommended these best practices, which include:

1. Blind or blinded administration, meaning that the officer conducting the lineup is unaware of the suspect's identity, or if that is not practical a "blinded" procedure is used to prevent the officer from seeing which lineup member is being viewed at a given time, removing the risk of suggestiveness.
2. Witness instructions that the perpetrator may or may not be present.
3. Proper use of non-suspect "fillers" that generally match the witness description of the perpetrator and do not make the suspect stand out.
4. Eliciting a witness confidence statement immediately after a selection is made in which the witness is asked to state, in his or her own words, the level of certainty in the identification.
5. Electronic recordation of the identification procedure.

Relevant portions of New York State's criminal procedure and family court laws were amended in 2017 to include the following key provisions:

- Permits admissibility of witness identifications resulting from an array of pictorial, photographic, electronic, filmed or video recorded" reproductions in addition to live lineups.
- Requires blind or blinded administration of photographic or video lineups.
- Articulates that a failure to use such procedures shall preclude testimony regarding an identification as evidence in chief, but shall not constitute a legal basis for a motion to suppress the identification or a subsequent identification.
- Requires the Division of Criminal Justice Services (DCJS) to promulgate policies and provide training to new and current police officers on topics including: selection of fillers, witness instructions, documentation and preservation of results of an identification procedure, eliciting and documenting witness confidence statements, and; procedures for administering an identification procedure in a manner designed to prevent opportunities to influence the witness.

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Text of Eyewitness Identification Statute

Section 60.25 of the criminal procedure law, subparagraph (ii) of paragraph (a) of subdivision 1 as amended by chapter 479 of the laws of 1977, is amended to read as follows:

§ 60.25 Rules of evidence; identification by means of previous recognition, in absence of present identification.

1. In any criminal proceeding in which the defendant's commission of an offense is in issue, testimony as provided in subdivision two may be given by a witness when:

(a) Such witness testifies that:

(i) He or she observed the person claimed by the people to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case; and

(ii) On a subsequent occasion he or she observed, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, a person or, where the observation is made pursuant to a blind or blinded procedure as defined in paragraph (c) of this subdivision, a pictorial, photographic, electronic, filmed or video recorded reproduction of a person whom he or she recognized as the same person whom he or she had observed on the first or incriminating occasion; and

(iii) He or she is unable at the proceeding to state, on the basis of present recollection, whether or not the defendant is the person in question; and

(b) It is established that the defendant is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction the witness observed and recognized on the second occasion. Such fact may be established by testimony of another person or persons to whom the witness promptly declared his or her recognition on such occasion and by such pictorial, photographic, electronic, filmed or video recorded reproduction.

(c) For purposes of this section, a "blind or blinded procedure" is one in which the witness identifies a person in an array of pictorial, photographic, electronic, filmed or video recorded reproductions under circumstances where, at the time the identification is made, the public servant administering such procedure:

(i) does not know which person in the array is the suspect, or

(ii) does not know where the suspect is in the array viewed by the witness. The failure of a public servant to follow such a procedure shall be assessed solely for purposes of this article and shall result in the preclusion of testimony regarding the identification procedure as evidence in chief, but shall not constitute a legal basis to suppress evidence made pursuant to subdivision six of section 710.20 of this chapter. This article neither limits nor expands subdivision six of section 710.20 of this chapter.

2. Under circumstances prescribed in subdivision one of this section, such witness may testify at the criminal proceeding that the person whom he or she observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion is the same person whom he or she observed on the first or incriminating occasion. Such testimony, together with the evidence that the defendant is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion, constitutes evidence in chief.

Section 60.30 of the criminal procedure law, as amended by chapter 479 of the laws of 1977, is amended to read as follows:

§ 60.30 Rules of evidence; identification by means of previous recognition, in addition to present identification. In any criminal proceeding in which the defendant's commission of an offense is in issue, a witness who testifies that (a) he or she observed the person claimed by the people to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case, and (b) on the basis of present recollection, the defendant is the person in question and (c) on a subsequent occasion he or she observed the defendant, or where the observation is made pursuant to a blind or blinded procedure, as defined in paragraph (c) of subdivision one of section 60.25 of this article, a pictorial, photographic, electronic, filmed or video recorded reproduction of the defendant, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, and then also recognized him or her or the pictorial, photographic, electronic, filmed or video recorded reproduction of him or her as the same person whom he or she had observed on the first or incriminating occasion, may, in addition to making an identification of the defendant at the criminal proceeding on the basis of present recollection as the person whom he or she observed on the first or incriminating occasion, also describe his or her previous recognition of the defendant and testify that the person whom he or she observed or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed on such second occasion is the same person whom he or she had observed on the first or incriminating occasion. Such testimony and such pictorial, photographic, electronic, filmed or video recorded reproduction constitutes evidence in chief.

Subdivision 6 of section 710.20 of the criminal procedure law, as amended by chapter 8 of the laws of 1976 and as renumbered by chapter 481 of the laws of 1983, is amended to read as follows:

6. Consists of potential testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, which potential testimony would not be admissible upon the prospective trial of such charge owing to an improperly made previous identification of the defendant or of a pictorial, photographic, electronic, filmed or video recorded reproduction of the defendant by the prospective witness. A claim that the previous identification of the defendant or of a pictorial, photographic, electronic, filmed or video recorded reproduction of the defendant by a prospective witness did not comply with paragraph (c) of subdivision one of section 60.25 of this chapter or with the protocol promulgated in accordance with subdivision twenty-one of section eight hundred thirty-seven of the executive law shall not constitute a legal basis to suppress evidence pursuant to this subdivision. A claim that a public servant failed to comply with paragraph (c) of subdivision one of section 60.25 of this chapter or of subdivision twenty-one of section eight hundred thirty-seven of the executive law shall neither expand nor limit the rights an accused person may derive under the constitution of this state or of the United States.

Subdivision 1 of section 710.30 of the criminal procedure law, as separately amended by chapters 8 and 194 of the laws of 1976, is amended to read as follows:

1. Whenever the people intend to offer at a trial (a) evidence of a statement made by a defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible upon motion pursuant to subdivision three of section 710.20, or (b)

testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him or her or a pictorial, photographic, electronic, filmed or video recorded reproduction of him or her as such, they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered.

Section 343.3 of the family court act, as added by chapter 920 of the laws of 1982, is amended to read as follows:

§ 343.3. Rules of evidence; identification by means of previous recognition in absence of present identification. 1. In any juvenile delinquency proceeding in which the respondent's commission of a crime is in issue, testimony as provided in subdivision two may be given by a witness when:

(a) such witness testifies that:

(i) he or she observed the person claimed by the presentment agency to be the respondent either at the time and place of the commission of the crime or upon some other occasion relevant to the case; and

(ii) on a subsequent occasion he or she observed, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, a person, or, where the observation is made pursuant to a blind or blinded procedure as defined herein, a pictorial, photographic, electronic, filmed or video recorded reproduction of a person whom he or she recognized as the same person whom he or she had observed on the first incriminating occasion; and

(iii) he or she is unable at the proceeding to state, on the basis of present recollection, whether or not the respondent is the person in question; and

(b) it is established that the respondent is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction the witness observed and recognized on the second occasion. Such fact may be established by testimony of another person or persons to whom the witness promptly declared his or her recognition on such occasion and by such pictorial, photographic, electronic, filmed or video recorded reproduction.

(c) For purposes of this section, a "blind or blinded procedure" is one in which the witness identifies a person in an array of pictorial, photographic, electronic, filmed or video recorded reproductions under circumstances where, at the time the identification is made, the public servant administering such procedure:

(i) does not know which person in the array is the suspect, or

(ii) does not know where the suspect is in the array viewed by the witness. The failure of a public servant to follow such a procedure shall be assessed solely for purposes of this article and shall result in the preclusion of testimony regarding the identification procedure as evidence in chief, but shall not constitute a legal basis to suppress evidence made pursuant to subdivision six of

section 710.20 of the criminal procedure law. This article neither limits not expands subdivision six of section 710.20 of the criminal procedure law.

2. Under circumstances prescribed in subdivision one, such witness may testify at the proceeding that the person whom he or she observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion is the same person whom he or she observed on the first or incriminating occasion. Such testimony, together with the evidence that the respondent is in fact the person whom the witness observed and recognized or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed and recognized on the second occasion, constitutes evidence in chief.

§ 8. Section 343.4 of the family court act, as added by chapter 920 of the laws of 1982, is amended to read as follows:

§ 343.4. Rules of evidence; identification by means of previous recognition, in addition to present identification. In any juvenile delinquency proceeding in which the respondent's commission of a crime is in issue, a witness who testifies that:

(a) he or she observed the person claimed by the presentment agency to be the respondent either at the time and place of the commission of the crime or upon some other occasion relevant to the case, and

(b) on the basis of present recollection, the respondent is the person in question, and

(c) on a subsequent occasion he or she observed the respondent, or, where the observation is made pursuant to a blind or blinded procedure, a pictorial, photographic, electronic, filmed or video recorded reproduction of the respondent under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, and then also recognized him or her or the pictorial, photographic, electronic, filmed or video recorded reproduction of him or her as the same person whom he or she had observed on the first or incriminating occasion, may, in addition to making an identification of the respondent at the delinquency proceeding on the basis of present recollection as the person whom he or she observed on the first or incriminating occasion, also describe his or her previous recognition of the respondent and testify that the person whom he or she observed or whose pictorial, photographic, electronic, filmed or video recorded reproduction he or she observed on such second occasion is the same person whom he or she had observed on the first or incriminating occasion. Such testimony and such pictorial, photographic, electronic, filmed or video recorded reproduction constitutes evidence in chief. For purposes of this section, a "blind or blinded procedure" shall be as defined in paragraph 16 (c) of subdivision one of section 343.3 of this part.

Section 837 of the executive law is amended by adding a new subdivision 21 to read as follows:

Promulgate a standardized and detailed written protocol that is grounded in evidence-based principles for the administration of photo-graphic array and live lineup identification procedures

for police agencies and standardized forms for use by such agencies in the reporting and recording of such identification procedure. The protocol shall address the following topics:

- (a) the selection of photographic array and live lineup filler photographs or participants;
- (b) instructions given to a witness before conducting a photographic array or live lineup identification procedure;
- (c) the documentation and preservation of results of a photographic array or live lineup identification procedure;
- (d) procedures for eliciting and documenting the witness's confidence in his or her identification following a photographic array or live lineup identification procedure, in the event that an identification is made; and
- (e) procedures for administering a photographic array or live lineup identification procedure in a manner designed to prevent opportunities to influence the witness.

Subdivision 4 of section 840 of the executive law is amended by adding a new paragraph (c) to read as follows:

(c) Disseminate the written policies and procedures promulgated in accordance with subdivision twenty-one of section eight hundred thirty-seven of this article to all police departments in this state and implement a training program for all current and new police officers regarding the policies and procedures established pursuant to such subdivision.

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The DCJS policy accompanied the law and is attached in Appendix II. The policy served as the basis for DCJS training for law enforcement officers in New York State and included recognition of the value of instructions and confidence statements (including the creation of forms that prompt law enforcement to read instructions and write down confidence statements provided by the eyewitness), filler selection, and recordation of the identification procedure, where practicable. The DCJS policy also includes a recommended prohibition on multiple identification procedures of the same suspect.

Recording of Interrogations Statute

Recording interrogations in their entirety sheds light on the circumstances that led up to a confession, which benefits the innocent, law enforcement and fact-finders. For the innocent, the practice can serve as a deterrent against coercive and illegal interrogation tactics. It also provides a full record of what transpired during the course of the interrogation or interview. For law enforcement, recordings substantiate authentic confessions, protect against frivolous claims of misconduct and reduce court time needed to testify on motions to suppress statements. It can also alert judges and juries if the

defendant has intellectual limitations or other vulnerabilities that increase the risk of false confessions

Relevant portions of New York State’s criminal procedure and family court laws were amended in 2018 to require video recording of custodial interrogations by a public servant at a detention facility, including the giving of any required advice of the rights of the individual being questioned and the waiver of any rights by the individual, for certain enumerated offenses. Those offenses are Class A-1 felonies, except those defined in article 220 of the penal law; felony offenses defined in section 130.95 and 130.96 of the penal law; a felony offense defined in article 125 or 130 of such law that is defined as a class B violent felony offense in section 70.02 of the penal law.¹ The law also articulated that the court may consider failure to comply as a factor, but not the sole factor, in determining admissibility, and the court shall give a cautionary jury instruction.

The law also articulated a set of allowable exceptions to the recording requirement. Under the law, the custodial interrogation need not be recorded if the prosecutor shows “good cause,” which includes, but is not limited to:

- (i) If electronic recording equipment malfunctions.
- (ii) If electronic recording equipment is not available because it was otherwise being used.
- (iii) If statements are made in response to questions that are routinely asked during arrest processing.
- (iv) If the statement is spontaneously made by the suspect and not in response to police questioning.

¹ **Class A-1 felony, except one defined in article 220 of the penal law**

- Aggravated enterprise corruption
- Aggravated murder
- Arson in the first degree
- Conspiracy in the first degree
- Crime of terrorism
- Criminal possession of a chemical weapon or biological weapon in the first degree
- Criminal use of a chemical weapon or biological weapon in the first degree
- Kidnapping in the first degree
- Murder in the first degree
- Murder in the second degree
- **Felony offenses defined in section 130.95 and 130.96 of the penal law; or**
 - Predatory Sexual Assault
 - Predatory Sexual Assault against a child
- **Felony offense defined in article 125 or 130 of such law that is defined as a class B violent felony offense in section 70.02 of the penal law.**
 - Attempted murder in the second degree
 - Manslaughter in the first degree
 - Aggravated manslaughter in the first degree
 - Rape in the first degree
 - Criminal sexual act in the first degree
 - Aggravated sexual abuse in the first degree
 - Course of sexual conduct against a child in the first degree

(v) If the statement is made during an interrogation that is conducted when the interviewer is unaware that a qualifying offense has occurred.

(vi) If the statement is made at a location other than the "interview room" because the suspect cannot be brought to such room, e.g., the suspect is in a hospital or the suspect is out of state and that state is not governed by a law requiring the recordation of an interrogation.

(vii) If the statement is made after a suspect has refused to participate in the interrogation if it is recorded, and appropriate effort to document such refusal is made.

(viii) If such statement is not recorded as a result of an inadvertent error or oversight, not the result of any intentional conduct by law enforcement personnel

(ix) If it is law enforcement's reasonable belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant.

(x) If such statement is made at a location not equipped with a video recording device and the reason for using that location is not to subvert the intent of the law.

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Text of Recording of Interrogations Statute

Section 60.45 of the criminal procedure law is amended by adding a new subdivision 3 to read as follows:

3.(a) Where a person is subject to custodial interrogation by a public servant at a detention facility, the entire custodial interrogation, including the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual, shall be recorded by an appropriate video recording device if the interrogation involves a class A-1 felony, except one defined in article two hundred twenty of the penal law; felony offenses defined in section 130.95 and 130.96 of the penal law; or a felony offense defined in article one hundred twenty-five or one hundred thirty of such law that is defined as a class B violent felony offense in section 70.02 of the penal law. For purposes of this paragraph, the term "detention facility" shall mean a police station, correctional facility, holding facility for prisoners, prosecutor's office or other facility where persons are held in detention in connection with criminal charges that have been or may be filed against them.

(b) No confession, admission or other statement shall be subject to a motion to suppress pursuant to subdivision three of section 710.20 of this chapter based solely upon the failure to video record such interrogation in a detention facility as defined in paragraph (a) of this subdivision. However, where the people offer into evidence a confession, admission or other statement made by a person in custody with respect to his or her participation or lack of participation in an offense

specified in paragraph (a) of this subdivision, that has not been video recorded, the court shall consider the failure to record as a factor, but not as the sole factor, in accordance with paragraph (c) of this subdivision in determining whether such confession, admission or other statement shall be admissible.

(c) Notwithstanding the requirement of paragraph (a) of this subdivision, upon a showing of good cause by the prosecutor, the custodial interrogation need not be recorded. Good cause shall include, but not be limited to:

(i) If electronic recording equipment malfunctions.

(ii) If electronic recording equipment is not available because it was otherwise being used.

(iii) If statements are made in response to questions that are routinely asked during arrest processing.

(iv) If the statement is spontaneously made by the suspect and not in response to police questioning.

(v) If the statement is made during an interrogation that is conducted when the interviewer is unaware that a qualifying offense has occurred.

(vi) If the statement is made at a location other than the "interview room" because the suspect cannot be brought to such room, e.g., the suspect is in a hospital or the suspect is out of state and that state is not governed by a law requiring the recordation of an interrogation.

(vii) If the statement is made after a suspect has refused to participate in the interrogation if it is recorded, and appropriate effort to document such refusal is made.

(viii) If such statement is not recorded as a result of an inadvertent error or oversight, not the result of any intentional conduct by law enforcement personnel.

(ix) If it is law enforcement's reasonable belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant.

(x) If such statement is made at a location not equipped with a video recording device and the reason for using that location is not to subvert the intent of the law. For purposes of this section, the term "location" shall include those locations specified in paragraph (b) of subdivision four of section 305.2 of the family court act.

(d) In the event the court finds that the people have not shown good cause for the non-recording of the confession, admission, or other statement, but determines that a non-recorded confession, admission or other statement is nevertheless admissible because it was voluntarily made then, upon request of the defendant, the court must instruct the jury that the people's failure to record the defendant's confession, admission or other statement as required by this section may be weighed as a factor, but not as the sole factor, in determining whether such confession, admission or other statement was voluntarily made, or was made at all.

(e) Video recording as required by this section shall be conducted in accordance with standards established by rule of the division of criminal justice services.

Subdivision 3 of section 344.2 of the family court act is renumbered subdivision 4 and a new subdivision 3 is added to read as follows:

3. Where a respondent is subject to custodial interrogation by a public servant at a facility specified in subdivision four of section 305.2 of this article, the entire custodial interrogation, including the giving of any required advice of the rights of the individual being questioned, and the waiver of any rights by the individual, shall be recorded and governed in accordance with the provisions of paragraphs (a), (b), (c), (d) and (e) of subdivision three of section 60.45 of the criminal procedure law.

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C. Determining Obstacles, if any, to Full Implementation of New Eyewitness Identification and Recording of Interrogation Procedures

1. Survey of Law Enforcement Agencies²

The Committee reviewed the laws and model policies developed by DCJS. DCJS was also helpful with providing information on where to obtain public information on the number and size of police departments within the state of New York. The Committee then decided on a sampling methodology that includes NYPD and the New York State Police, along with small, medium-sized, and larger law enforcement agencies, in an effort to gain a better understanding of matters relating to the laws' implementation. The Committee collected information about the more than 500 law enforcement agencies throughout New York State and classified them by the number of employed officers, including the 79 smallest (<10 officers), 154 small (10-19 officers), 136 medium-sized (20-36 officers), and 131 large (>36 officers) agencies. We randomly selected 25 of the smallest and 25 of the small agencies, and 35 of the medium-sized and 35 of the large agencies, as well purposefully included the NYPD and the New York State Police. The total sample size, accordingly, was 122 law enforcement agencies. All agencies were assured that their responses could be submitted anonymously if they so chose, and all responding agencies elected to respond anonymously.

The survey included 50 questions. It sought information about training conducted on the Eyewitness Identification procedures, how the procedures are carried out, and how the

² Thank you to the NYPD Governance, Structure and Assessments Unit Executive Director, Dr. Monica Brooker, and her staff for their efforts to create, disseminate and compile data from the survey.

results are documented. It also sought information about training conducted on the law concerning the recording of interrogations and matters pertaining to the law's implementation. The survey is attached to this report as Appendix III.

After the initial requests to complete the survey were disseminated, we made follow-up requests to agencies that failed to respond. We ultimately received responses from 19 agencies, two of which indicated that they did not conduct eyewitness identifications or custodial interrogations, and nine others which did not respond to most questions about the requested policies and practices. We thus received complete responses from eight agencies, or 6.6% (8/122) of the sample.

Far too few law enforcement agencies responded to the surveys to amount to a representative sample or permit generalization from the results. Nevertheless, the limited responses we received suggest that important questions remain regarding the laws' implementation. For example, among other issues presented:

- 3 of 8 respondents indicated that “no training has been conducted” regarding eyewitness identification procedures, and 2 of 9 respondents indicated that “no training has been conducted” for the video-recording of interrogations.
- Some agencies do not uniformly employ the use of a blind or blinded administrator in their eyewitness identification procedures, which arguably is the single most important reform included in the statute (2 of 8 respondents indicated that a blind or blinded administrator is “never” used in connection with photo array identifications, while 1 indicated that a blind or blinded administrator is used “most of the time”).
- All recommended instructions are not given to witnesses in connection with eyewitness identifications (7 of 8 respondents indicated that witnesses are instructed that “the true perpetrator may or may not be present”; 5 of 8 respondents indicated that witnesses are instructed that “they need not make an identification of anyone”; and 5 of 8 respondents indicated that witnesses are instructed that “the investigation will continue whether or not they identify someone”).
- Exceptional circumstances are reported to preclude the recording of interrogations with somewhat surprising regularity, in particular, “suspect refused to participate if session was video-recorded,” was indicated by 4 of 6 respondents; “equipment malfunctioned”—1 of 6 respondents; and “equipment was not available because it was otherwise being used”—1 of 6 respondents).

2. *Interviews with Representatives from the District Attorneys Association of the State of New York (DAASNY), the New York State Association of Criminal Defense Lawyers (NYSACDL) and the New York State Defenders Association (NYSDA)*

On December 11, 2018, members of the subcommittee interviewed by phone representatives from the New York State Association of Criminal Defense Lawyers and the New York State Defender Association. Our objective in the call was to solicit feedback from the defense community concerning the implementation of the New York State law as it pertains to eyewitness identifications and the recording of interrogations.

On both issues, the two attorneys indicated that they had fought against and were intensely disappointed in the laws that ultimately passed. While acknowledging that they did not actively solicit feedback from the defense community, and that it may be too early to tell, they reported hearing nothing to indicate that the situation had improved.

With regard to eyewitness identifications, both attorneys expressed disappointment in the limitations of the bill. Blinded procedures were already in practice in many large jurisdictions, so in their view they conceded the use of photo lineups without an exchange for the more meaningful reform they sought: the blind lineup. They were very disappointed that no requirement to record eyewitness identifications was adopted.

Both attorneys were also disappointed with the bill concerning the recording interrogations. In particular, they cited four limitations: (1) recording should be required of all felonies, not just murder cases and certain B felonies; (2) there are too many loopholes (e.g., “inadvertence”) to excuse the failure to record even in situations in which it is otherwise required; (3) the full interrogation process should be recorded “from soup to nuts,” including Miranda, not just “the custodial part” in which the confession is taken; and (4) lacking the remedy of exclusion for violations, the law will prove ineffective.

In response to the question of whether they had received feedback from others, both attorneys said they had not and repeated that there has not been enough time. Both expressed frustration that even if feedback were elicited, there did not appear to be an opportunity for change.

On December 12, 2018, members of the subcommittee interviewed by phone representatives from the District Attorney Association of the State of New York (“DAASNY”). Our objective on the call was to solicit feedback from the prosecutorial community concerning the implementation of the New York State law as it pertains to eyewitness identifications and the recording of interrogations.

On both issues, both representatives indicated that implementation is going well. Generally speaking, the attorneys interviewed indicated that the requirements of the new law were actually already regular practice for many prosecutors' offices prior to the passage of the law.

With respect to the eyewitness identification portion of the law, various types of in person and online trainings have been offered to police departments and prosecutors across the state. Further, DAASNY's Committee on Best Practices created a standardized checklist for officers overseeing an eyewitness identification so that officers can ensure they are complying with all requirements of the law.

On the interrogation recording front, the representatives felt similarly positive. Again, they made clear that many departments (particularly larger departments) had already been recording interrogations as required by the law prior to its passage. While early on they heard some issues with equipment malfunctions, those issues now seem to be largely resolved. DAASNY has also conducted surveys of police departments and have found that almost every single department of significant size has its own recording facility in-house. In the two representatives' experience, many officers are now using the recording equipment for interrogations of suspects accused of crimes beyond just those required by the new law.

Neither attorney had heard any complaints about the new law. Indeed, feedback on the law as well as commentary about the effectiveness of implementing the same is regularly solicited by DAASNY, and they have not received any complaints.

Conclusion: Based on the results of the surveys and outreach to the state's prosecutorial and defender associations, the Committee determined that more information is needed. While far too few law enforcement agencies responded to the surveys to amount to a representative sample or permit generalization from the results, some data suggest that training for all law enforcement agencies has not been accomplished; that some agencies do not uniformly employ the use of a blind or blinded administrator in their eyewitness identification procedures (which arguably is the single most important reform included in the statute); that all recommended instructions are not always given to witnesses in connection with eyewitness identifications; and that exceptional circumstances are reported to preclude the recording of interrogations with somewhat surprising regularity; among other questions raised. Additionally, information and impressions about the laws and their implementation that was provided by representatives from DAASNY and NYSACDL was extremely divergent. While DAASNY opined that both laws were working in practice, NYSACDL opined that the defense community believed that the new laws had set

back their practice. Further data must be collected to get an adequate understanding about matters important to the laws' implementation in New York State.

RECOMMENDATIONS:

Eyewitness misidentification and false confessions are two of the leading contributing factors to wrongful conviction. In the opinion of the Committee, the information needed to assess the laws' implementation should be collected uniformly across the state using scientifically-supported best practices. Focus group discussions involving interested and knowledgeable stakeholders should be conducted to complement the survey data. The currently available preliminary data and anecdotal interviews are inadequate to conclude with confidence that the laws have been implemented as intended.

The Committee, therefore, recommends further and scientifically rigorous collection of data to better understand matters critical to the faithful implementation of the new laws throughout the State. It further recommends the creation of a diverse stakeholder advisory group, including representation from Division of Criminal Justice Services (DCJS); the New York Police Chiefs Association; the New York State Sheriffs Association; the New York State Association of Criminal Defense Lawyers (NYSACDL); the New York State Defenders Association (NYSDA); the Innocence Project; affected people from both the innocence and victims community; the academic community with an expertise in both criminology and statistical analysis; and the District Attorneys Association of the State of New York (DAASNY), to be convened by NYSBA, to get a deeper understanding of their experiences and impressions regarding the laws' implementation statewide.

Further, following the collection of this information, and to the extent there appears to be a failure to uniformly follow the intent of the laws because of how they were drafted, it is recommended that the New York State Bar Association re-convene these stakeholders to revisit the laws' provisions.

II. Jailhouse Informants

A. Data Relating to New York State Wrongful Convictions in Which Jailhouse Informants Were a Contributing Factor

A full one-fifth of New York State's thirty wrongful convictions proven through postconviction DNA testing involved the use of a jailhouse informant, from Rochester to Utica to Long Island. A deeper exploration of each case demonstrates the incentives baked into an unregulated and largely hidden jailhouse informant system, enabling leniency for the informant who provides unreliable testimony in exchange. In the case of wrongfully

convicted Utica man Steven Barnes, a jailhouse informant denied there was any leniency provided to him in exchange for his testimony, yet he served no prison time on a second felony offense he had been charged with. In a Nassau County wrongful conviction case, a DNA test that led to the exoneration of three men, John Restivo, John Kogut, and Dennis Halstead, ultimately also revealed that the jailhouse informant used by law enforcement in that case had provided untrue testimony. Indeed, the jailhouse informant also denied any deal, “No deal was made, sir,” but he inculcated a co-defendant and pleaded guilty to lesser charges and received a lower sentence (4-8 years) than that originally sought (14 years). He said he had already obtained leniency for testifying against his co-defendant. However, he was in touch with police with this information before pleading guilty in his case. When jailhouse informants receive deals for lighter sentences, their victims may be deprived of justice, serving sometimes decades behind bars for crimes they did not commit. As well, each time a person is wrongfully convicted, the person who actually committed the crime eludes detection, thereby putting the public’s safety in peril.

B. Approach Taken by Subcommittee in Developing Recommendations

The Committee researched and reviewed the legislative and legal precedent that has changed since the 2009 NYS Bar Task Force Report on the use of jailhouse informants. There were no substantive changes in law or policy. An in-depth memorandum outlining the research conducted and the findings therein is attached to this Report and Recommendation as Appendix IV.

There have been a limited number of cases involving the use of jailhouse informants in New York State since the issuance of the 2009 NYS Bar Task Force Report. In general, New York courts continue to abide by the standard for admissibility of jailhouse informant testimony as set forth by the New York Court of Appeals in *People v. Cardona*, 360 N.E.2d 1306 (N.Y. 1977). This allows for the admission of jailhouse informant testimony so long as the informant is not deemed an agent of the government. In the handful of cases dealing with this issue since 2009, every court found that the jailhouse informant in question was not an agent of the government, and thus admitted the jailhouse informant testimony.

On the legislative front, the Committee researched and reviewed a number of pieces of proposed legislation involving the use of jailhouse informants that have been proposed on numerous occasions since 2009 in both the State Assembly and the State Senate. Despite the proposal of numerous bills on the topic since the issuance of the 2009 report, no bill has made it past the committee stage. The legislation that has been proposed has been primarily two different bills, each of which has been reintroduced in substantially the same form a number of times. One bill sought to regulate the use of confidential informants by statutorily defining such informants and regulating the use of testimony from the same. The second bill proposed requiring prosecutors’ offices to track and submit an annual

report to the department of state with statistical information regarding the use of informants and informant testimony. The Committee also searched for and reviewed potential federal legislation on the topic.

Further, the Committee also reviewed select comprehensive law review articles that have been issued on the subject in the last 10 years. These articles generally focused on the understanding that jailhouse informant testimony is often inherently unreliable, and as a result is a significant contributing factor to wrongful convictions. These articles also propose methods to remedy the risk of wrongful convictions, particularly by proposing systems by which prosecutors' offices track and regulate the use of such informant testimony.

Finally, the Committee performed an analysis of other states' statutes and model policies guiding jailhouse informant practices. As New York has not passed significant legislation on the issue of jailhouse informants in the last 10 years, the Committee found the review of legislation in other U.S. jurisdictions insightful. Texas enacted legislation in 2017 regulating the use of jailhouse informants, particularly requiring prosecutors to maintain detailed records of the use of such testimony. The Committee also researched the policies implemented by various Texas prosecutor's offices in response to the new legislation. The Committee found particularly instructive the policy developed by the Tarrant County, Texas, Criminal District Attorney's Office on Jailhouse Informant Procedure, and it has relied substantially on that policy in making its own recommendations.

In addition, the Committee reviewed the Subcommittee Report and Final Proposals on Jailhouse Informants from the 2009 report, and proposed that the following recommendations from the 2009 report be considered for renewed recommendation:

- i. Any Informant Testimony Should Be Corroborated – “at a minimum, the corroboration requirement for the use accomplice testimony should be extended to non-accomplice testimony.”
- ii. Jury instructions
- iii. Plea bargains – “...it seems desirable that a defendant, who is offered a plea bargain, be given all the relevant information about any informant before being required to accept the plea (with in camera review when articulated and legitimate reasons are put forth by Prosecution that Defendant cannot/should not know).
- iv. Videotaping jailhouse informants' statements to law enforcement
- v. Prosecutors best practices
- vi. Pre-trial reliability hearings

Given the limited timeframe, the Committee sought to identify a set of recommendations that both represented a consensus view of the Committee and that are viable with respect to implementation. Therefore, the Committee does not recommend a legislative proposal at this time. Since consideration of possible legal remedies for failure to properly regulate and disclose the use of jailhouse informants would require a change to existing law through either a legislative proposal or court rule, the Committee did not address previous recommendations put forward in the 2009 report related to a corroboration requirement for informant testimony, possible jury instructions or the use of pre-trial reliability hearings. The other recommendations from the 2009 report are included in the final recommendations of the Committee.

C. Other Reform Efforts from Across the Nation

The robust tracking and disclosure of jailhouse informant information and testimony is an area of wrongful conviction reform that is beginning, in recent times, to receive fuller attention by criminal justice stakeholders and policymakers.

Indeed, in May of 2018, the American Legislative Exchange Council (ALEC), a of conservative state legislators and private sector representatives who draft and share model state-level legislation for distribution among state governments in the United States, drafted a model bill for the tracking and disclosure of jailhouse informants.³ ALEC provides a forum for state legislators and private sector members to collaborate on model bill and draft legislation that members may customize for their own state legislatures.

More than five states introduced legislation during the 2018 legislative sessions to begin to better regulate the use of and benefits provided to jailhouse informants and to disclose to the defense impeaching information on jailhouse witnesses including benefits provided, their criminal history and previous jailhouse informant activities. In November of 2018, Illinois lawmakers passed a legislative proposal to regulate the use of jailhouse informants. The new law is considered to be the strongest in the nation and will require prosecutors to disclose their planned use of jailhouse informant testimony at least 30 days before trial, thus enabling defense attorneys time to investigate the witness and their claims. The new law also requires prosecutors to disclose to defense lawyers the benefits they plan to provide to the informant in exchange for their testimony, along with the disclosure of other cases in which the witness testified. Finally, the new law requires pre-trial reliability hearings for the use of jailhouse informants in select crime categories. This will allow judges to exercise a gatekeeping function by excluding unreliable jailhouse informant testimony that may mislead juries.

The Illinois law came on the heels of a Texas law that passed the year before, which requires full disclosure of information related to the jailhouse informant, including specific

³ See <https://www.alec.org/model-policy/jailhouse-informant-regulations-2/>

impeachment information on jailhouse informant witnesses such as: their complete criminal history, benefits offered or implied in exchange for testimony, history of jailhouse informant activities, and any other information related to credibility. Before passage of the law in Texas, some individual prosecutors' offices had already begun to tackle this issue and, indeed, a policy developed in Tarrant County, Texas, served as an excellent template for a recommended model policy put forward by this subcommittee.

D. Development of Statewide Model Policy to be Adopted at the County Level

While the Committee believes that prosecutors should be required to track and disclose the use of jailhouse informant testimony and any benefits provided to them, it also grappled with concerns about maintaining informant confidentiality. The Committee agrees that tracking informants will enhance transparency and help prosecutors and law enforcement to assess the reliability and credibility of a jailhouse informant before he or she is used as a witness. Tracking can assist law enforcement investigations by shedding light on the history and reliability of a potential informant. Similarly, prosecutors can more accurately assess the evidentiary strength of a potential informant by accessing promises or benefits for potential informants made by other prosecutors in the same office.

In addition, all agree that prosecutors should be required to disclose to the defense prior to a plea agreement or trial specific impeachment information on jailhouse informant witnesses including: their complete criminal history, benefits offered or implied in exchange for testimony, history of jailhouse informant activities, and any other information related to credibility.

In an effort to develop a proposal that would assure comprehensive tracking and disclosure of relevant jailhouse informant information and testimony, the subcommittee reviewed and slightly modified the Tarrant County District Attorney's Policy on Jailhouse Informants. That policy guided the development of a proposed Model Policy for adoption in county-based prosecutors' offices throughout the State of New York. The main modifications to the policy were: the removal of the use of the polygraph for the assessment of informant testimony; and the requirement that information that is tracked under the Model Policy be disclosed to the defense in advance of any plea agreement. The subcommittee also added a provision that each DA's office should consider recordation of interviews as part of the policy but consensus on this point could not be reached by the Committee. Section E below offers an argument in support recordation.

The Committee recommends that the subcommittee resolve the confidentiality concerns raised by the larger Committee relating to the adoption of the Model Policy in each of New York's 62 county prosecutors offices. For similar reasons, the Committee could not come to consensus regarding the development of a statewide tracking system. While the Committee agreed that a statewide tracking system that would incorporate key information about each

jailhouse informant that is captured at the county-level would hold great value in helping law enforcement to understand which informants are operating in more than one county and is made aware of the scope of their participation in other cases, it was determined by the Committee that the New York State Bar Association should further explore the privacy, resource and logistical concerns raised by the larger Committee. While the subcommittee did not identify a single entity that would develop a statewide tracking system, it considered several, including DCJS, the AG's Office, and the Office of Court Administration.

E. Further Consideration of Recordation of Informant Interviews

According to the Innocence Project, 17% of the 363 DNA exonerations in the U.S. contain jailhouse informants as a contributing factor (that number is 20% in the state of New York). Such testimony, not permitted in many countries, puts innocent people at risk for two reasons: (1) the informant is incentivized to lie, casting doubt as to the reliability of his or her testimony, and (2) it is difficult for judges, juries, and other fact finders to evaluate this testimony, fully formed, once presented.

In 2009, the New York State Task Force made a number of recommendations for reducing these risks, including "the videotaping jailhouse informants' statements to law enforcement." While many in the subcommittee agree this remains a practice that should be implemented by any actor employing the use of a jailhouse informant, the subcommittee could not reach consensus about its inclusion in the Model Policy but still reiterates the value of recordation of the informant statement. This is consistent with the rationale for the recordation of interrogations or interviews of suspects, namely that transparency enables more reliable evidence and more accurate fact finding.

Just as recording serves to deter the use of coercive tactics in suspect interrogations, it will deter the offer of strong contingencies, such as threats or promises of leniency and other benefits, explicit and implied, in law enforcement exchanges with in-custody informants. In so doing, recording will inhibit the kinds of exchanges most likely to elicit unreliable testimony. Just as problematic as the elicitation of unreliable testimony is that judges and juries are handicapped in their ability to evaluate that testimony. One limitation concerns their lack of first-hand exposure to the contingencies used to elicit an informant's testimony. A second limitation is that they are blinded as to the source of the details contained in that informant's testimony.

Within the population of those false confessions identified as false through postconviction DNA testing, an astonishing 94% contained details about the crime, often quite vivid, that were both accurate and not in the public domain—facts that led fact finders to misjudge these false statements as credible. In light of actual innocence, it is clear that these confessors could not have volunteered such details on their own. Rather, through a process of contamination, their statements contained facts that were disclosed by police, often

inadvertently, during the course of an *unrecorded* interrogation. Exactly the same problem afflicts the factfinder seeking to assess the testimony of an incentivized informant whose prior conversations with law enforcement were not recorded. Just as recording suspect interrogations enables judges and juries to identify the source of details, the same remedy should apply to jailhouse informants. Therefore, while the subcommittee could not come to consensus about its inclusion in the Model Policy, the subcommittee still strongly urges consideration of the recordation of all informant statements by law enforcement.

RECOMMENDATIONS: *The Committee recommends the implementation – at the county level – of a Model Policy that is attached in Appendix I for the county-based tracking and disclosure of jailhouse informant information and testimony, after the Subcommittee conducts further study to determine whether additional protections to ensure informant safety are needed. (The recommended model policy attached is based in substantial part on the policy developed by the Tarrant County, Texas, Criminal District Attorney’s Office on Jailhouse Informant Procedure.)*

Further, the Committee recommends further study by the NYSBA before it makes final recommendations regarding the establishment of a statewide tracking system by an as-yet-to-be-determined centralized entity (e.g. DCJS, AG, OCA, etc.) to ensure that data collected in connection with jailhouse informants at the county level is available to district attorneys throughout New York State, and addresses the confidentiality and cost/resource issues raised during the deliberations of the 2019 Task Force discussion.

March 20, 2019

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c/o Michael Miller, President
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re: NYSBA Report of the Task Force on Wrongful Convictions (“Report”)

To the New York State Bar Association House of Delegates:

On March 11, 2019, the Board of Directors of the New York County Lawyers Association discussed the Report following a presentation from Hon. Barry Kamins, Co-Chair of the New York State Bar Association Task Force on Wrongful Convictions. At this meeting the Board voted to endorse the Report and encourage its approval by the New York State Bar Association House of Delegates at its April 13, 2019 meeting.

NYCLA would like to thank its Committee on Civil Rights & Liberties, co-chaired by Elliot Dolby Shields and Ilyssa Fuchs, for its time and effort in considering the Report, and issuing its own letter of support for the Report, a copy of which is attached as *Annex A*.

NYCLA commends the work of the Task Force on Wrongful Convictions.

Sincerely,



Michael J. McNamara
President

cc: Hon. Barry Kamins, *Co-Chair*, NYSBA Task Force on Wrongful Convictions
Hon. Robert Smith, *Co-Chair*, NYSBA Task Force on Wrongful Convictions
Ms. Kathy Baxter, *General Counsel*, New York State Bar Association

ANNEX A

March 7, 2019

President
Michael J. McNamara

Hon. Barry Kamins

Hon. Robert Smith

President-Elect
Stephen C. Lessard

Co-Chairs, Task Force on Wrongful Convictions
New York State Bar Association

Vice President
Vincent T. Chang

Dear Honorable Justice Kamins and Smith:

Secretary
Asha Smith

Treasurer
Adrienne B. Koch

**Immediate
Past President**
Carol A. Sigmond

The members of the New York County Lawyers Association's ("NYCLA") Civil Rights and Liberties Committee (the "Committee") write to endorse the recommendations in the 2019 Report of Task Force on Wrongful Convictions (the "Task Force") by the New York State Bar Association.

In the past year, the Committee has also engaged with key stakeholders, including hosting two continuing legal education courses on wrongful convictions. The first CLE, in May 2018, Wrongful Convictions: Why They Happen and How to Prevent Them, included wrongfully convicted persons, criminal defense attorneys, prosecutors from the conviction integrity unit at the Bronx D.A.'s Office, and wrongful conviction attorneys. The second, on March 13, 2019, Handling a Wrongful Conviction Action in New York, is a practical course with faculty that include three of the leading wrongful conviction attorneys in New York.

In light of this work, the Committee believes that the Task Force's recommendations, if meaningfully implemented, will work to both help exonerate those that have been unjustly convicted of crimes they did not commit and to prevent wrongful convictions in the future. We are particularly encouraged by the provisions for better scrutiny of forensic evidence, tracking of jailhouse informants, and greater access to post-conviction remedies for those that plead guilty despite their innocence.

We also hope that the Conviction Integrity Units will work independently and thoroughly to scrutinize the convictions secured in the offices of every District Attorney in the state. But we emphasize the recommendations regarding complete and open transparency with petitioners and their counsel. Further, if a petitioner and their counsel believe that there is enough evidence for post-conviction relief, these Units must give full access to evidence and witnesses, even if they have not yet made a final determination. Wrongfully convicted persons fight—usually from behind bars—to prove their innocence every day; they should have control of when to approach the court to challenge their conviction, not the Conviction Integrity Units. The Units should supplement and complement efforts by the wrongfully convicted and their counsel; they are not a replacement.

In closing, the Committee commends the Task Force for its thorough Report and respectfully urges the NYSBA House of Delegates to pass the proposals therein at its April 13, 2019 meeting.

Respectfully Submitted,

Elliot Dolby Shields, Esq.

Ilyssa Fuchs, Esq.

Co-Chairs, NYCLA Civil Rights and Liberties Committee

Robert Rickner, Esq.

Chair, NYCLA Civil Rights and Liberties Committee, Wrongful Conviction Subcommittee



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #10

REQUESTED ACTION: Approval of the report and recommendations of the Task Force on Evaluation of Candidates for Election to Judicial Office.

The Task Force on Evaluation of Candidates for Election to Judicial Office was appointed in 2018 to review the existing methods of vetting judicial candidates and propose best practices, guidelines and minimum standards for review of candidates. Its aim is to assist bar associations, good government groups and others in developing nonpartisan screening and evaluation processes and improving those that already exist. The Task Force distributed its report in connection with the January meeting; it is available online at www.nysba.org/judicialevaluation.

The Task Force notes that at the outset, it had been advised that the Independent Judicial Elections Qualification Commissions (IJEQCs), overseen by the Office of Court Administration, would be disbanded at the end of 2018. Concerns had been expressed that the commissions were not working well and that questions had been raised as to whether it was appropriate for the court system to interject itself into the election process by administering a system of evaluating judicial candidates. Consequently, the Task Force believed it necessary to work quickly to insure the continued availability of screening in 2019.

The Task Force reviewed the background of judicial evaluation in New York and surveyed local, affinity and specialty bar associations as to their thoughts on evaluations, as well as members of the IJEQCs, judges, and political leaders. It found that systems utilized by bar associations vary from county to county, and it concluded that a one-size-fits-all approach for screening would not work for New York State. Where existing reviews are effective, the Task Force urges their continuation; in particular, the Task Force noted that existing systems in place in New York City, on Long Island, and several upstate urban counties – which comprise over three-quarters of the state’s population – are currently well served.

For those counties not currently served by existing screening entities, the Task Force recommends the establishment of regional or district screening committees. Underwriting support for these efforts should come from the Office of Court Administration. NYSBA would establish a working group to help implement these panels and create resource guides.

Finally, the Task Force has developed a set of best practices to guide local bar and regional screening committees, addressing composition of the committees; use of questionnaires and the conduct of investigations; evaluation criteria; and rating and appeals processes. NYSBA should work with local bar/regional committees in making ratings known to the public.

At the January meeting, the House adopted a scheduling resolution to govern the submission of comments on the report and consideration of the report at the April 13 meeting. Comments received, as well as the scheduling resolution, are attached. The Task Force has prepared a memorandum outlining its review of the comments and changes made to the report in response, as well as redlined excerpts from the report showing changes the Task Force has made.

Finally, the materials include a resolution offered by the Task Force for your consideration in connection with adoption of the report and recommendations.

Robert L. Haig and Hon. Susan Phillips Read, co-chairs of the Task Force, will present the report at the April 13 meeting.

RESOLUTION
Final Report of the
Task Force on the Evaluation of Candidates
for Election to Judicial Office

WHEREAS, the New York State Office of Court Administration decided that it was discontinuing the Independent Judicial Election Qualification Commissions (IJEQCs) at the end of 2018; and

WHEREAS, in June 2018, New York State Bar Association President Michael Miller created the Task Force on the Evaluation of Candidates for Election to Judicial Office (Task Force); and

WHEREAS, the Task Force was charged with investigating and reporting on the various vetting structures that exist throughout New York State regarding candidates for election to judicial office with the goal of making recommendations in time for the 2019 election cycle; and

WHEREAS, the Task Force began its work immediately by collecting and examining relevant information; and

WHEREAS, the Task Force drew upon the considerable knowledge of its members; and

WHEREAS, the Task Force reviewed the work of the New York State Commission to Promote Public Confidence in Judicial Elections (the Feerick Commission), IJEQCs, and local, affinity and specialty bar associations that evaluate judicial candidates subject to election; and researched judicial screening in other states; and

WHEREAS, the Task Force undertook outreach and background investigation, including statewide surveys of bar association leaders, judges, political leaders and members of the IJEQCs; and

WHEREAS, the Task Force's work over the course of the last months has encompassed lively and detailed substantive discussions enabling a full examination of the issues regarding this subject matter and leading to the recommendations put forth in the Task Force's Final Report; and

WHEREAS, the Task Force concluded that many bar associations across New York currently engaged in evaluating candidates are doing so in effective ways that optimize resources devoted to their evaluation practices and reflect local considerations; and

WHEREAS, the Task Force recommended a set of best practices to be considered by bar associations; and

WHEREAS, the Task Force co-chairs presented the Informational Report of the Task Force at the January 2019 meeting of the House of Delegates; and

WHEREAS, the Task Force reviewed and took into account comments on the Informational Report submitted to it; and

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association hereby approves the final report and recommendations of the Task Force on the Evaluation of Candidates for Election to Judicial Office; and it is further

RESOLVED, that the officers of the Association are hereby authorized to take such action as they may deem necessary to implement this resolution.

M E M O R A N D U M

TO: NYSBA House of Delegates
FROM: Task Force on the Evaluation of Candidates
for Election to Judicial Office
DATE: April 1, 2019
RE: Comments on Task Force Report

The scheduling resolution adopted by NYSBA's House of Delegates on January 18, 2019 provided that "Any comments on the Special Committee's report or particular recommendations contained therein must be submitted in writing to the Secretary of the Association at the Bar Center by March 15, 2019; otherwise they shall not be considered." Now that the deadline for comments has passed, we are writing to discuss the comments that NYSBA has received and to explain the revisions which the Task Force has made to its Report in response to those comments.

We begin by thanking all of the numerous constituencies which have contributed to this project. We are pleased by the compliments and the support that the Task Force's Report has received and by the fact that there has been so little disagreement with the recommendations the Task Force has developed. In light of the very few areas of disagreement between the Task Force's recommendations and the comments NYSBA has received, the Task Force has made a few modest revisions to the Report and is now submitting the final version of the Report for consideration by the House of Delegates.

In this memorandum we will briefly review the comments which NYSBA has received on the Task Force's Report and indicate the Task Force's positions relating to those

comments. NYSBA received comments on the Task Force’s Report from three entities and one individual. The comments are discussed below.

1. New York County Lawyers Association

The New York County Lawyers Association has submitted a letter dated March 14, 2019 stating that “On March 11, 2019, the Board of Directors of the New York County Lawyers Association . . . voted to endorse the Report and encourage its approval by the New York State Bar Association House of Delegates at its April 13, 2019 meeting.” That letter also states that “NYCLA would like to thank its Judicial Section, chaired by Hon. Judith J. Gische, for its time and effort in considering the Report, and adopting a resolution supporting the Report” NYCLA’s letter concludes by stating that “NYCLA commends the work of the Task Force on the Evaluation of Candidates for Election to Judicial Office.” The letter and other materials which NYCLA submitted do not contain any requests for changes in the Task Force’s Report.

2. NYSBA’s Judicial Section

NYSBA’s Judicial Section has submitted a memorandum dated March 15, 2019 which is strongly supportive of the Task Force’s recommendations. For example, the Judicial Section begins its memorandum by stating that “The Judicial Section of the NYSBA (“Judicial Section”) commends the Task Force on the Evaluation of Candidates for Election to Judicial Office (“Task Force”) for its tireless efforts in completing its Report under difficult time constraints, owing to the disbandment of the Independent Judicial Elections Qualification Commissions (“IJEQCs”) at the end of 2018.”

The Judicial Section also states:

At the outset, the Judicial Section embraces the Task Force’s guiding principle that a strong, independent and highly qualified judiciary is vital to the proper functioning of our

democratic system. To this end, we support the view that all candidates for election to judicial office must be effectively screened to determine their qualifications and that information must be conveyed to the voting public.

The Judicial Section states that “The Judicial Section agrees with the Task Force’s conclusion that the primary responsibility for screening candidates for elected judicial office should rest with the attorneys of this State, through the organized Bar Associations (including affinity and specialty Bar Associations), which are uniquely suited to perform this task.” In addition, the Judicial Section states:

The Judicial Section also shares the Task Force’s view that screening systems already in place have historically worked well in many areas of the State. As such, we fully support the Task Force’s practical recommendation that systems that are presently effective should be continued in their current form, under the common sense principle: if it’s not broken, don’t fix it.

The Judicial Section states:

As for those areas of the State where there is currently little or no effective screening, we wholeheartedly endorse the Task Force’s recommendation to eschew a top-down, “one-size-fits-all” approach in favor of a system that better reflects local and regional values, culture and diversity. Specifically, we agree that screening processes that are effective, fair and as non-political as possible should be developed by local Bar Associations, with support and assistance, as needed, from NYSBA and other organizations. To this end, the Task Force’s approach of providing a series of best practices, guidelines and minimum standards for the review of potential candidates by the local bar associations, is an excellent start. In particular, we support the Task Force’s recommendation, as part of its proposed set of best practices, to encourage the use of a standard form questionnaire, which can then be adapted as needed for local use.

The Judicial Section also states:

We concur with the Task Force’s call for the NYSBA, with its substantial resources and exposure, to play a more active role in educating the public about the importance of judicial elections, including through the use of social media. Part of this role should

be to ensure the dissemination of candidate ratings to the voting public.

The Judicial Section concludes its memorandum by stating:

In closing, we wish to emphasize our unwavering commitment to an effective and robust screening system for candidates to elected judicial office, so that all New Yorkers may continue to enjoy the benefits of a strong, independent and highly qualified judiciary. We extend our heartfelt thanks to all members of the Task Force for their tremendous effort in support of this mission and are grateful for the opportunity to participate in this vitally important discussion.

The Judicial Section raises three issues in its memorandum about the Task Force's

Report: (1) the Judicial Section "urge[s] the Task Force to reconsider and clarify part of its recommendation that the NYSBA work with local bar associations to 'establish regional judicial screening committees in 2019' (Report, at p. 39) for those counties not currently served by existing screening entities" because of "the overarching goal of allowing local attorneys to take the lead in screening candidates for election to the courts in which they practice"; (2) the Judicial Section argues that "there should be a rating that identifies a candidate who has chosen not to participate in the process"; and (3) the Judicial Section argues that NYSBA should recommend a three-tier rating system instead of a two-tier rating system.

We first note that we do not believe that there is any disagreement between our Task Force and the Judicial Section as to the implementation of the proposed regional judicial screening committees. It was never the intent of our Task Force that these regional screening committees would take the place of local attorneys and local bar associations. On the contrary, our Task Force Report recommended "that the State Bar work with all local bar associations in those districts [with limited judicial screening] to establish regional screening committees in 2019," that "These regional screening panels should have broad representation from counties in the judicial district," "that it would be valuable to include local officials and representatives of

local bar associations in any working group,” and that “the State Bar needs to join forces with local bar associations to create regional systems that will work to improve and ensure the overall quality of the state’s judiciary.” Accordingly, we believe that this issue has been resolved by the addition of one explanatory sentence to our Report confirming that the Task Force recommends regional judicial screening committees only where local bar associations lack the members and other resources necessary to create and support local bar association judicial screening committees and only where local bar associations prefer and affirmatively elect to participate in regional judicial screening (see attached redlined p. 39).

We next turn to the two issues the Judicial Section has raised about ratings for judicial candidates. One primary focus throughout the deliberations of our Task Force was the need to recommend an approach to evaluation of candidates for election to judicial office in which candidates will participate voluntarily. For that reason, and because of the strong personal interest which judges have in the subject matter of our Report, we have added language to the Report discussing the limited revisions which the Judicial Section has requested to the Task Force’s recommendation of a best practice for rating candidates and urging bar associations to give serious consideration to the Judicial Section’s views. We think it will be helpful in future efforts to implement our Report for NYSBA to be able to advise all participants in judicial evaluation processes and procedures that NYSBA’s Report is responsive to the views of NYSBA’s Judicial Section. In this connection, the two issues which the Judicial Section has raised relating to ratings were the subject of considerable debate during our meetings and our final recommendations reflect divided votes. We have therefore amplified our discussion of the Task Force’s proposed best practice for ratings for judicial candidates in the two respects

requested by NYSBA's Judicial Section to reflect the Section's views (see attached redlined p. 42).

3. Monroe County Bar Association

Mark J. Moretti, Immediate Past President of the Monroe County Bar Association, has submitted an e-mail dated January 11, 2019 proposing changes to two paragraphs of the Task Force's Report which relate to the Monroe County Bar Association. In his e-mail, Mr. Moretti states that "we agree with the Task Force conclusions that the system works best when political leaders buy into using the ratings before making their selections" and that "We also agree that each individual county has to deal with its own lay of the land and that the Task Force Report provides a useful starting point and template in doing so." We believe that the language e which Mr. Moretti has proposed describing activities of the Monroe County Bar Association is uncontroversial and we therefore have included Mr. Moretti's proposed language, with a few revisions, in the final version of the Report (see attached redlined pp. 8 [footnote], 25-26).

4. A. Vincent Buzard

A. Vincent Buzard has submitted comments to NYSBA relating to the Task Force's Report. Mr. Buzard begins by stating that "These comments are based upon my experience of over 25 years in judicial evaluations which includes developing a new judicial evaluation system as President of the Monroe County Bar Association" The Monroe County Bar Association has not joined in or supported Mr. Buzard's comments and it has advised NYSBA that "After an extensive year-long process . . . MCBA decided to suspend judicial evaluations"

Mr. Buzard proposes in his comments that the Task Force "amend report [sic] so that both a three tier and two-tier system can both be considered best practices according to local

determination.” As previously discussed in this memorandum, NYSBA’s Judicial Section has recommended a three-tier rating system and we have responded to the Judicial Section’s recommendation in the manner and for the reasons stated in this memorandum.

Mr. Buzard states in his comments that he “strongly recommend[s] that the standard of review in any appeals process not be de novo.” The basis for Mr. Buzard’s recommendation is that “my experience is that the more governing boards become involved in judicial evaluation the more subjective and inappropriate influences can come into play” and that “while you recommend great care to be taken in the appointment of the judiciary committee, there are no such limitations on the governing board.” Mr. Buzard also states that appellate decisions by governing boards of bar associations “can be based on second-guessing the judiciary committee, personal concerns for the candidate found unqualified, political concerns or other irrelevant factors.”

Our Task Force recommended “that individual bar associations should establish their own understandable and transparent policies that would govern [this issue as well as certain] other issues in the appeals process.” The standard of review on appeal which is appropriate for one bar association may not be appropriate for another bar association. In particular, the relationship between the judiciary committee and the governing board of one bar association may not be the same as the relationship between these entities in another bar association. We do not think that NYSBA should tell bar associations how to structure and regulate the relationships among their internal components. We also do not think that NYSBA should adopt Mr. Buzard’s views about the factors which may motivate appellate decisionmaking by governing boards of bar associations.

Mr. Buzard also argues that ratings should use the terms “qualified” or “not qualified” instead of “approved” or “not approved” which in his view “is not strong.” We see no reason to revise the detailed discussion of this issue and the Task Force’s conclusion on pages 42-43 of the Report.

Mr. Buzard states that he “would give more guidance as to what constitutes an appropriate investigation.” The guidance which Mr. Buzard recommends includes “extensive interviewing,” “surveys of lawyers,” “call[ing] lawyers who have had cases with and preferably against the candidate and lawyers who have appeared in front of sitting judges seeking re-election or higher judicial office,” and “requiring the candidate to submit samples of written work product” which “should be carefully reviewed by the subcommittee.” Our concern about including such extensive and detailed “guidance” in our Report is that some bar associations might reject as unrealistic and unduly onerous not only this recommendation but also other recommendations if we ask them to do more than their resources permit.

Finally, Mr. Buzard states that he has “also found that voting by the screening committee is best done by secret ballot.” We see arguments on both sides of this issue and therefore do not see any need to revise the Task Force’s Report in this regard.

associations are working forcefully and are employing evaluation systems that serve the public and the judiciary well. The Task Force believes that these bar associations should be encouraged to continue their efforts. There are effective judicial evaluation systems in place in 10 of the 11 largest counties in New York State. Nearly three-quarters of the state's population is currently being well served by the judicial screening of the local bar associations.

Nonetheless, there are some judicial districts (such as the 7th Judicial District, which encompasses Monroe County¹ and seven smaller counties) where there is almost no judicial screening whatsoever.³ There are many small counties in other districts (such as Hamilton County in the 4th District and Lewis County in the 5th District) where the size of the county and the absence of a significant body of resident attorneys in the county virtually precludes the possibility or even the potential for any meaningful judicial screening.

The Task Force believes that increased judicial screening needs to be encouraged throughout the state. NYSBA should not allow the systematic screening currently performed by the IJECQs to fall through the potential upstate cracks. Screening ought to be available for all judicial candidates. In order to assist those judicial districts with limited screening, the Task Force recommends that NYSBA work with all local bar associations in those districts to establish regional or district screening committees in 2019. Underwriting support for this initiative should come from the Office of Court Administration which has funded and staffed the IJECQs.

NYSBA must take appropriate action to continue non-partisan evaluation and screening of candidates for election to judicial office. This should include the establishment of a NYSBA working group to help implement the availability of screening panels throughout the state and the creation of resource guides as well as web pages to assist bar associations on the subject of judicial screening.

In keeping with its mission, the Task Force accordingly has developed a series of best practices that should help guide local bar associations and regional screening commissions in their role in evaluating candidates for judicial office. These best practices should include:

1. The bar association should establish a separate judiciary committee which would be charged with the duty of investigating and evaluating candidates for judgeships.
2. Judiciary committees should consider and establish term limits for members of the committee to ensure new members with diverse perspectives and opinions.
3. The questionnaire used by the City Bar to evaluate candidates should be used as a suggested model for other bar associations conducting evaluations, with local bar associations using variations to fit their needs and capabilities.
4. The members of the judiciary committee, or a subcommittee of the judiciary committee, would conduct investigations of the candidates for the judiciary.
5. The judiciary committee should use six basic criteria to evaluate judicial candidates. These criteria would be integrity, independence, intellect, judgment, temperament, and

³ The Monroe County Bar Association has advised the Task Force that it has sought with some success to achieve at least the public information goal of judicial evaluations in other ways.

There are four authorized ratings: “Highly Qualified,” “Qualified,” “Not Qualified” and “Not Rated.” A two-thirds vote is needed to achieve the “Highly Qualified” rating. A majority vote is needed to achieve the “Qualified” rating. Failure to receive the “Qualified” rating marks the candidate as “Not Qualified.”

Any candidate who does not achieve a “Highly Qualified” rating can appeal the rating to the board. The board by majority vote may remand the decision to the committee for review. The board may also review the decision itself. The board by a majority vote can affirm the committee decision, set aside the committee decision if it finds by a majority vote that the initial decision was “arbitrary and capricious” or remand the decision to the committee.

The entire evaluation procedure is confidential.

(c) Erie County Bar Association

The Erie County Bar Association has a judiciary committee which is composed of 29 members. The board of directors of the association appoints the committee members. There are nine new members each year, and not more than 14 members may belong to the same political party. Fifteen members are needed for a quorum.

The candidates are rated on 11 separate benchmarks which include integrity, experience, professional ability, education, reputation, industry and temperament. There are four ratings: “Outstanding,” “Well Qualified,” “Qualified” and “Not Recommended.”

An 80% vote of the committee is needed for the “Outstanding” rating. A two-third’s vote is needed for “Well Qualified.” A majority vote is needed for “Qualified” and “Not Recommended.” A candidate who receives the “Not Recommended” rating may request reconsideration by the committee. The board’s procedures include a mechanism “whereby the applicant’s request for reconsideration is first presented to the committee, which will make recommendations to the board in accordance with the board’s procedures for reconsideration.” The board will then make a final determination on the candidate.

A candidate can appeal a “Not Recommended” rating to the board of the Bar Association.

There are recusal and conflict-of-interest provisions, and the procedures are held in “strictest confidence.”

(d) Monroe County Bar Association

The Monroe County Bar Association ~~no longer screens judicial candidates. A longstanding feud between one of the political leaders and the bar association escalated to a point where more than a year ago, the association decided to end judicial screening~~has advised the Task Force that, after an extensive year-long process led by a task force consisting of representatives of the political parties, lawyers and retired judges, the Bar Association decided to suspend judicial evaluations and to examine how to communicate effectively with and educate the public about judicial candidates. Over the last two election cycles, the Bar Association has held a public forum in which candidates who chose to appear could respond to questions from a panel

of lawyers, and a series of programs broadcast on NPR where candidates were interviewed and able to respond to callers. The Monroe County Bar Association continues to evaluate and explore how best to serve its members and the public by effectively informing and educating the public about the qualifications of judicial candidates.

(e) Nassau County Bar Association

The Nassau County Bar Association has extensive written rules governing its operations. Its Judiciary Committee consists of 21 members appointed by the President with the approval of the Board of Directors. No judicial or non-judicial employee of a court of record may be a member of the Committee.

Members are appointed in two classes, for two-year terms. There are term limits. These permit a maximum of three consecutive terms and no more than seven years in any nine-year period. Once the member reaches the term limit, there is a required two-year waiting period before the member can return to the Committee.

No more than ~~ten~~10 members of the Committee may be enrolled in the same political party. Committee members are prohibited from serving as an officer or member of any campaign committee for any candidate for judicial office in New York State.

Committee members may not directly or indirectly contribute to, support, or participate in the campaign of any candidate for judicial office in New York State.

~~13~~Thirteen members of the Committee constitute a quorum. All actions of the Committee are taken by a majority of the members present and voting. All proceedings are confidential.

A secret ballot is taken to determine by majority vote, of those present and voting, whether the candidate is "Well Qualified" or "Not Approved at This Time." No matter how many committee members are present, at least seven affirmative votes are required for the "Well Qualified" rating.

Criteria are whether or not (1) the person has established a reputation for good character and temperament, (2) the person has a sufficient degree of professional experience, scholarship and ability to perform the duties of the office for which the person is being considered, (3) whether the conduct of such person has been above reproach, (4) whether such person is known as a conscientious, studious, thorough, courteous, patient, punctual, just and unbiased person who can be counted upon to be fearless and truthful when subject to public and/or political pressure, (5) whether such person is of good moral character and (6) whether such person is emotionally, cognitively and physically able, with any reasonable accommodations, to fulfill the duties of the office for which the person is being considered.

Any person found "Not Approved at this Time" may request reconsideration by the Committee. The reconsideration is de novo.

Candidates dissatisfied with the results can appeal to the Board of Directors and be heard in executive session. The Board of Directors' review is treated as an appellate review, not a de

These regional screening panels should have broad representation from counties in the judicial district. The State Bar must take appropriate action to continue non-partisan evaluation and screening of candidates for election to judicial office. This should include the establishment of a State Bar working group to help implement the availability of screening panels throughout the state and the creation of resource guides as well as web pages to assist bar associations on the subject of judicial screening. The Task Force believes that it would be valuable to include local officials and representatives of local bar associations in any working group.

Again, while a uniform system will not work for every district in New York, the State Bar needs to join forces with local bar associations to create regional systems that will work to improve and ensure the overall quality of the state's judiciary.

The Task Force emphasizes, however, that it recommends regional judicial screening committees only to fill the gap created where local bar associations lack the members and other resources necessary to support local bar association judicial screening committees, and only where local bar associations prefer and affirmatively elect to participate in regional screening.

B. Best Practices for Bar Association Evaluation Committees

The qualities of a jurist do not know any geographical boundaries. Therefore, the judicial screening systems in place in the state ought to – as much as possible – be using the same procedures in order to properly evaluate candidates. This is part of the mandate of the Task Force. Our mission statement requires that “the task force will propose best practices, guidelines and minimum standards for review of such judicial candidates.” Given the overwhelming number of potential issues involved in creating and maintaining a judicial screening system, the Task Force focused on the most important elements of a “best practices” program. The Task Force believes that the establishment of best practices will help to improve the judiciary and make the evaluation process simpler for both the candidates and those charged with evaluating the candidates.

The determination of “best practices” was not an easy task for the Task Force. Some members of the Task Force believed that the overall goal of an independent and well-accomplished judiciary would be better served by the establishment of what might be termed “apple pie” minimum standards for rating judicial candidates rather than the use of “best practices.” Many also believed that in reviewing the individual best practice benchmarks, the use of minimum standards — rather than the mandating of detailed criteria — could prove helpful to local bar associations in achieving these “best practice” benchmarks.⁸⁸⁸⁹ While the Task Force was able to come to quick agreement on many of the best practice benchmarks, a number of these measures were subject to significant debate.

The Task Force members also wanted to assure bar associations that in no manner was there a belief that the “best practices” would serve as mandates. Local bar associations have their own customs and their own history. They may have limited resources. As a rule, they are the best

⁸⁸⁸⁹ For example, instead of providing in detail all the conflict of interest standards that would be appropriate for members of a judiciary committee, it might be preferable and simpler to suggest that judiciary committees establish certain basic conflict standards.

The majority of the Task Force determined that, on balance, the two-tiered rating system was preferable; however, the Task Force does not mean to suggest that local bar associations with established and successful three (or more)-tiered systems should change. When considering which rating system best serves the needs of their individual communities, local bar associations may also wish to take into consideration the views of the Judicial Section of the NYSBA, which strongly disfavors a two-tiered system. In its comments on the Informational Report, the Judicial Section advocated “a ratings distinction between a candidate with exceptional qualifications and attributes versus a candidate who only meets the minimum standards.” The Judicial Section expressed a concern that a two-tiered rating system unfairly disadvantages incumbent judges running for reelection in a contested election. In particular, an excellent incumbent judge would be rated the same as someone who lacks judicial experience, but is nonetheless minimally qualified to serve as a judge. The Task Force also acknowledges the Judicial Section’s view that, so long as participation in judicial screening remains voluntary, there should be a rating to identify a candidate who has chosen not to participate in the evaluation process.

The Task Force also debated the issue of whether the rating given to candidates should be that of either “Qualified” or “Approved.” This particular debate was further complicated by the related issue of whether the rating given candidates who were found not to be “Approved/Qualified” should be a simple “Not Approved/Qualified” or a the more provisory “Not Approved/Qualified *at this Time*” rating.

Advocates for the “Qualified” grade believed that use of this term would be beneficial in trying to attain the best qualified candidates for the judiciary. A “Qualified” judiciary should not be diluted by the idea of an “Approved” Judiciary. They also believed that the use of the word “Approved” gave the appearance that the judiciary committee had endorsed a candidate.

On the other hand, the advocates for the “Approved” grade believed that an “Approved” grade realistically established that the candidate had been found to have affirmatively demonstrated the necessary qualifications for the performance of the office that he or she was seeking. Thus, there was no reason to find that the “Approved” grade had in any manner been diluted. They similarly did not believe that the use of the term “Approved” established that the judiciary committee had endorsed any candidates. The advocates for the “Approved” grade also believed that the use of “Not Qualified” as a grade for candidates might be interpreted as pejorative and excessively demeaning to candidates, and would unnecessarily encourage appeals from candidates wanting to remove such a negative finding from the record.

On the issue of whether to use “Not Approved/Qualified” rating or the “Not Approved/Qualified *at this Time*” rating, the supporters of the “Not Approved/Qualified *at this Time*” standard believed that by seeming less demeaning, it prevented disappointed candidates from appealing the ratings. The backers of the “Not Approved/Qualified” rating believed that it forced more candidates into participating in the bar association evaluation process because candidates otherwise did not see that receiving a “Not Approved/Qualified *at this Time*” rating hurt their candidacy.



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518/285-4310

MEMORANDUM

To: Robert L. Haig and Hon. Susan Phillips Read, co-chairs of the Task Force on the Evaluation of Candidates for Election to Judicial Office

From: Judicial Section of the NYSBA

Date: March 15, 2019

Re: Judicial Section Comments on Informational Report of the Task Force on the Evaluation of Candidates for Election to Judicial Office

Dear Mr. Haig and Judge Read:

The Judicial Section of the NYSBA ("Judicial Section") commends the Task Force on the Evaluation of Candidates for Election to Judicial Office ("Task Force") for its tireless efforts in completing its Report under difficult time constraints, owing to the disbandment of the Independent Judicial Elections Qualification Commissions ("IJEQCs") at the end of 2018.

At the outset, the Judicial Section embraces the Task Force's guiding principle that a strong, independent and highly qualified judiciary is vital to the proper functioning of our democratic system. To this end, we support the view that all candidates for election to judicial office must be effectively screened to determine their qualifications and that information must be conveyed to the voting public.

For the reasons outlined in the Report, the IJEQC system, despite initial high hopes, was unable, in practice, to encourage widespread participation by judicial candidates in its voluntary screening process, or to effectively inform voters of the results of the judicial screening process. The Judicial Section agrees with the Task Force's conclusion that the primary responsibility for screening candidates for elected judicial office should rest with the attorneys of this State, through the organized Bar Associations (including affinity and specialty Bar Associations), which are uniquely suited to perform this task.

The Judicial Section also shares the Task Force's view that screening systems already in place have historically worked well in many areas of the State. As such, we fully support the Task Force's practical recommendation that systems that are presently effective should be continued in their current form, under the common sense principle: if it's not broken, don't fix it.

As for those areas of the State where there is currently little or no effective screening, we wholeheartedly endorse the Task Force's recommendation to eschew a top-down, "one-size-fits-all" approach in favor of a system that better reflects local and regional values, culture and diversity. Specifically, we agree that screening processes that are effective, fair and as non-political as possible should be developed by local Bar Associations, with support and assistance, as needed, from NYSBA and other organizations. To this end, the Task Force's approach of providing a series of best practices, guidelines and minimum standards for the review of potential candidates by the local bar associations, is an excellent start. In particular, we support the Task Force's recommendation, as part of its proposed set of best practices, to encourage the use of a standard form questionnaire, which can then be adapted as needed for local use.

That being said, we would urge the Task Force to reconsider and clarify part of its recommendation that the NYSBA work with local bar associations to "establish regional judicial screening committees in 2019" (Report, at p. 39) for those counties not currently served by existing screening entities. The recommendation seems at odds with the overarching goal of allowing local attorneys to take the lead in screening candidates for election to the courts in which they practice. While NYSBA can, and should, reach out to local Bar Associations and offer assistance and support wherever needed, it should not be creating a new system of regional panels.

An important criticism of the IJEQC system, as well as current local review panels, is the failure to effectively inform voters of the results of the judicial screening process. We concur with the Task Force's call for the NYSBA, with its substantial resources and exposure, to play a more active role in educating the public about the importance of judicial elections, including through the use of social media. Part of this role should be to ensure the dissemination of candidate ratings to the voting public. Relatedly, as long as participation in the judicial screening process remains voluntary, there should be a rating that identifies a candidate who has chosen not to participate in the process.

While we appreciate the Task Force's rationale for recommending a two-tier rating system, the Judicial Section strongly disagrees with this recommendation. As seen from the materials in the Appendix, many Bar Associations successfully make use of three, or even four, potential ratings. Notably, the American Bar Association uses a three-tier rating system for candidates to the Federal bench.

The end product of any effective screening process should be to provide voters with useful, actionable information to assist them in making an informed choice among candidates for judicial office. To this end, it seems essential that there should be a ratings distinction between a candidate with exceptional qualifications and attributes versus a candidate who only meets the minimum standards. A two-tier, "Approved" or "Not Approved" rating system fails to meet the primary objective of encouraging judicial excellence.

Among other things, a two-tiered rating system works to the distinct disadvantage of judges who are running for reelection. In other words, a judge who is running for

reelection could be rated the same as someone who has no prior judicial experience, but is qualified to serve as a judge. A three-tiered rating system can properly account for relevant judicial experience, particularly in contested elections. This is significant because a number highly qualified and experienced judges have lost contested elections.¹

In closing, we wish to emphasize our unwavering commitment to an effective and robust screening system for candidates to elected judicial office, so that all New Yorkers may continue to enjoy the benefits of a strong, independent and highly qualified judiciary. We extend our heartfelt thanks to all members of the Task Force for their tremendous effort in support of this mission and are grateful for the opportunity to participate in this vitally important discussion.

¹ Further, while we understand that the subject of retention elections is beyond the scope of the Report, the Judicial Section hopes that the NYSBA will, in the near future, study whether New York should institute a system of retention elections. The NYSBA has, in the past, endorsed the use of retention elections. As an example of a retention election system, Pennsylvania provides that after a judge has won an initial partisan election, subsequent terms are attained through retention elections, in which judges do not compete against another candidate, but voters are given a "yes" or "no" choice whether to keep the judge in office for another term. If the candidate receives more yes votes than no votes, he or she is successfully retained. If not, the candidate is not retained and the vacancy created at the expiration of that term will be filled through a partisan election.

COMMENTS BY A VINCENT BUZARD on the Report of the Task Force on the
Evaluation of Candidates for Election to Judicial Office March 15, 2019

These comments are based upon my experience of over 25 years in judicial evaluations which includes developing a new judicial evaluation system as President of the Monroe County Bar Association, serving for many years on the Governor's Judicial Screening Commission for the Fourth Department, chairing and serving as a member of the State Bar Judicial Screening Committee, serving as the first chair of the Independent Screening Commission for the Seventh Judicial District by appointment of Judge Kaye for the maximum two terms.

As I said at the January House of Delegates meeting the co-chairs and members of the Task Force are to be congratulated for preparing an exhaustive report in a short period of time. The report and our deliberations and conclusions are critical to one of the core missions of the State Bar which is to assure that we have the best possible judiciary.

The Appeal Should Not Be Reviewed De novo

I completely agree with the recommendation that the determinations of the judiciary committees should stand on their own and not be considered merely recommendations to the governing board. My experience is that the more governing boards become involved in judicial evaluation the more subjective and inappropriate influences can come into play. While you recommend great care to be taken in the appointment of the judiciary committee, there are no such limitations on the governing board.

For that reason, I strongly recommend that the standard of review in any appeals process not be de novo. Unless there is a standard such as "clearly erroneous", "arbitrary and capricious" or other similar standard of review, members of the board can and sometimes will substitute their judgment for the committees without finding any error on the part of the committee reversing the judiciary committee. That decision can be based on second-guessing the judiciary committee, personal concerns for the candidate found unqualified, political concerns or other irrelevant factors.

Further, a properly functioning judiciary committee will have put hours into the rating while the board does not have the time to devote to the subject. In other words all of the time-consuming work of the judiciary committee can simply be set aside because the board would have made a different decision. I ask that the report and recommendations be amended to discuss the importance of making clear that the appeal is subject to a de novo but rather subject to a higher specified standard of the local bars choosing.

A Two-Tier and Three-Tier Rating System Should Both Be as a Best Practice Depending upon Local all will will

Best practices should not be limited to a qualified or not qualified rating. My experience is that a judiciary committee will be confronted with a range of candidates from those who barely meet the minimum standards but must be found qualified to those who are highly qualified and the

caliber of person we want to have on the bench. Under a two-tier system the committee must tell the public that both candidates have the same rating so that the voter can vote with equal confidence in either which is not the actual case. Whether the candidate will be an excellent judge or a minimally adequate judge is not readily apparent to the voters. Our duty is to tell the voters the difference where possible.

The State Bar Association should not be on record that the sole best practice is to only tell the public which candidates meet minimum standards but not identify those candidates who are highly qualified. The Association has a long history of advocating for the best quality judiciary possible and that tradition should not be abandoned now by telling local bar associations that the best practice is to not identify candidates who are highly qualified.

A three-tier rating system including distinguishing between qualified and highly or well qualified candidates can be done because it is being done . A candidate for appointment by the Governor to vacancies in the lower courts and the Appellate Division must be found to be highly qualified by the Governor's Judicial Screening Commission to be forwarded to the governor for appointment. The Governor's Commission for Court of Appeals nominees forwards the names of only those candidates who are determined to be highly qualified The State Bar screens candidates for appointment to the Court of Appeals using a three-tier rating system with well-qualified being the highest.

According to the Task Force report five of the nine larger bar associations doing evaluations have a rating for highly qualified or highly recommended candidates. Three of the smaller Bar Association's have a rating of three or more tiers with only one with two tiers.

Apparently the Task Force is concerned about lack of participation with multiple tiers but the actual practice of the bars prove that a multiple tier system can work. There is no evidence in the report that all these bars are failing for lack of participation. Furthermore the State Bar Association should not say to each of these bars with multiple tier systems that they should change their system so that they are not identifying highly qualified or highly recommended candidates.

A solution is to amend report so that both a three tier and two-tier system can both be considered best practices according to local determination. The language in the recommendations and in the list of best practices could read as follows:

“If a bar Association finds that it can only do a two-tier ranking because of an unacceptable number of candidates choosing not to participate then a two-tier system under the circumstances can be deemed to be a best practice. If a bar association finds that it can establish an evaluation that determines whether a candidate is unqualified, qualified or highly qualified and not have an unacceptable level of nonparticipation by candidates then the best practice is to have a three-tier system using whatever rating terms they may choose”.

Such language would accommodate concerns about unacceptable levels of nonparticipation but would also provide for identifying highly qualified candidates where possible.

Local Bar Should Be Given A Broader Choice of Ratings Terminology

On the issue of ratings, my view is that “approved “ or “not approved “ is not strong and the clearest ratings are “highly qualified,” “qualified” and “not qualified”. However, I believe that reasonable people can differ and if the purpose of the best practices is to not recommend a one-size-fits-all then the report could specify the various acceptable options for ratings and let local bar associations decide rather than saying only one set of terms constitutes a best practice.

Guidance On Investigations Should Be Provided

Under investigations and meetings, I would give more guidance as to what constitutes an appropriate investigation. The investigation in my experience should include requiring the candidate to submit samples of written work product. A surprising number of practicing lawyers are unable to submit work product other than demand letters or other writings but have never written a brief. All writings should be carefully reviewed by the subcommittee. The subcommittee should also call lawyers who have had cases with and preferably against the candidate and lawyers who have appeared in front of sitting judges seeking reelection or higher judicial office. Calls should not be limited to people whom the candidate identifies as references which will be predictably favorable interviews of the candidates is necessary and can be helpful. However, I have found many times that a candidate who interviews well maybe a person who absolutely should not be on the bench or continue on the bench. Only by extensive interviewing can those distinctions be validly made. This may seem self-evident, but I have served on screening panels where none of this was done and sole reliance was on the application and the interview which was certainly not a best practice.

For many decades the Monroe County Bar Association conducted a survey of lawyers in the community which was highly successful. I still believe surveys of lawyers should be encouraged but that may be more of a job that some bars can undertake. That option could certainly be discussed in the report.

Secret Ballots should be recommended

I have also found that voting by the screening committee is best done by secret ballot. That is a practice on the State Bar screening committee, and a number of the bar association's. People do not want to be afraid that their unfavorable vote will be reported to the candidate. I also have observed that with oral votes people attempt to talk the people voting unqualified out of their position and some will cave to pressure,

I hope the members of the Task Force and the House find these comments useful. If you wish to discuss them I can be reached at 585-586-1929 or email at avincentbuzard@gmail.com

Proposed Changes to the Informational Report of the NYSBA Task Force on the Evaluation of Candidates for Judicial Office

I. Executive Summary, top p. 8

Drop the sentence that reads: “Nearly three-quarters of the state’s population is currently being well served by the work of the local bar associations.”

Alternatively, insert the following before that sentence: “In Monroe County, the bar association has sought with some success to achieve at least the public information goal of judicial evaluations in other ways.” This addition probably necessitates a change in the percentage of the state’s population that “is currently being well served by the work of the local bar associations.”

II. Subsection (d), p. 25

Replace the existing language with:

“After an extensive year-long process led by a task force of the MCBA comprised of representatives of the political parties, lawyers and retired judges, MCBA decided to suspend judicial evaluations to examine how to effectively communicate with and educate the public about judicial candidates. The process had caused controversy and friction between the judiciary and the Bar, and was not effective in achieving its goal of informing the public, as candidates that were rated Not Qualified were repeatedly elected. Over the last two election cycles, MCBA has held a public forum in which candidates who chose to appear could respond to questions from a panel of lawyers and a series of programs broadcast on NPR where candidates were interviewed and able to respond to callers. MCBA continues to evaluate and explore how to best serve its members and the public by effectively informing and educating the public about the qualifications of judicial candidates.”

March 14, 2019

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**Immediate
Past President**
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New York State Bar Association
House of Delegates
c/o Michael Miller, President
One Elk Street
Albany, New York 12207

**re: NYSBA Report of the Task Force on the Evaluation of Candidates for
Election to Judicial Office (“Report”)**

To the New York State Bar Association House of Delegates:

On March 11, 2019, the Board of Directors of the New York County Lawyers Association discussed the Report following a presentation from Robert L. Haig, Co-Chair of the New York State Bar Association Task Force on the Evaluation of Candidates for Election to Judicial Office. At this meeting the Board voted to endorse the Report and encourage its approval by the New York State Bar Association House of Delegates at its April 13, 2019 meeting.

NYCLA would like to thank its Judicial Section, chaired by Hon. Judith J. Gische, for its time and effort in considering the Report, and adopting a resolution supporting the Report at its January 10, 2019 meeting with an accompanying letter to the President, a copy of which is attached as *Annex A*.

NYCLA commends the work of the Task Force on the Evaluation of Candidates for Election to Judicial Office.

Sincerely,



Michael J. McNamara
President

cc: Mr. Robert L. Haig, *Co-Chair*, NYSBA Task Force on the Evaluation of Candidates for Election to Judicial Office
Hon. Susan Phillips Read, *Co-Chair*, NYSBA Task Force on the Evaluation of Candidates for Election to Judicial Office
Hon. Judith J. Gische, *Chair*, NYCLA Judicial Section
Ms. Kathy Baxter, *General Counsel*, New York State Bar Association

ANNEX A



*Supreme Court Appellate Division
First Department*

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212-340-0400

Judith J. Gische
Associate Justice

Michael J. McNamara, Esq.
President
NYCLA
14 Vesey Street
New York, NY 10007

Via e-mail

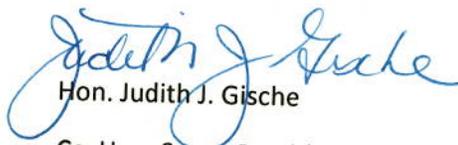
January 22, 2019

Dear Mr. McNamara:

As chair of the Judicial Section at NYCLA I am enclosing a recent resolution adopted by the section at its last regularly scheduled meeting. The resolution supports NYCLA voting at the next House of Delegates meeting in favor of any resolution adopting the Informational Report and Recommendations made by the New York State Bar Association's Task Force on the Evaluation of Candidates. A copy of the resolution is attached. The co-chairs of the Task Force met with the section on January 10, 2019. Before that meeting the report was made available to the members of my section. A motion was made at the meeting to adopt a resolution supporting the report. It was approved by all those members present.

We hope that the NYCLA Board will favorably consider our resolution.

Very truly yours,


Hon. Judith J. Gische

Cc: Hon. Susan Read (via email reads@gtlaw.com)

Robert Haig, Esq. (via email RHaig@kelleyDrye.com)

NYCLA

Judicial Section Resolution

January 17, 2019

Wherefore in December 2018 the New York State Bar Association Task Force on the Evaluation of Candidates for Election to Judicial Office published an informational report (Informational Report and Recommendation) containing: results of surveys undertaken by it from interested parties, analysis of current judicial screening practices across New York State, practices in other states, and recommendations, including recommendations on best practices for Bar Association Evaluation Committees,

And

Wherefore on January 10, 2019 at a regularly scheduled meeting of the Judicial Section, Task Force co-chairs Hon. Susan Read and Robert Haig, Esq. came to further discuss and answer questions about the Informational Report and Recommendations,

Now on motion

It is hereby resolved that the Judicial Section supports NYCLA voting in support of a resolution adopting the Informational Report and Recommendations at the next New York State Bar Association meeting of the House of Delegates.



NASSAU COUNTY BAR ASSOCIATION

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April 2, 2019

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Kevin M. Kerwin, Esq.
New York State Bar Association
1 Elk Street
Albany, NY 12207

Dear Mr. Kerwin:

The Nassau County Bar Association (NCBA) Judicial Section recently received the report of the New York State Bar Association Task Force on the Evaluation of Candidates for Election to Judicial Office for comment. Upon review by the members of the Judicial Section, and approved by the NCBA Board of Directors on March 14, the following comments are offered by the Nassau County Bar Association for the Task Force's consideration:

The Judicial Section applauds the efforts undertaken by the distinguished task force in preparing this comprehensive report. It is noteworthy that the report is the result of public hearings, surveys of bar associations, members of the Independent Judicial Elections Qualification Commissions, judges and political leaders.

In Nassau County, the NCBA Judiciary Committee assumes the task of reviewing candidates and responded to the survey with an outline detailing their procedures and methodology. Fortunately, those NCBA procedures were compatible with the Report's final Recommendations.

The Judicial Section anticipates that the NCBA will continue to keep their current practices and be mindful of the Report recommendations.

Should you have any questions, feel free to contact NCBA Judicial Section Chair Gary Knobel at gknobel@nycourts.gov or Vice-Chair Elizabeth Pessala at epessala@courts.state.ny.us.

Sincerely,

ELIZABETH POST
NCBA Executive Director

**RESOLUTION ADOPTED BY HOUSE OF DELEGATES
JANUARY 18, 2019
TO GOVERN CONSIDERATION OF THE REPORT AND
RECOMMENDATIONS OF THE TASK FORCE ON
EVALUATION OF CANDIDATES FOR ELECTION TO JUDICIAL OFFICE**

RESOLVED, that the House of Delegates hereby adopts the following procedures to govern consideration at the April 13, 2019 meeting of the House, and any subsequent meetings as may be necessary, of the report and recommendations of the Task Force on Evaluation of Candidates for Election to Judicial Office:

1. The report and recommendations of the Task Force will be circulated to members of the House, sections and committees, county and local bar associations, and other interested parties.
2. **Comments on report and recommendations:** Any comments on the Special Committee's report or particular recommendations contained therein must be submitted in writing to the Secretary of the Association at the Bar Center by March 15, 2019; otherwise they shall not be considered. All comments complying with this procedure shall be distributed to the members of the House in advance of the April 13, 2019 meeting.
3. **Consideration of the report and recommendations at the April 13, 2019 meeting and any subsequent meetings:** The report and recommendations will be scheduled for formal debate and vote at the April 13, 2019 meeting and considered in the following manner:
 - a. The Task Force shall be given an opportunity to present its report and recommendations.
 - b. All those wishing to speak with regard to the report and recommendations may do so only once for no more than three minutes.
 - c. The Task Force may respond to questions and comments as appropriate.
 - d. Procedural motions shall be considered out of order until debate on substantive issues is concluded.
 - e. A vote on the report and recommendations shall be taken at the conclusion of the debate.



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #12

REQUESTED ACTION: Approval of the report and recommendations of the New York City Bar Association.

In 2010, the NYSBA Committee on Standards of Attorney Conduct, together with the New York City Bar Association and the New York County Lawyers Association, proposed a new Part 522 of the Rules of the Court of Appeals to permit in-house counsel admitted in other jurisdictions but working in New York to register and provide legal services to the lawyer's employer. The Court of Appeals adopted Part 522 in 2012 and amended the rules in 2013 to permit pro bono work by registered in-house counsel.

The attached report from the New York City Bar Association recommends amendments to part 522. The amendments would (a) Expand the grace period for filing an application from 30 to 90 days; (b) clarify that there is no residency requirement; (c) Permit registration by attorneys who are not employed full time in New York; (d) provide a one-time cure period for attorneys who have not complied with the rule; (e) limit the reciprocity provision to lawyers registered in other U.S. jurisdictions; (f) amend the requirement that foreign lawyers maintain active bar membership if their home jurisdiction prohibits the lawyers from doing so; and (g) allow foreign lawyers who are unable to provide required documentation due to their home jurisdictions' legal systems to apply for admission via affidavit.

The report was posted for comment in the Reports Community on February 11. No comments have been received.

Steven Fink, Chair of the NYC Bar's Professional Responsibility Committee drafting subcommittee, will present the report at the April 13 meeting.

REPORT BY THE PROFESSIONAL RESPONSIBILITY COMMITTEE

**PROPOSED AMENDMENT TO NEW YORK COURT OF APPEALS PART 522
RULES FOR THE REGISTRATION OF IN-HOUSE COUNSEL¹**

I. SUMMARY

The Professional Responsibility Committee of the New York City Bar Association proposes amendments to the New York Court of Appeals Part 522 (“Rules for the Registration of In-House Counsel”) in order to expand the grace period for filing of an application, to clarify that there is not a residency requirement and also to permit attorneys who are not “full time” in New York to register under the program. To encourage in-house counsel who are already delinquent under the current Part 522 to register, we also propose the announcement and provision of a cure period of 90 days in connection with announcing the changes.² Finally, we propose amendments to the foreign lawyer registration provisions of Part 522 in order to eliminate the reciprocity requirement for foreign lawyers and to permit foreign lawyers working in-house, under certain circumstances, to apply using an affidavit.

II. RATIONALE FOR THE PROPOSAL

We strongly support the in-house counsel registration program described in Part 522 because we believe it promotes accountability for applicants and awareness by courts. Before the program, in-house lawyers not admitted in New York faced a kind of limbo in which it was not clear whether their legal work, performed entirely within and for their New York employer organizations, nonetheless could be viewed as engaging in the unauthorized practice of law in New York. We believe that a few simple revisions could further the benefits of the program. Moreover, we believe that amendments clarifying admission requirements for foreign lawyers working in New York as in-house counsel will help to preserve New York’s position as the world’s preeminent center for the practice of law and international business.

a. Expand Grace Period from 30 to 90 Days

In-house counsel who move to the State from other jurisdictions may not learn about Part 522 until after they have begun work in New York, particularly in instances where their employers give them short notice that they will need to relocate to New York. Moreover, satisfying the requirement for certificates of good standing from foreign jurisdictions (where applicable) may

¹ This report has been reviewed and approved by the Committee on Standards of Attorney Conduct of the New York State Bar Association.

² The proposed language of the amendment is set forth in an appendix immediately following this report.

cause delay. For these reasons, we suggest providing more of a cushion. While leniency may be granted to those who apply on their 31st day (a day late), those who miss this deadline may in some cases decide simply not to apply out of the fear that applying late will result in a penalty or discipline. We see only upside to increasing the current grace period from 30 to 90 days. New York's 30-day application period is the shortest in the country among jurisdictions that specify a time period for registration of foreign in-house counsel.³

b. Clarify that There Is No Residency Requirement

We understand, anecdotally, that some clerks who review these applications have been reading a residence requirement into Part 522, even though there is no language supporting such a requirement. Thus, if an applicant were to list a home address outside of New York or the tri-state area, the applicant might not be permitted to register. We do not believe that the policy underlying the program is furthered when a residence requirement is imposed, as it necessarily excludes foreign lawyers working in-house in New York but who reside outside the tri-state area and thus permits fewer foreign lawyers working in some capacity as in-house counsel in the State to register.

c. Permit Attorneys Who Are Not Employed “Full Time” in New York to Register under the Program

We propose amending Part 522 to permit attorneys who practice as in-house counsel in New York on a part time basis to register under the rule. The current rule permits registration only by attorneys who are employed as in-house counsel full time in the State. “Part-time” applicants would include, for example, lawyers with childcare responsibilities or transitioning back into the workforce and in-house counsel who are not employed 100% of the year in New York (or perhaps do not know whether that will be the case) but nevertheless will be working here on a permanent and recurring basis. We see no reason why such lawyers should not be permitted to register and enjoy the legitimacy, accountability and safe harbor in-house counsel registration represents.

d. Provide a One-Time Cure Period of Three Months in Connection with Announcing the Changes

Announcement of the proposed changes would be a natural time to announce a one-time cure period for in-house counsel who are eligible but have not yet registered under Part 522. Encouraging such lawyers to register furthers the policy objectives of an in-house counsel registration requirement by fostering accountability on the part of foreign in-house counsel and awareness on the part of courts and the public. Furthermore, under this proposed amendment,

³ Six jurisdictions provide for 90-day grace periods. See AZ ST S CT r. 38(a)(4) (2017); CONNECTICUT BAR EXAMINING COMMITTEE AUTHORIZED HOUSE COUNSEL RULE 5, effective Jan. 1, 2008: <https://www.jud.ct.gov/CBEC/housecounsel.htm#Forms> (citing CONN. RULE OF SUPER. CT. § 2-15A(b)(1)(D) (2018)); ILL. S. CT. RULE 716(l) (2018); IOWA CT. RULE 31.16(1) (2017); KAN. S. CT. Rule 712(a)(1)(b) (2018). One provides for a 60-day grace period. WIS. S. CT. Rule 10.03(4)(f) (2018). While the majority of U.S. jurisdictions with registration requirements have not specified grace periods, we have no data on whether they apply one in practice. We believe that specifying a 90-day grace period will serve to encourage compliance with the Rule and is particularly appropriate for non-US lawyers moving to New York, in some instances on short notice. (All websites cited in this letter were last visited on January 31, 2019.)

part-time in-house counsel would be eligible to register. A cure period will give part-time in-house counsel already practicing in New York, but who have not yet registered, an opportunity to do so.

e. Limit the Reciprocity Requirement to Lawyers Registered in Other U.S. Jurisdictions

We propose limiting the reciprocity requirement in Part 522.1(b)(2) to apply only to lawyers registered and in good standing in another jurisdiction within the United States. Of the twenty-three (23) U.S. jurisdictions that permit foreign lawyers to practice as in-house counsel, New York is the only state that requires reciprocity from foreign jurisdictions as a condition for permitting in-house counsel to practice. New York’s reciprocity requirement makes compliance with the Rule impossible for in-house counsel from the many jurisdictions that do not permit in-house counsel to be members of their local bars or to maintain professional licenses during their employment as in-house counsel.⁴ At the same time, because membership in the local bar is not permitted in these jurisdictions, and is not required in a number of other jurisdictions even where it is permitted, New York lawyers may be employed as in-house counsel in many if not all of these jurisdictions and so the goal of a reciprocity requirement (ensuring that New York lawyers will not be precluded from working abroad) will be satisfied without imposing a formal requirement.⁵ Moreover, many international transactions are governed by New York law and so there is a demand for New York lawyers outside the United States. The opposite, however, cannot be said to be true. For example, if a Norwegian lawyer were to work as in-house counsel in New York and could only advise on Norwegian law, that in-house counsel would likely be of little utility. By limiting the reciprocity requirement to lawyers registered outside of New York, but inside of the United States, Part 522 will no longer prevent admission of otherwise qualified lawyers who have come from foreign jurisdictions to work and practice law in New York. Their emigration to serve as in-house counsel in New York supports New York’s efforts to both maintain and promote strength and diversity in its international business and legal practices.⁶

⁴ An informal survey conducted by the Litigation Committee of the ABA Section of International Law of 70 jurisdictions on four continents concluded that in “more than 70% of the researched countries . . . in-house counsel would not be able to obtain a certificate of good standing, because professional licenses and bar membership are prohibited for in-house counsel.” See Report “The Regulation of In-House Counsel Across International Markets,” March 2015. “The data also indicates that many jurisdictions impose comparable education requirements to the US in order for a lawyer to be admitted to the practice of law, and in many instances, in particular in Europe, impose rigorous training requirements for all lawyers.” While the ABA approach is to give the courts discretion in determining whether to permit registration by applicants from jurisdictions that do not provide reciprocity, we believe that a bright-line rule has the advantages of clarity and reducing the burden on the New York courts.

⁵ By way of example, Belgian lawyers working as in-house counsel cannot be active members of a Belgian bar association, but they must register with the Instituut voor Bedrijfsjuristen (IBJ)/Institut des juristes d’entreprise (IJE) (the “Institute”) as in-house counsel. March 1, 2000 – Act Creating an Institute of Corporate Jurists Art. 6 § 6 (2000). A New York lawyer is permitted to register with the Institute as in-house counsel and will receive all of the same benefits and oversight as a Belgian member. *Id.* at Art. 4 § 1(1). Similarly, a New York lawyer working in-house in England and Wales may register as a Registered Foreign Lawyer. Such registration is not required, but registration increases the scope of services that may be provided by such in-house lawyer. See Solicitors Regulation Authority Handbook, Rule 3.4(b) (Scope of Practice) (2017).

⁶ Alternatively, if there is not sufficient support to eliminate the reciprocity requirement altogether by way of amendment to the Rule, we propose an amendment that would permit foreign in-house counsel to establish reciprocity by affidavit in instances where their home jurisdiction has not promulgated any law or regulation that may be cited to confirm that New York lawyers may serve as in-house attorneys in that jurisdiction.

f. Amend the Requirement that Foreign Lawyers Remain Active Members of the Bar in Their Home Jurisdictions Where Laws in Those Jurisdiction Prevent It

In a number of jurisdictions in Europe—France, Italy, Sweden and Belgium, for instance— in-house counsel are not considered sufficiently independent to be members of the bar. In these countries, lawyers who are members of the bar must suspend their bar memberships while practicing in-house. Ultimately, if they have kept up with the various training and continuing education requirements for bar membership in these foreign jurisdictions, in-house lawyers are able to enter or reenter the bar as active members in good standing upon entering or returning to private practice. Accordingly, we believe that foreign lawyers in this position should not be barred from registration in New York. These lawyers should be equally qualified to practice in-house in New York as lawyers who can remain active members of the bar in their home jurisdictions. We also believe that these lawyers could be subject to effective discipline by New York should they fail to follow the New York Rules of Professional Conduct: they could be prevented from practicing in New York and sanctions here would no doubt impede their ability to practice as in-house counsel in foreign countries and to be admitted or readmitted to the bar in foreign countries.

g. Allow Foreign Lawyers Excluded by the Structure of Legal Oversight in Their Home Jurisdictions to Apply for Admission Via Affidavit

Where qualified foreign lawyers are unable to provide assurances, certifications and/or proof of good standing due to structural constraints within the legal systems of their home jurisdictions, New York should provide these individuals with an alternative mechanism for admission. We believe the best mechanism to accomplish this is to allow for admission using an affidavit, along with supporting documentation sufficient to establish that (a) the lawyer is unable to comply with provisions of Part 522 due to structural constraints within his home jurisdiction; and (b) the lawyer is in good standing in the lawyer's home jurisdiction, as required by Part 522, or the lawyer's bar membership has been suspended because the lawyer is working in-house, but may be reinstated upon a showing that the lawyer has an independent legal practice. This practice will help to ensure that foreign lawyers who, in fact, are well-qualified registration applicants are not rejected admission.

We respectfully urge adoption of these amendments to simplify, clarify and broaden the in-house counsel registration requirement which, in turn, will benefit foreign in-house counsel as well as New York State's residents and courts.

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APPENDIX

Part 522 with proposed new language double underlined and deletions struck through (the only proposed changes are in §§ 522.1, 522.2, 522.3(a), 522.5(a), 522.7(a) and 522.8)

Part 522 - Rules for the Registration of In-House Counsel

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§ 522.1 Registration of In-House Counsel

(a) In-House Counsel defined. An in-house counsel is an attorney who is employed full time or part time in this State by a non-governmental corporation, partnership, association, or other legal entity, including its subsidiaries and organizational affiliates, that is not itself engaged in the practice of law or the rendering of legal services outside such organization. An attorney is not required to reside in New York State or an adjacent state in order to register under this Part.

(b) In its discretion, and in accordance with Section 522.1(a), the Appellate Division may register as in-house counsel an applicant who:

- (1) (i) has been admitted to practice in the highest law court in any other state or territory of the United States or in the District of Columbia; or (ii) is a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or public authority where such an authority both exists and holds in good standing compliant members employed as in-house counsel; or (iii) where no such authority exists, or where such authority exists but suspends the membership of members employed as in-house counsel, is trained and licensed as a lawyer in a foreign jurisdiction and eligible to join the bar of such foreign jurisdiction, if such a bar exists, or is otherwise eligible to engage in the private practice of law in such jurisdiction, upon ceasing to be employed as in-house counsel.
- (2) is currently admitted to the bar as an active member in good standing in at least one other jurisdiction, within ~~or outside~~ the United States, which would similarly permit an attorney admitted to practice in this State to register as in-house counsel; ~~and~~ or (i) was admitted to the bar in at least one other jurisdiction outside the United States and either is a current

active member in good standing or has a bar membership that has been suspended because the applicant is employed as in-house counsel, but the applicant is eligible to again become an active member in good standing upon a showing that the applicant is no longer working as in-house counsel; or (ii) is otherwise trained as a lawyer and permitted to provide legal services in a foreign jurisdiction and eligible to join the bar of such foreign jurisdiction, if such a bar exists, or is otherwise eligible to engage in the private practice of law in such jurisdiction, upon ceasing to be employed as in-house counsel; and

- (3) possesses the good moral character and general fitness requisite for a member of the bar of this State.

§ 522.2 Proof required

An applicant under this Part shall file with the Clerk of the Appellate Division of the department in which the applicant resides, is employed or intends to be employed as in-house counsel:

(a) (i) a certificate of good standing from each jurisdiction in which the applicant is licensed to practice law; or, (ii) if the foreign jurisdiction in which the applicant is licensed to practice law does not issue such certificates, an affidavit along with relevant supporting documentation confirming that the applicant is trained as a lawyer and eligible to join the bar of such foreign jurisdiction, if such a bar exists, or is otherwise eligible to engage in the private practice of law in such jurisdiction, upon ceasing to be employed as in-house counsel;

(b) (i) a letter from each such jurisdiction's grievance committee, or other body entertaining complaints against attorneys, certifying whether charges have been filed with or by such committee or body against the applicant, and, if so, the substance of the charges and the disposition thereof; or, (ii) if the foreign jurisdiction in which the applicant is licensed does not provide such letters, an affidavit certifying whether charges have been filed with or by such committee or body against the applicant, and, if so, the substance of the charges and the disposition thereof;

(c) an affidavit certifying that the applicant:

(1) performs or will perform legal services in this State solely and exclusively as provided in section 522.4; and

(2) agrees to be subject to the disciplinary authority of this State and to comply with the New York Rules of Professional Conduct (22 NYCRR Part 1200) and the rules governing the conduct of attorneys in the judicial department where the attorney's registration will be issued; and

(d) an affidavit or affirmation signed by an officer, director, or general counsel of the applicant's employer, on behalf of said employer, attesting that the applicant is or will be employed as an attorney for the employer and that the nature of the employment conforms to the requirements of this Part.

(e) Documents in languages other than English shall be submitted with a certified English translation.

§ 522.3 Compliance

An attorney registered as in-house counsel under this Part shall:

(a) (i) remain an active member in good standing in at least one state or territory of the United States or in the District of Columbia or a foreign jurisdiction as described in section 522.1(b)(1); or, (ii) if the attorney has never obtained such membership by virtue of having spent the attorney's entire career as in-house counsel in a jurisdiction in which in-house counsel are not required or permitted to have such membership, or the attorney's membership in a foreign jurisdiction has been suspended because of the attorney's employment as in-house counsel, the attorney will remain eligible to join the bar of such foreign jurisdiction, if such a bar exists, or otherwise remain eligible to engage in the private practice of law in such jurisdiction upon ceasing to be employed as in-house counsel;

(b) promptly notify the appropriate Appellate Division department of a disposition made in a disciplinary proceeding in another jurisdiction;

(c) register with the Office of Court Administration and comply with the appropriate biennial registration requirements; and

(d) except as specifically limited herein, abide by all of the laws and rules that govern attorneys admitted to the practice of law in this State.

§ 522.4 Scope of legal services

An attorney registered as in-house counsel under this Part shall:

(a) provide legal services in this State only to the single employer entity or its organizational affiliates, including entities that control, are controlled by, or are under common control with the employer entity, and to employees, officers and directors of such entities, but only on matters directly related to the attorney's work for the employer entity, and to the extent consistent with the New York Rules of Professional Conduct;

(b) not make appearances in this State before a tribunal, as that term is defined in the New York Rules of Professional Conduct (22 NYCRR 1200.0 Rule 1.0[w]) or engage in any activity for which *pro hac vice* admission would be required if engaged in by an attorney who is not admitted to the practice of law in this State;

(c) not provide personal or individual legal services to any customers, shareholders, owners, partners, officers, employees or agents of the identified employer; and

(d) not hold oneself out as an attorney admitted to practice in this State except on the employer's letterhead with a limiting designation.

§ 522.5 Termination of registration

(a) Registration as in-house counsel under this Part shall terminate when:

- (1) the attorney ceases to be an active member in another jurisdiction or otherwise qualified under section 522.1(b)(2); or
- (2) the attorney ceases to be an employee of the employer listed on the attorney's application, provided, however, that if such attorney, within 30 days of ceasing to be such an employee, becomes employed by another employer for which such attorney shall perform legal services as in-house counsel, such attorney may request continued registration under this Part by filing within said 30-day period with the appropriate Appellate Division department an affidavit to such effect, stating the dates on which the prior employment ceased and the new employment commenced, identifying the new employer and reaffirming that the attorney will provide legal services in this State solely and exclusively as permitted in section 522.4. The attorney shall also file an affidavit or affirmation of the new employer as described in section 522.2(d) and shall file an amended statement within said 30-day period with the Office of Court Administration.

(b) In the event that the employment of an attorney registered under this Part ceases with no subsequent employment by a successor employer, the attorney, within 30 days thereof, shall file with the Appellate Division department where registered a statement to such effect, stating the date that employment ceased. Noncompliance with this provision shall result in the automatic termination of the attorney's registration under this Part;

(c) Noncompliance with the provisions of section 468-a of the Judiciary Law and the rules promulgated thereunder, insofar as pertinent, shall, 30 days following the date set forth therein for compliance, result in the termination of the attorney's rights under this Part.

§ 522.6 Subsequent admission on motion

Where a person registered under this Part subsequently seeks to obtain admission without examination under section 520.10 of the Rules of this Court, the provision of legal services under this Part shall not be deemed to be the practice of law for the purpose of meeting the requirements of section 520.10(a)(2)(i).

§ 522.7 Saving Clause and Noncompliance

(a) An attorney employed as in-house counsel, as that term is defined in section 522.1(a), shall file an application in accordance with section 522.2 within ~~30~~90 days of the later of commencement of such employment or the effective date of this amendment;

(b) Failure to comply with the provisions of this Part shall be deemed professional misconduct, provided, however, that the Appellate Division may upon application of the attorney grant an extension upon good cause shown.

§ 522.8 Pro bono legal services

Notwithstanding the restrictions set forth in section 522.4 of this Part, an attorney registered as in-house counsel under this Part may provide pro bono legal services in this State in accordance with New York Rules of Professional Conduct (22 NYCRR 1200.0) rule 6.1(b) and other comparable definitions of pro bono legal services in New York under the following terms and conditions. An attorney providing pro bono legal services under this section:

(a) shall be admitted to practice and in good standing in another state or territory of the United States or in the District of Columbia and possess the good moral character and general fitness requisite for a member of the bar of this State, as evidenced by the attorney's registration pursuant to section 522.1(b) of this Part;

(b) pursuant to section 522.2(c)(2) of this Part, agrees to be subject to the disciplinary authority of this State and to comply with the laws and rules that govern attorneys admitted to the practice of law in this State, including the New York Rules of Professional Conduct (22 NYCRR Part 1200.0) and the rules governing the conduct of attorneys in the judicial department where the attorney's registration is issued;

(c) may appear, either in person or by signing pleadings, in a matter pending before a tribunal, as that term is defined in New York Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.0(w), at the discretion of the tribunal, without being admitted pro hac vice in the matter. Prior to any appearance before a tribunal, a registered in-house counsel must provide notice to the tribunal that the attorney is not admitted to practice in New York but is registered as in-house counsel pursuant to this Part. Such notice shall be in a form approved by the Appellate Division; ~~and~~

(d) shall not hold oneself out as an attorney admitted to practice in this State, in compliance with section 522.4(d) of this Part; and

(e) if registered under section 522.3(a)(ii), shall only provide such pro bono legal services under the direct supervision of a duly registered New York lawyer.



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #13

REQUESTED ACTION: Approval of the report and recommendations of the Task Force on Incarceration Release Planning and Programs.

Attached is a report from the Task Force on Incarceration Release Planning and Programs. The Task Force was appointed in 2018 to recommend policy changes and best practices for incarceration release programs, including options for those released in rural and urban settings; substance abuse and mental health treatment; housing options; and the impact on recidivism and public safety resulting from inadequate release planning. In its report, the Task Force makes 34 recommendations within eight substantive sections:

- Addressing barriers to utilizing the expertise of formerly incarcerated people.
- Bolstering and expanding eligibility for rights restoration and ensure that formerly incarcerated people know of these mechanisms and can access them.
- Ensuring access to public assistance benefits.
- Ensuring adequate housing.
- Promoting access to education both in and out of prison.
- Identifying and treating people with substance abuse or mental health issues.
- Examining the unintended consequences to laws and policies regarding people with sex offense convictions.
- Providing adequate funding for pre-release planning and re-entry.

The Task Force notes that its work derives from two principles: (1) re-entry must begin at the point of arrest, be attentive to a person's individual needs, and strive to incorporate community resources; and (2) we must prioritize rehabilitation over punishment.

The report references seven appendices: For the sake of reproduction, the appendices are not included in the printed materials, but may be accessed online at www.nysba.org/releasereport

The Task Force's report was published in the Reports Community on March 1. Attached are letters from the NYSBA Committee on Mandated Representation, the Committee on Legal Aid/President's Committee on Access to Justice, the Committee on Diversity and Inclusion, and the IOLA Fund of the State of New York indicating support for the report.

The report will be presented at the April 13 meeting by Task Force co-chairs Scott M. Karson and Sherry Levin Wallach.



**THE NEW YORK STATE BAR ASSOCIATION
REPORT OF THE TASK FORCE
ON INCARCERATION RELEASE
PLANNING AND PROGRAMS
2019**

This Task Force is solely responsible for the contents of this report.
This report is not the official position of the New York State Bar Association unless
and until it is adopted in whole or in part by the House of Delegates of the
Association

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PREFACE

“We must accept the reality that to confine offenders behind walls without trying to change them is an expensive folly with short-term benefits—winning battles while losing the war. It is wrong. It is expensive. It is stupid.”¹

– former U.S. Supreme Court Chief Justice Warren E. Burger

Since its founding in 1876, the New York State Bar Association has dedicated itself to a number of laudable goals, including promoting reform in the law, facilitating the administration of justice and advocating for the rights and liberties of all New Yorkers. Consistent with these goals, the Association has long been active in study and advocacy concerning laws, policies and practices pertaining to the release of incarcerated persons from New York State prisons and jails.

In 2006, a special committee of the Association issued a report entitled, *Re-Entry and Reintegration: The Road to Public Safety*, which concluded that a variety of “collateral” consequences of a criminal conviction—consequences rarely spelled out by a court in imposing a criminal sentence—can have a profound negative effect on the ability of people with conviction histories to re-enter society.² The report concluded that the “legal disabilities and social exclusions resulting from [a criminal conviction] . . . erect formidable societal barriers for . . . those returning to their communities after incarceration, and their families. Those consequences are far-reaching, often unforeseen, and sometimes counterproductive.” It went on to provide a detailed examination of those collateral consequences on such things as employment, education, housing, maintaining stable family ties, public benefits, financial penalties, voting rights and immigration status.

Ten years later, in 2016, in response to the concerns of policymakers, the media and people across New York State regarding the issue of mass incarceration and ways to reduce the prison population, the Association formed a Special Committee on Re-Entry, which issued a report focused on issues facing individuals re-entering their communities after incarceration.³ The 2016 report recognized the following principles: “(1) confinement often increases the likelihood of recidivism by leaving unaddressed or exacerbating a person's identifiable problem areas; whereas (2) a coordinated, systematic and quickly undertaken effort to identify and focus on these problem areas is likely to diminish recidivism considerably.” The 2016 report made nine principal recommendations concerning diversion programs, pre-release planning, individualized assessment of collateral consequences, employment, education, housing, medical and mental health care, and issues affecting juveniles.

When he took office in June 2018, Association President Michael Miller established the Task Force on Incarceration Release Planning and Programs. Its mission: to “build upon the work

¹ Hon. Warren E. Burger, former Chief Justice, U.S. Supreme Court, Speech to the American Bar Association (1987) (also quoted from Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* 93 (2003)).

² New York State Bar Association, Special Committee on Collateral Consequences of Criminal Proceedings, *Re-Entry and Reintegration: The Road to Public Safety*, May 2006, available at <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26857>.

³ New York State Bar Association, *Report of the Special Committee on Re-Entry*, January 2016, available at <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=61806>.

of NYSBA's Task Force on Re-Entry and . . . recommend . . . policy changes and best practices for effective incarceration release planning programs . . . [to] examine existing programs and consider all relevant issues including: options for those released into urban and rural settings, inconsistent rules and limited availability of substance abuse and mental health treatment, housing options, and the impact on recidivism and public safety that results from inadequate release planning."

A vast number and variety of re-entry programs and practices operate within the 62 counties of New York State. In order to make its inquiry manageable, and to develop recommendations that are realistic and attainable, the Task Force identified 17 representative counties on which to focus its inquiries. Selection was based on geographic diversity, diversity of population and demographics and the counties' urban, suburban or rural character, and the presence of one or more state prisons or county jails. The Task Force studied the following counties: New York, Kings, Queens, Bronx and Richmond (the five counties comprising New York City); Nassau, Suffolk, Westchester, Albany, Onondaga, Chemung, Oneida, Broome, Franklin, Erie, Monroe and Wyoming.

In addition to making county-specific inquiries, the Task Force reached out to the Governor's Office, the New York Department of Criminal Justice Services and Department of Corrections and Community Supervision, defender organizations, the District Attorneys Association of the State of New York and several programs that provide re-entry services.

The Task Force conducted a truly remarkable full-day open meeting at the Bar Center in Albany at which representatives of state and local law enforcement and corrections agencies, social services providers, members of not-for-profit re-entry related organizations, advocates for re-entry reform in the area of re-entry and formerly incarcerated individuals engaged in a frank and extremely useful exchange of ideas. The meeting was informative and, in some cases, provocative, and, in all case, proved to be of great value to the Task Force.

EXECUTIVE SUMMARY

The Task Force makes thirty-four recommendations, set forth below which fall into two categories: those that suggest legislative, administrative, or policy change; and those that promote best practices. This report includes following eight substantive sections:

I. Experts on Re-Entry: Incarceration is a uniquely punitive and disorienting experience that makes re-entry even more challenging. People who have lived through the experience of incarceration and re-entry are well-positioned to be part of re-entry solutions and criminal justice reforms. In this section, we identify some of the barriers to fully realizing the insight and expertise of formerly incarcerated people, and we make recommendation to dismantle these barriers.

II. Rights Restoration: While New York State has some rights restoration mechanisms, eligibility is limited and there is insufficient public information about who is eligible and the impact of these mechanisms. Moreover, for people who cannot afford to retain counsel, accessing these rights restoration mechanisms is daunting at best; more often it is impossible. In this section, we discuss the value of rights restoration and make

recommendations to bolster and expand eligibility for existing rights restoration mechanisms. We also make recommendations to ensure that formerly incarcerated people know of these mechanisms and can access them when eligible, regardless of their ability to retain counsel.

III. The Financial Well-Being of People Being Released from Prison and the Need to Facilitate Access to Public Assistance Benefits: Low-income people are disproportionately caught up in our criminal justice system, and a conviction and incarceration drives people further into debt and financial distress.⁴ Most people who leave prison lack the financial resources to obtain food, shelter, medical care and other basic needs. Steps must be taken to ensure that people have immediate access to public assistance benefits – including Medicaid – upon release.

IV. Housing: Perhaps there is nothing more obvious than the notion that safe, stable and habitable housing is a prerequisite to a person’s successful transition from incarceration to the community. Yet, too often people are released from prison and jail to shelters or short term emergency housing.⁵ Because housing is such a basic need for all people, the Task Force decided to explore what prisons and jails are doing to assist people in planning for housing upon their release. We also acknowledge that no amount of pre-release planning is going to get people housing if barriers to public and private housing persist for formerly incarcerated people. For that reason, we identify these barriers make recommendations to eliminate them.

V. Education and Vocational Needs: College is expensive, and many find it difficult to finance higher education for themselves or their children. It is therefore understandable that some people object to having their tax dollars pay for educating incarcerated people. But, while this objection may be understandable, it is counter-productive. Access to prison-based higher education and vocational training has a proven track record in altering criminogenic behavior, providing people with marketable skills, and promoting successful reintegration. In this section of the report, we discuss the value of ensuring that people in and out of prison have access to education, and we explore prison-based educational program and community-based educational programs for formerly incarcerated people. We also make recommendations to promote access to education both in and out of prison.

VI. Protecting the Most Vulnerable: Services for Individuals with Mental Illness Returning to the Community: “Instead of getting people with mental illness the treatment and support they need, our society too often puts them in jails or prisons, which are the

⁴ In Section II of this report, we set forth the research and data to support these assertions. *See also*, Bruce Western, Justice Lab, Columbia University, *The Challenge of Criminal Justice Reform*, The Square One Project, January 2019, at 5, available at https://static1.squarespace.com/static/5b4cc00c710699c57a454b25/t/5c5a45d6eb3931523e32a8f3/1549419991367/The+Challenge+of+Criminal+Justice+Reform_Bruce+Western_Final.pdf (noting that “disadvantaged communities must now cope with incarceration, community supervision, court fines and fees, and collateral consequences on a vast scale.”).

⁵ *See e.g.*, Adam Shrier et al., *Many Inmates Move from Prison to Shelters, Despite Efforts to Get Them Homes*, City Limits, Jan. 17, 2017, available at <https://citylimits.org/2017/01/17/many-inmates-move-from-prison-to-shelters-despite-efforts-to-get-them-homes/> (last visited Feb. 26, 2019).

worst place for recovery.”⁶ Many enter prison and jail with mental health and substance abuse issues. This report does not explore the various reasons for the “criminalization of mental illness,” though we do acknowledge that the failure to properly identify and treat individuals with serious mental health and substance abuse issues seriously impacts them and the communities to which they return. In this report, we explore one legal mechanism designed to ensure that people in need of mental health treatment obtain it – the Assisted Outpatient Treatment (AOT), set forth in New York’s Mental Hygiene Law.⁷ We also focus on the lack of safe, stable, and supportive housing, a significant concern for people with a serious mental illness who are transitioning from incarceration to the community.

VII. Persons with Sex Offense Convictions: Perhaps there is no population more reviled than people who have been convicted of a sex offense. Popular opinion - unsupported by research or anecdotal experience - is that people with a past sex offense convictions are likely to recidivate and thus pose a danger to the community. Based on this misinformation, over the past twenty-five years New York has erected a formidable framework of registration requirements, community notification, residency restrictions, and strict community supervision requirements designed to protect against the perceived danger people with a past sex offense convictions pose to the community. But since this framework has been implemented, a rich body of research has emerged that challenges the very foundations upon which it was built. As explained in this section, this research shows that recidivism rates for people with sex offense convictions are much lower than the public perceives them to be. Moreover, there are significant unintended costs to our laws and policies regarding people with sex offense convictions. This section of the report examines these laws and policies in the context of the research, and sets forth recommendations for evidence-based laws and policies.

VIII. Funding: We finish the report with a section about the need to view funding for pre-release planning and re-entry as an important investment in people, families, and our communities – and one that will pay itself off with enhanced public safety and community well-being.

The foregoing sections and recommendations emanate from the following two important principles that drove the work of this task force:

Re-entry must begin at the point of arrest, be attentive to a person’s individual needs, and strive to incorporate community resources.

Waiting to plan for re-entry until a person is released, or just before a person is released, is too late:

If reentry planning is simply implemented as a “program” for those leaving prison, and nothing more it will provide us with little else than an opportunity to pick up

⁶ National Alliance of Mental Illness, *Criminalization of Mental Illness: It’s a Crime*, Aug. 27, 2014, <https://www.nami.org/Blogs/From-the-CEO/August-2014/Criminalization-of-Mental-Illness-It%E2%80%99s-a-Crime> (last visited Feb. 22, 2019).

⁷ See Mental Hygiene Law § 9.60.

the damaged pieces that our affinity for punishment has created. However, if we carefully attend to the wide range of concerns that affect reentry, we can substantially reduce the prison population, avoid the damage, and promote reintegration. In order to reduce the cost of incarceration in both dollars and human suffering, the most effective way to do so is to begin reentry at the time of arrest.⁸

Planning for re-entry at the time of arrest, focusing on the arrested person's individual needs, and striving to maintain or make strong community connections will force judges, prosecutors, and defense counsel to grapple with the following questions for each arrested individual: Is a conviction and incarceration necessary, or are there alternative ways to hold the individual accountable while promoting public safety? If incarceration is necessary, what steps can be taken while the person is in prison or jail to promote the person's success upon release? Finally, what steps can be taken to maintain the person's connections to the community and, if necessary, help the person to build positive, pro-social connections?

The principle of early and individualized re-entry planning has important implications for prisons and jails. Prisons and jails have the dual goals of protecting the safety of incarcerated people, guards, and prison staff while simultaneously preparing people for their release to the community. Between 1972 and 2007, the rates of incarceration in the United State more than quadrupled.⁹ During this period, the goal of rehabilitation gave way to a penchant for punishment. Not only did the conditions of incarceration deteriorate, but prisons and jails were often forced to abandon many important rehabilitative programs.¹⁰ But the tide has turned, and while the rates of incarceration are still too high, they have been decreasing over the last decade.¹¹ Simultaneously, there is a growing public awareness of the harm to communities and individuals that the high rates of incarceration -and our over-dependence in jails and prisons - have had. Now is the opportune time to examine the resources available to jails and prisons for rehabilitative programming and re-entry planning, and to think creatively about the best use of resources to promote each person's successful reintegration into the community upon release. It is also an opportune time to consider how each prison and jail can better utilize community-based resources to ensure that incarcerated people can maintain and, where necessary, bolster their connections to the community to which they will be released.

We must prioritize rehabilitation over punishment.

The second principle that informed this Task Force's work is the immense value to our communities in prioritizing rehabilitation over punishment, and redemption over retribution. Over the past four decades, our penchant for punishment has resulted not only in more people being incarcerated for longer periods of time, but also a growing array of punishments after release from

⁸ Alan Rosenthal and Elaine Wolf, *Center for Community Alternatives Working Paper: Unlocking the Potential of Reentry and Reintegration*, October 2004, at 5, available at http://www.communityalternatives.org/pdf/unlocking_potential.pdf.

⁹ See Section I for the research and data to support this assertion. See also Western, *The Challenge of Criminal Justice Reform*, *supra* note 4.

¹⁰ See Section I; see also Western, *supra* note 4, at 7 ("Conditions in prisons became more punishing as overcrowding became common and educational programming was cut").

¹¹ Western, *supra* note 4.

prison or jail. As one expert has stated in writing about the inordinate focus on punishment between 1972 and 2007:

Even after sentences were completed, millions of men and women were hamstrung by criminal background checks in applications for jobs, housing, and credit. Criminal records limited voting rights, eligibility for federal benefits, and access to licensed occupations. The criminal justice system became a vast apparatus designed to punish, exclude, and close of opportunities.¹²

There is a growing awareness of the costs that this penchant for punishment imposes on individuals, families, and communities, and several jurisdictions (including New York) are scaling back some of the “tough on crime” policies.¹³ Yet, as described in this report, there are still too many laws, regulations, policies, and practices that are punitive in nature, and needlessly impair people’s ability to successfully transition to the community as law abiding citizens. Thus, this report prioritizes rehabilitation and access to opportunities over punishment. We believe that doing so promotes the safety and well-being of individuals and our communities.

RECOMMENDATIONS

We suggest the following best practices, policy and legislative changes:

1. EXPERTS ON RE-ENTRY

Best practices:

- A. People with past convictions should be included in re-entry policy discussions and decision-making. This inclusion should reflect a concerted effort to elevate and honor the insights formerly incarcerated people have obtained through their lived experiences, and thus be more than just one or two “credible messengers.”
- B. DOCCS’ policy of prohibiting people on parole from having contact with formerly incarcerated people should be re-examined.

¹² *Id.* at 7. See also Alexandra Natapoff, *Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal* (2018) (focusing on the United States’ misdemeanor system, and categorizing it as a behemoth that systematically strips people of jobs, credit, welfare benefits, housing, immigration status, financial well-being and social status). Many of the life-long consequences of a criminal conviction are discussed in the 2006 report on re-entry and reintegration of the NYSBA Special Committee on Collateral Consequences of Criminal Proceedings, *supra* note 2.

¹³ See, e.g., Eric Westervelt & Barbara Brosher, *Scrubbing the Past to Give Those with a Criminal Record a Second Chance*, NPR Morning Edition, Feb. 19, 2019, available at <https://www.npr.org/2019/02/19/692322738/scrubbing-the-past-to-give-those-with-a-criminal-record-a-second-chance> (“In the last two years, more than 20 states have expanded or added laws to help people move on from their criminal records—most involve misdemeanors. Marijuana legalization and decriminalization have played a big role in driving these reforms. Fairness is another factor, with lawmakers from both parties rethinking the long-term consequences of certain criminal records, as well as the economic impact of mass incarceration.”).

- C. DOCCS and county jails and correctional facilities should re-examine and revamp their policies and protocols regarding the admission of service provider staff and volunteers who have past convictions to ensure that such policies are clear and do not create needless barriers for formerly incarcerated people to access prisons and jails to engage in legitimate employment and volunteer work.

2. RIGHTS RESTORATION

Best practices:

- A. All formerly incarcerated people should have access to rights restoration services. Funding should be sufficient to ensure that people are not turned away because of limited program capacity and to ensure services are available in all communities.
- B. Jails and prisons should incorporate information about rights restoration mechanisms in pre-release and transitional education programs.
- C. Certificates of Relief from Disabilities should be provided to eligible individuals upon their release from prison. Barriers that released individuals face in applying to DOCCS for Certificates of Relief from Disabilities and Certificates of Good Conduct should be eliminated. Applicants should not be required to provide copies of tax returns, and people on parole and post release supervision should be permitted to apply directly and not be required to wait until their parole officer decides to apply on their behalf.

Legislative recommendation:

- D. Human Rights (Executive) Law § 296(16) should be amended to make it clear that if an applicant is asked to disclose an arrest that resulted in a sealing or Youthful Offender adjudication, the applicant can legally deny the arrest, adjudication or conviction.

3. FINANCIAL NEED AND ACCESS TO PUBLIC ASSISTANCE BENEFITS

Legislative recommendation:

- A. New York Social Services Law and regulations should be amended to make it clear that soon-to-be-released people can apply for public benefits assistance prior to their release from prison or jail so that these benefits are in place when they are released.
- B. DOCCS and local jails should implement policies and procedures so that soon-to-be-released people are told that they may be eligible for public assistance benefits, are told how to apply prior to their release, and are given assistance in applying.

4. HOUSING

Policy changes:

- A. We reiterate the recommendation in the 2006 NYSBA Report urging Congress to undertake a wholesale review and revision of laws and regulations that require or permit Public Housing Authorities (PHA) to screen out people with conviction histories.
- B. All PHAs in New York should be required to implement the HUD letters and guidance urging them to eliminate all outright bars to public housing for people with prior convictions (except where required by law), and to develop policies and practices that give PHAs discretion to allow people with past convictions to reside in public housing.
- C. In developing rules and policies that rely on discretion rather than outright bars to consideration of people with convictions, PHAs should implement the following principles:
 - 1. Other than the two permanent bars mandated by federal law, PHAs should not have any mandatory or permanent bars to living in public housing. Instead, there should be an individualized consideration of each applicant.
 - 2. Not all crimes should be considered. Only those type of offenses that PHAs are required by law to consider and those that are directly related to a person's tenancy should be considered. PHAs should not be permitted to have vague standards, such as "crimes indicating that an applicant may be a negative influence," etc.
 - 3. Crimes that are not recent should not be considered. In assessing recency, PHAs should consider the date of the offense and not the date of conviction or the date of release from incarceration.
 - 4. PHAs must consider and give ample weight to mitigating information, including but not limited to a person having been awarded a Certificate of Relief from Disabilities or Certificate of Good Conduct. Mitigating information should also include an applicant's good conduct and achievements while incarcerated.
- D. There should be a comprehensive review of the policies and practices of all the PHAs in New York to assess the extent to which they have implemented the HUD guidance prohibiting them from using arrest records in housing decisions and replacing outright bars to public housing with discretion that utilizes an individualized approach to decision-making.

Legislative recommendations:

- E. Congress needs to amend the definition of chronic homelessness in 42 USC § 11360(2) to state that people in jail and prison who have insufficient financial resources to pay for stable housing upon release are deemed to be "chronically homeless." In the meantime, CoC coalitions should use their discretion whenever possible to make federally funded transitional, supportive, and permanent housing solutions available to people being released from prison or jail.

- F. Eligibility for the Temporary Release Program (most commonly called work release) should be expanded and the program revitalized. The 1995 Executive Order, which has been continued and expanded with every Governor since, should be rescinded and steps should be taken to ensure that the Temporary Release Program can fully realize its potential in helping people successfully transition to the community.
- G. Executive Law § 296(16) should be amended to make it an unlawful discriminatory practice for private landlords and public housing authorities to consider a sealed arrest or conviction in making decisions about housing. Doing so is consistent with the 2015 Guidance issued by HUD stating that public and private landlords should not use arrests as a reason for an adverse housing decisions. In this regard, we applaud Governor Cuomo for seeking to make this a reality in his 2019-2020 Budget Proposal. In Part II, Subpart O of this proposed budget, the Governor proposes to amend Human Rights Law § 296(16) to include “housing” thereby prohibiting private landlords and housing authorities from considering sealed arrests and convictions in making housing decisions. We also applaud the Governor for seeking to ensure that stale prosecutions (arrests that were never prosecuted) are not used against people for civil purposes. See Part II, Subpart L of his proposed 2019-2020 budget. If enacted, these two proposals would go far in ensuring that arrests that did not lead to convictions and sealed convictions are not used against people when they seek housing.
- H. A provision should be added to the Human Right Law to prohibit discrimination against people with past convictions who are seeking housing. However, because housing is such a basic, critical need, great care should be taken in crafting this provision to ensure that it does not unwittingly give landlords and housing authorities permission to deny people housing in a wide array of circumstances. Governor Cuomo’s promulgated guidance for the New York State Housing Finance Agency, may be a model. Before using it as a framework for anti-discrimination legislation, information should be obtained about how this guidance has worked in practice, including the number of people denied housing under this guidance and the reasons for the denial.

Best practices:

- I. People should leave prison and jail with a feasible plan for safe and stable housing. DOCCS and county jails need to actively assist people *prior* to their release in identifying and securing housing. For DOCCS, the steps to securing housing should be incorporated into Phase III of the DOCCS Transitional Services Program and should include access to the internet when necessary to assist people in identifying housing.
- J. The State should ensure that DOCCS and local jails have the staffing and resources necessary to assist people prior to their release in identifying safe and stable housing. Re-entry staff should conduct an individual assessment of each soon-to-be-released person to discern specific housing needs. They should also connect with community-based organizations to develop awareness of the full range of housing options available and any restrictions to such housing (*i.e.*, the creation and maintenance of a

resource guide for each community).

- K. The State should implement multiple ways to provide housing, including housing stipends, and provide the resources needed to develop and provide transitional, supportive, and permanent housing to people being released from prison and jail who need housing.

5. EDUCATIONAL AND VOCATIONAL ISSUES:

Legislative recommendations:

- A. Eligibility for both federal Pell Grants and the New York State Tuition Assistance Program (TAP) should be restored to permit qualified incarcerated persons access to college programs. College programming in prisons and jails should be significantly expanded so that any eligible individual may enroll.
- B. The Fair Access to Education Act legislation which would amend New York Correction and Executive Laws to make it an unlawful discriminatory practice for any college or university in New York to ask about or consider an applicant's past arrest or conviction during the application process should be enacted.

Best practices:

- C. Sufficient funding should be allocated to provide all eligible incarcerated individuals access to timely, appropriate, uninterrupted, modernized, certified programming tailored to their educational and/or vocational needs and strengths, including special education services, adult basic education, pre-college and college and vocational programs that provide marketable skills training. In addition, sufficient funding should be provided to expand the availability of vocational programs so as to allow incarcerated individuals to enroll in those courses of their choice
- D. Education during incarceration should be deemed a priority not a privilege and, as such, DOCCS and county jails should:
- provide in-depth orientation at intake regarding the importance of the educational and vocational screening process and train screeners to encourage incarcerated individuals to take the screening seriously;
 - require certification by the New York State Department of Education of all teachers and instructors and regularly evaluate them during classroom time;
 - train offender rehabilitation counselors (ORCs) and parole officers regarding the availability of educational opportunities upon release and mandate that they focus on and encourage to take advantage of said educational opportunities;
 - remove barriers to education such as conflicts with obtaining Limited Credit Time Allowance and monetary disincentives;
 - ensure proper certifications and licenses are provided to those who complete vocational courses; and
 - ensure college credits earned during incarceration are transferable upon release.

- F. To help educate our communities about the fiscal, health and safety implications of providing educational and vocational opportunities to those who are incarcerated, oversight hearings should be held by both houses of the New York State Legislature with the purpose of soliciting testimony on the need for, and the quality of, the educational and vocational programs offered in the jail and prison settings in New York State.

6. **MENTAL ILLNESS ASSISTANCE:**

Best practices:

- A. The New York State Office of Mental Health (“OMH”) collects many statistics about Assisted Outpatient Treatment (“AOT”), but does not track rates of re-incarceration and involuntary hospitalization for individuals subjected to an AOT order upon release from prison. OMH and/or CJS should begin tracking this statistic to develop a dataset that would provide empirical evidence of how useful AOT is in helping individuals with serious mental illness stay in their communities.
- B. The stock of supportive housing for people with mental illness, including forensic supported housing and short-term transitional housing, should be dramatically increased statewide so that people with mental illnesses being released from incarceration are not released into shelters, motels or three-quarter houses, or kept in prison beyond the end their sentences.

7. **PERSONS CONVICTED OF SEX OFFENSES:**

Legislative and policy change recommendations:

- A. Amend the Sexual Assault Reform Act (“SARA”) to require that in place of the “1,000 feet rule,” the decision to impose a buffer zone restriction around schools be made on a case-by-case basis by the Sex Offender Registration Act (“SORA”) hearing court, upon a showing of a need for the restriction based upon the defendant’s offense conduct, history of behavior, or other mental or emotional conditions, with possibility of revision over time;
- B. Amend the SORA Risk Assessment Instrument used to make risk classifications, to bring it into conformance with the latest scientific research;
- C. Reevaluate the excessively long registration periods imposed on individuals by SORA, in line with academic research demonstrating that individuals’ risk of reoffending decreases considerably over periods of time shorter than those stipulated by SORA;
- D. For those individuals with sex offense convictions who are subject to community supervision, individualize determinations concerning release conditions to ensure they bear a reasonable relationship to the underlying offense and subsequent rehabilitation, so as to avoid blanket imposition of boilerplate, draconian conditions.

8. FUNDING:

Legislative and policy change recommendations:

- A. Dramatically increase state funding of effective programs. Current funding for re-entry is based upon the vagaries of short term federal and foundation grants, donors and some limited state funding. Consistent state funding would provide necessary stability and permanence to these programs and avoid imposition of unfunded mandates on the counties.
- B. Recommend that the New York State Council on Community Re-entry and Reintegration create a resource for grant writing and grant writing expertise for each county, to provide assistance to reentry services providers.
- C. Prioritize state funding for programs that collaborate and coordinate with key service providers so as to enable the formerly incarcerated person to obtain services he or she requires in one location.

The Task Force on Incarceration Release Planning and Programs presents the foregoing recommendations to the NYSBA House of Delegates for its acceptance when this report is presented on April 13, 2019.

INTRODUCTION

Re-entry services have typically focused on the point in time after a person is released from prison or jail. But a more advanced view “recognize[s] the need to prepare for the transition back to the community prior to release from incarceration and envision[s] that re-entry planning begins when the person enters prison [or jail].”¹⁴ Obtaining quality mental health and substance abuse treatment, education, vocational training, medical and mental health care, and assistance in planning for the release are all crucial to increasing the chances of successful re-entry.

Re-entry of formerly incarcerated persons has been a headline issue in New York State for the past several years. New York is home to numerous advocacy and direct services organizations working tirelessly to assist in this effort, but many barriers still exist and many of our communities lack the resources to provide adequate supports.

More than half a million individuals have been released from New York State prisons since 1985.¹⁵ Some have been returned to localities where they have no connections or significant relationships, making re-entry a hugely difficult experience particularly as reconnection with family has been shown to be an essential part of successful re-entry.¹⁶ But regardless of the community to which they return, it is a daunting task for any person released from incarceration to

¹⁴ Alan Rosenthal & Elaine Wolf, *Unlocking the Potential of Re-Entry and Reintegration*, October 2004, at 2, available at http://www.communityalternatives.org/pdf/unlocking_potential.pdf.

¹⁵ New York State Assembly Standing Committee on Correction, *2016 Annual Report*, Dec. 15, 2016, at 15, available at <https://nyassembly.gov/comm/Correct/2016Annual/index.pdf>.

¹⁶ The Council of State Governments Justice Center, *Reentry Matters: Strategies and Successes of Second Chance Act Grantees, Second Chance Act 10th Anniversary Edition*, November 2018, available at <https://csgjusticecenter.org/wp-content/uploads/2018/11/Reentry-Matters-2018.pdf>.

live a life “outside the walls.”¹⁷ While incarcerated, many people lose connections with their children and their families,¹⁸ and most who enter the state prison system lose their jobs, homes, medical insurance and personal belongings. When released, most people have neither an income nor savings and as a result have serious difficulty in locating shelter, clothing, transportation, support and medical programming and employment.¹⁹ This is compounded by the fact that many lack higher education credentials or vocational training²⁰ and that the communities to which people released are often ill-prepared to assist them.²¹ Yet in the face of all these obstacles, individuals are expected to succeed at immediately returning to a normal life.²²

In order to assist individuals and communities with re-entry challenges, Governor Cuomo has allocated a limited amount of funding to county re-entry task forces and not-for-profit organizations dedicated to lessening the barriers to re-entry.²³ These task forces, managed through the New York State Division of Criminal Justice Services (DCJS), seek to assist recently released

¹⁷ The Fortune Society, *Reentry: Coming Home*, <https://fortunesociety.org/coming-home/> (last visited Feb. 20, 2019) (“When I returned to the community, I wanted to complete my education and change my life, but I lacked the resources to do so.” - Mitchell Leviticus; “The day of my release came, I felt like a fish out of water. I needed to get accustomed to new technology, work on re-establishing family ties, and look for employment.” - Lorenzo Brooks; “After spending 17 years in prison, I was released at the age of 40 with nothing to live on and nowhere to go.” - Damon Rodriguez).

¹⁸ *Id.* (“Seeking safety, justice-involved individuals often immediately seek to reconnect with their families upon release. Unfortunately, incarceration can separate individuals from their loved ones from long periods of time. Many are placed in jails and prisons that are located far from their homes, discouraging visitation and communication with their families, and causing children to grow up without the emotional support of their mothers and fathers. According to the Bureau of Justice Statistics, approximately 53% of incarcerated individuals in 2007 were parents of children under age 18. Finding solutions to these disconnects among families is a crucial component of criminal justice reform. Bonds help formerly incarcerated individuals stabilize their lives, service as vital support systems during their reentry process.”)

¹⁹ Nathan James, Congressional Research Service, *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism*, Jan. 12, 2015, available at <https://fas.org/sgp/crs/misc/RL34287.pdf>. See also National Re-Entry Resource Center, *NRCC Facts & Trends*, <https://csgjusticecenter.org/nrrc/facts-and-trends/> (last visited Feb. 20, 2019); Simmons School of Social Work, *The Challenges of Prisoner Re-entry Into Society*, Jul. 12, 2016, <https://socialwork.simmons.edu/blog/Prisoner-Reentry/> (last visited Feb. 26, 2019); Aaron Taube, *Here's What It's Like For People Trying To Find A Job After They're Released From Prison*, Business Insider, Oct. 10, 2014, <https://www.businessinsider.com/getting-a-job-after-prison-2014-10> (last visited Feb. 26, 2019) (“Despite the nonprofit organizations and nongovernment agencies tasked with helping the formerly incarcerated find work after prison, doing so can be extremely difficult.”).

²⁰ Kathleen Bender, *Education Opportunities in Prison are Key to Reducing Crime*, Center for American Progress, Mar. 2, 2018, <https://www.americanprogress.org/issues/education-k-12/news/2018/03/02/447321/education-opportunities-prison-key-reducing-crime/> (last visited Feb. 26, 2019).

²¹ See *id.*

²² Jon Mooallem, *You Just Got Out of Prison. Now What?*, N.Y. Times Magazine, Jul. 16, 2015, available at <https://www.nytimes.com/2015/07/19/magazine/you-just-got-out-of-prison-now-what.html>.

²³ See Press Release, Governor Andrew M. Cuomo, *Governor Cuomo Announces Comprehensive Reforms to Improve the Re-Entry Process for Formerly Incarcerated Individuals* (Mar. 5, 2018), available at <https://www.governor.ny.gov/news/governor-cuomo-announces-comprehensive-reforms-improve-re-entry-process-formerly-incarcerated> (“the Governor has provided approximately \$4 million in annual grants to support twenty County Re-Entry Task Forces serving a total of 5,000 individuals returning to their counties after serving a state prison sentence”). In addition to funding re-entry programs, Governor Cuomo allocated funding for education programs in New York prisons for the purpose of reducing recidivism rates. Jesse McKinley, *Cuomo to Give Colleges \$7 Million for Courses in Prisons*, N.Y. Times, Aug. 6, 2017, available at <https://www.nytimes.com/2017/08/06/nyregion/cuomo-to-give-colleges-7-million-for-courses-in-prisons.html>.

individuals who are deemed “high risk” of re-arrest.²⁴ DCJS provides training, technical assistance, and funding to these groups, with the goals of reducing recidivism rates and promoting community safety.²⁵ In addition, DCJS awarded a limited amount of funding to various not-for-profit organizations such as Project MORE, Trinity Alliance of the Capital Region Inc., and the Oneida Workforce Development.²⁶ But more funding is needed. Programs and services need to be provided statewide, not just in the State’s most populous areas.

In 2018, Governor Cuomo signed an executive order granting conditional pardons to New Yorkers who are on parole, allowing them to register to vote.²⁷ His 2019-2020 budget proposes a number of measures affecting criminal justice policies, and it addresses re-entry in Section II. As an overview, this budget bill would enact into law major components of legislation that remove unnecessary barriers to reentry.²⁸ Specifically, this bill would:

- amend various occupational licensing laws to remove mandatory bans for applicants with criminal convictions;
- amend the Vehicle and Traffic Law to remove the six month mandatory drivers' license suspension for non-driving related offenses;
- amend the Public Officers Law to protect against the indiscriminate release of mugshots under the Freedom of Information Law;
- amend the Criminal Procedure Law and the Executive Law to prevent the use in a civil context of past arrest information that did not result in a conviction; and
- amend the Corrections Law to provide for consideration of compassionate release for older incarcerated individuals facing health issues exacerbated by age.

A number of law enforcement agencies are also engaging in strategies to help individuals successfully re-enter society, seeing this as both a public safety and a cost saving measure. Some of the state’s sixty-two District Attorneys have introduced education initiatives, crime prevention efforts, and re-entry programming. Together with public defense agencies, service providers and the New York State Office of Court Administration (OCA), they are helping to develop and staff specialty courts aimed at youth, veterans and those suffering from substance abuse and mental illness. In addition, some county sheriffs, county jails and corrections departments have developed creative programming to help with transitional needs as persons are released from local facilities. Statistics provided by one county correctional facility show that providing programming and re-

²⁴ Division of Criminal Justice Services, *DCJS County Re-entry Task Force Initiative*, http://www.criminaljustice.ny.gov/crimnet/ojsa/initiatives/offender_re-entry.htm (last visited Nov. 12, 2018).

²⁵ *Id.*

²⁶ *Id.* See Press Release, Governor Andrew M. Cuomo (Mar. 5, 2018), *supra* note 23, for a full list of funding beneficiaries.

²⁷ Press Release, Governor Andrew M. Cuomo, Governor Cuomo Signs Executive Order to Restore Voting Rights to New Yorkers on Parole (Apr. 18, 2018), available at <https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-restore-voting-rights-new-yorkers-parole>.

²⁸ See New York State Division of the Budget, *FY 2020 New York State Executive Budget: Public Protection and General Government Article VII Legislation*, available at <https://www.budget.ny.gov/pubs/archive/fy20/exec/artvii/ppgg-artvii.pdf>; New York State Division of the Budget, *FY 2020 New York State Executive Budget: Public Protection and General Government Article VII Legislation—Memorandum in Support*, available at <https://www.budget.ny.gov/pubs/archive/fy20/exec/artvii/ppgg-artvii-ms.pdf>.

entry planning for people prior to their release helps them to successfully reintegrate into the community and decreases recidivism.²⁹

Our report is greatly aided by—and we recommend that any future efforts should include—individuals who have lived experience with the criminal justice system. They have a unique understanding of the barriers to successful re-entry, and through their experiences, have clear ideas about how best to eradicate them. This report makes specific recommendations designed to elevate the voices and experiences of people who have been incarcerated.

I. THE EXPERTS ON RE-ENTRY: FORMERLY INCARCERATED PEOPLE

When I got out [of prison], I felt the world was small; there was no room for me. Things moved so fast, and I couldn't keep up. I felt like I did not belong. My family couldn't understand what I was feeling. They couldn't understand why I felt so paranoid; so pressured....

Other formerly incarcerated people could serve as guides or buddies. This would provide the released person with someone who can both "show them the ropes" and understand the internal struggle they go through when adjusting to life outside prison—someone who has been through it personally; someone who knows how it feels.

- Gloria Rubero, a formerly incarcerated person³⁰

Those who are closest to the problem are closest to the solution, but furthest from the resources and power.

- Glenn Martin, former President of JustLeadershipUSA³¹

The message of the above sentiments is plain: formerly incarcerated people's lived experiences make them uniquely qualified to meaningfully contribute to re-entry policy development and service programs, yet too often they are barred from both. These sentiments are not unique as demonstrated by the similar statements made by several participants at this Task Force's November 9, 2018 Open Meeting. Below, we discuss what makes incarceration an experience unlike any other and thus why formerly incarcerated peoples' lived experiences matter; we also discuss affirmative steps that should be taken to include people with lived experiences in re-entry policy development and service programs.

²⁹ See Appendix A (This appendix provides an example from the Westchester Department of Corrections programming statistics of how programming offered during incarceration reduces recidivism.)

³⁰ Ms. Rubio's essay entitled "Let Those Who Have Been There Guide Reentry," can be found in the 2015 report by the Center for Justice at Columbia University, *Aging in Prison: Reducing Elder Incarceration and Promoting Public Safety*, Nov. 2015, available at http://centerforjustice.columbia.edu/files/2015/10/AgingInPrison_FINAL_web.pdf.

³¹ *About*, JustLeadershipUSA, <https://www.justleadershipusa.org/about-us/> (last visited Feb. 20, 2019).

A. Incarceration is a Uniquely Disorienting Experience that Makes Re-Entry More Challenging.

In 2014, the National Research Council's Committee on Causes and Consequences of High Incarceration Rates issued a comprehensive report entitled *The Growth of Incarceration in the United States: Exploring Causes and Consequences* ("NRC Report"). This report chronicled the causes and consequences of the nation's quadrupling rate of incarceration between 1973 and 2009, noting that this "growth in incarceration rates . . . is historically unprecedented and internationally unique."³² The NRC Report concluded that this unprecedented growth in incarceration resulted from "policy choices made by legislators to greatly increase the use of imprisonment as a response to crime."³³ Put simply, "politicians and policy makers from across the political spectrum embraced an increasingly 'get tough' approach to criminal justice."³⁴ In New York, these policy choices greatly expanded the state's prison population, and between 1978 and 1999, New York's prison population grew from approximately 20,000³⁵ to 72,649 people.³⁶

Across the country these "tough on crime" policy choices not only affected the number of people confined in prisons and jails, they also impacted the conditions of confinement. As noted in the NRC Report:

Eventually, advocates of these more punitive policies began to focus explicitly on daily life inside the nation's prisons, urging the implementation of a "no frills" approach to everyday correctional policies and practices. Daily life inside many prison systems became harsher, in part because of an explicit commitment to punishing prisoners more severely. What some scholars characterized as a "penal harm" movement that arose in many parts of the country included attempts to find "creative strategies to make offenders suffer."³⁷

The dramatic increase in incarceration rates in such a short amount of time led to overcrowding and often created unsanitary and unsafe conditions. Combined with a more punitive approach, this increase in incarceration resulted in reduction in rehabilitative programming; cuts in

³² National Research Council, Committee on Causes and Consequences of High Incarceration Rates, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 2014, at 2, available at http://johnjay.jjay.cuny.edu/nrc/nas_report_on_incarceration.pdf. (Hereinafter "NRC Report.")

³³ NRC Report at 4.

³⁴ NRC Report at 163.

³⁵ Prison Policy Initiative, *New York Prison and Jail Population 1978-2015*, https://www.prisonpolicy.org/graphs/NY_Prison_Jail_Population_1978-2015.html (last visited Feb. 20, 2019).

³⁶ *Id.* See also New York State Department of Corrections and Community Supervision, *DOCCS Fact Sheet*, Feb. 1, 2019, available at <http://www.doccs.ny.gov/FactSheets/PDF/currentfactsheet.pdf>. Notably, efforts to reduce the prison population, including reform of New York's drug laws, have contributed to a recent decline in New York's prison population, and as of December 1, 2018, New York's prison population is 47,601. *Id.*

³⁷ NRC Report at 163 (internal citations omitted). See also Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, December 2001, available at <https://aspe.hhs.gov/basic-report/psychological-impact-incarceration-implications-post-prison-adjustment>. ("The abandonment of the once-avowed goal of rehabilitation certainly decreased the perceived need and availability of meaningful programming for prisoners as well as social and mental health services available to them both inside and outside the prison. Indeed, it generally reduced concern on the part of prison administrations for the overall well-being of prisoners.")

funding for educational programs, mental health, substance abuse, and medical treatment; and stricter rules regarding access to material items. Prisons and jails also implemented stricter rules regarding contact with family members and loved ones, limiting access to phones and personal visits. By 2006, a bipartisan Commission on Safety and Abuse in America's Prisons painted a grim picture of prison conditions in the United States, concluding as follows:

[T]here is still too much violence in America's prisons and jails, too many facilities that are crowded to the breaking point, too little medical and mental health care, unnecessary uses of solitary confinement and other forms of segregation, a desperate need for the kinds of productive activities that discourage violence and make rehabilitation possible, and a culture in many prisons and jails that pits staff against prisoners and management against staff.³⁸

In an article entitled *All the Strange, Terrible Things You Get Used to in Prison*, Jerry Metcalf, who is imprisoned in Thumb Correctional Facility in Lapeer, Michigan, details the most common features of prison, including: regular strip searches; being addressed by a number rather than a name; and ongoing exposure to violence and the threat of violence. He poignantly describes the lack of personal autonomy, stating:

I'm told when to eat, when to sleep, when to go outside, when to talk with and see my family, when to shower, when to cut my hair or iron my clothes. My money is managed for me; I pay zero taxes; and my healthcare (what little there is of it), is free and monitored by others.... I can't remember the last time I had to make a major decision like that for myself. I grow nervous just imagining the prospect.³⁹

Mr. Metcalf's account of prison life is mirrored by the NRC Report, which details the following common features of prison life: highly structured and regimented environment that erodes personal autonomy; near total absence of personal privacy; degradation and dehumanization; exposure to violence and conflict; the need to be hypervigilant and to constantly modulate interactions with guards, prison staff, and other prisoners to prevent or diffuse conflicts; material deprivation; the idleness and boredom that results from limited educational, work, and other programming opportunities; and restricted and controlled contact with family members and loved ones.⁴⁰

There are adaptive behaviors that people commonly develop to successfully navigate the unusual prison environment described by Mr. Metcalf and discussed in the NRC Report. But these adaptive behaviors can make it harder for people to transition from prison to the community. As one expert has stated, "a tough veneer that precludes seeking help for personal problems, the generalized mistrust that comes from fear of exploitation, and the tendency to strike out in response to minimal provocations are highly functional in any prison context [but] problematic

³⁸ John J. Gibbons & Nicholas deBelleville Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, 22 Wash. U. J. L. & Pol'y 385, 390 (2006).

³⁹ Mr. Metcalf's article is a joint collaboration between the Marshall Project and Vice. Jerry Metcalf, *All the Strange, Terrible Things You Get Used to in Prison*, Vice, Mar. 2, 2018, https://www.vice.com/en_us/article/9kzva3/all-the-strange-terrible-things-you-get-used-to-in-prison.

⁴⁰ These features are a summary of Chapter 6 of the NRC Report, entitled "The Experience of Prison." See also Haney, *supra* note 37.

virtually everywhere else.”⁴¹ These same adaptations may cause people to feel isolated and abnormal once they are released from incarceration to the community, contributing to a belief that failure is likely if not inevitable.

B. People Who Have Lived the Experience of Incarceration and Re-Entry Are Well Positioned to Be Part of Re-Entry Solutions.

People who have lived through and successfully navigated the experience of incarceration and release have insights and empathy for others experiencing the same transition. Their lived experiences render them uniquely qualified to identify problems and solutions to re-entry, and to relate to and assist others experiencing re-entry.

Over the past decade, a growing number of service providers have sought to create effective re-entry programs.⁴² But while these re-entry programs generally focus on helping people attain the skills necessary to live stable lives, they often fail to address the uniquely disorienting impact of incarceration:

Basic and instrumental needs such as employment and stable housing have been the focus of reentry programming. And while the ability to secure employment and housing are critical ingredients to re-entry and reintegration, these assets alone overlook the web of disorientation and psychological disconnection that accompanies movement from custody to freedom.⁴³

Those who have lived the re-entry experience can provide the more nuanced and empathetic support re-entering people need to successfully navigate the impact incarceration has had on their well-being and thought-processes.⁴⁴ But too few re-entry programs prioritize the hiring of people with lived experiences; and those that do often face barriers to hiring such individuals. While peer leadership and support are positively viewed in other domains,⁴⁵ it seems that the stigma of a conviction creates particular barriers for this type of leadership and support in the context of re-entry services:

Negative stereotypes of formerly incarcerated people, as well as legal barriers to employing people with criminal records in reentry programs that are run or contracted by government, make peer support more difficult, if not impossible to

⁴¹ NRC Report at 178 (quoting Craig Haney, *Reforming Punishment: Psychological Limits to the Pains of Imprisonment* (2006)).

⁴² See Marsha Weissman, Center for Community Alternatives, *Lessons for Sentencing Reform and Reentry: A Case Study of Project New Opportunity*, 2018, at 5-6, available at <http://www.communityalternatives.org/pdf/PNO-Documents-New-Version-Final.pdf>.

⁴³ *Id.* at 6.

⁴⁴ *Id.* at 8 (noting as follows: “‘Navigation’ support, particularly when provided by peers, can be essential to adjustment because it is empathetic, grounded in shared experiences about the challenges of navigating daily life.”).

⁴⁵ For example, New York has long supported and endorsed recovery community organizations often led by people in recovery. See Friends of Recovery New York, *Recovery Community Organizations*, <https://www.for-ny.org/recovery-support/recovery-community-organizations/> (last visited Feb. 22, 2019). The New York State Office of Alcoholism and Substance Abuse Services supports the use of peer advocates in outpatient programs and home and community based services. See New York State Office of Alcoholism and Substance Abuse Services, *Certified Recovery Peer Advocate*, <https://www.oasas.ny.gov/recovery/PeerServices.cfm> (last visited Feb. 22, 2019).

include in such programs. In addition, probation and parole conditions typically bar people under supervision from contact with other with criminal records, which makes it problematic to engage with a formerly incarcerated mentor.⁴⁶

During the November 9, 2018 Open Meeting this Task Force convened, some service providers spoke of the challenges they face to hiring people with conviction histories for re-entry programs, particularly those that provide pre-release programming. Jails and prisons typically conduct background checks of service provider staff, and often refuse access to people with conviction histories.⁴⁷ Because the decision-making about access is often opaque, it is a challenge for service providers to know if they can actually hire people with lived experiences and ensure they can access the jail or prison as a necessary part of their job. Open Meeting participants also noted that a common condition of parole is a prohibition against associating with anyone who has been convicted of a felony.⁴⁸ Finally, they noted that people with lived re-entry experience often are not included in re-entry policy discussions and decision-making.

Fortunately, many people with lived re-entry experiences are pushing back against the stigma and publicly amplifying the value of their experiences in policy decisions and service programs. In the context of policy, All of Us or None is an example of an impactful advocacy organization created and led by people with lived experiences. All of Us or None has gained national attention and success with its Ban the Box campaign.⁴⁹ The Ban the Box campaign urges public and private employers to remove the criminal history question for the initial employment application, and delay making an inquiry about past convictions until later in the application process. Since 2003, when the All of Us or None campaign was launched, 33 states, the District of Columbia, and 150 local jurisdictions adopted some form of Ban the Box legislation.⁵⁰

⁴⁶ Weissman, *supra* note 42, at 8.

⁴⁷ See, for example, DOCCS Directive 4750, titled “Volunteer Services Program,” which provides that paid professionals are treated as volunteers for purposes of admission to DOCCS’ facilities, and must undergo a criminal background check. DOCCS, Directive 4750 (Jan. 14, 2019), available at <http://www.doccs.ny.gov/Directives/4750.pdf>.

⁴⁸ See James M. Binall, *Divided We Fall: Parole Supervision Conditions Prohibiting Inter-Offender Associations*, U. Pa. J. L. & Soc. Pol’y, forthcoming, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3225502 (noting that most states restrict parolees’ associations with other parolees, but that there is no evidence that such restrictions reduce re-offending behavior, and that in fact, such restrictions may actually impair the ability of people on parole to refrain from criminal conduct).

⁴⁹ For more information about All of Us or None, see generally *All of Us or None*, Legal Services for Prisoners with Children, <https://www.prisonerswithchildren.org/our-projects/allofus-or-none> (last visited Feb. 22, 2019).

⁵⁰ See National Employment Law Project, *Ensuring People with Convictions Have a Fair Chance to Work*, <https://www.nelp.org/campaign/ensuring-fair-chance-to-work/> (last visited Feb. 22, 2019). See also Dorsey Nunn, *Ban the Box Keeps Families and Communities Together*, New York Times, April 13, 2016 (describing how the Ban the Box campaign has “harnessed the power of the community of millions of formerly incarcerated people to organize for ourselves, to speak in our own voices, and make demands on the system”), available at <https://www.nytimes.com/roomfordebate/2016/04/13/should-a-jail-record-be-an-employers-first-impression/ban-the-box-keeps-families-and-communities-together>. New York State has adopted a ban the box policy for state agencies; several cities have adopted some type of ban the box policy for public and/or private employers, including Buffalo, Ithaca, Kingston, Newburgh, New York City, Rochester, Syracuse, Woodstock and Yonkers; and several counties have adopted ban the box policies for public employers, including Albany, Dutchess, Tompkins, Ulster and Westchester counties. All of Us or None has produced videos on ban the box, available at <https://www.prisonerswithchildren.org/our-projects/allofus-or-none/all-of-us-or-none-videos/> (last visited Feb. 22, 2019).

Similarly, JustLeadershipUSA is an organization started by a formerly incarcerated person and led and staffed by people with lived experiences. JustLeadershipUSA is proving to be an effective voice in the campaigns to close Rikers Jail in New York City and to reform New York's bail, discovery, and speedy trial laws. Other advocacy organizations, like the Katal Center for Health and Justice, are selecting people with lived experiences to lead their various campaigns.⁵¹

In the context of service programs, the Fortune Society exemplifies the value of peer support in re-entry. The organization prioritizes hiring people with lived experience: about 70% of Fortune employees have a history of incarceration, substance abuse, or homelessness, with 50% having a history of incarceration.⁵² As one Fortune employee stated, "We have a lot of formerly incarcerated individuals that understand the needs of individuals coming home from prison. Showing up to let people know that we did it, and if we can do it, you can do it."⁵³ Some of the service providers that attended the November 9, 2018 Open Meeting spoke of the value of hiring people with conviction histories, including the Center for Community Alternatives and MHEP-Rise.

A recent study of Project New Opportunity (PNO) emphasizes the value to re-entry service programs of hiring people with past convictions. PNO was created to assist people being released from federal prison as a result of President Barack Obama's commutation of needlessly long sentences for drug crimes. Staffed by a Project Director and several part-time Reentry Consultants, the program initially recruited Reentry Consultants with professional social worker degrees and experience. But the part-time nature of the positions made recruitment and retention difficult, and the program suffered. The hiring of a full-time Deputy Director who had himself been formerly incarcerated revitalized the program. He re-wrote the Reentry Consultant job description to place a greater emphasis on lived experience. The skills of professional social workers were not abandoned; rather, where necessary, formerly incarcerated Reentry Consultants who did not have professional training were paired with those who did, "joining the life skills of people who had negotiated the challenges of transition with the clinical skills and resources of social workers."⁵⁴ A survey of program participants revealed that they valued the empathy and understanding their Reentry Consultants showed them.⁵⁵

Despite the inroads that have been made, the stigma and barriers to involving people with lived re-entry experience in policy discussions and service programs persist. Effective solutions to re-entry problems can be best achieved if there is a concerted effort to include people with past convictions in service programs and in re-entry policy discussions and decision-making. Doing so requires that we address the stigma associated with past criminal justice involvement and take affirmative steps to remove the barriers to full participation. This inclusion should not just involve one or two "token participants" but a concerted effort to elevate and honor the insights formerly incarcerated people have obtained through their lived experiences. New York is rich with policy

⁵¹ The Katal Center for Health & Justice, for example, recently hired Donna Hylton, a formerly incarcerated woman as a Senior Justice Fellow to lead its Women and Girls Project. *See Donna Hylton*, https://www.katalcenter.org/donna_hylton (last visited Feb. 22, 2019).

⁵² *See Services that Build Lives*, <http://www.fortunesociety.org/services-that-build-lives/> (last visited Feb. 22, 2019).

⁵³ Video, *Give Hope*, Fortune Society (Nov. 14, 2017), <http://www.fortunesociety.org/givehope/> (last visited Feb. 22, 2019).

⁵⁴ Weissman, *supra* note 42, at 14.

⁵⁵ *Id.* at 18.

and advocacy organizations that affirmatively recruit and hire people with conviction histories, including the Fortune Society, the Center for Community Alternatives, Katal Center for Health and Justice, and JustLeadershipUSA. These organizations provide a deep pool of people upon whom to draw who have experience with incarceration and re-entry and a demonstrated commitment to using this experience to make positive change.

DOCCS' policy prohibiting people under supervision from having contact with formerly incarcerated people should also be re-examined. As one formerly incarcerated person has stated, because of this policy, "You are ... unable to associate with the very people who can help you."⁵⁶

Finally, DOCCS, county jails and correctional facilities should re-examine and revamp their policies and protocols regarding the admission of service provider staff and volunteers who have past convictions. In re-examining these policies, DOCCS and county jails should ask why convictions that are remote in time (*i.e.*, more than five years old) are considered at all, what types of convictions should be considered, and what the person has accomplished since his or her conviction. We also recommend that DOCCS and jails re-consider if there is any value to conducting a criminal background check for people seeking admission to the facility who have relevant and meaningful professional experience. In such circumstances, the person seeking admission has a proven track record that is significantly more relevant than anything a criminal history screening can reveal.⁵⁷

II. RIGHTS RESTORATION SERVICES: RE-ENTRY PROGRAMS

As previously stated, this Association's 2006 report on re-entry and reintegration examined many of the "collateral" consequences of a criminal conviction that hinder people's ability to live law-abiding, dignified lives in the community after serving their sentences.⁵⁸ In 2014, the National Association of Criminal Defense Lawyers ("NACDL") issued a report discussing some of the mechanisms for rights restoration available in various jurisdictions. The report concluded with a strong recommendation that mechanisms for rights restoration be made available to people who have completed their sentence so that everyone with a criminal record has "a clear path to equal opportunity."⁵⁹

⁵⁶ See Gloria Rubero, "Let Those Who Have Been There Guide Reentry," in the Center for Justice at Columbia University, *Aging in Prison: Reducing Elder Incarceration and Promoting Public Safety*, November 2015, available at http://centerforjustice.columbia.edu/files/2015/10/AgingInPrison_FINAL_web.pdf. See also, Binall, *supra* note 48, at 1 (concluding that "offender no association conditions endorse an untenable conceptualization of former offenders, a rejection of evidence-based parole practices, an uninformed view of inter-offender associations, and a superficial application of criminological theory").

⁵⁷ In this regard, we note that DOCCS Directive 4750 ("Volunteer Service Programs"), *supra* note 47, sets the policies for admission to DOCCS not only for volunteer services but also for the delivery of services as part of a person's employment. The directive requires that such individuals "provide documentation that they are certified, licensed and/or otherwise qualified to provide the services for which they are applying." This requirement begs the question: If a person is certified and qualified to provide the services for which they are seeking admission to a facility, why is it necessary to conduct a background check? After all, if the person has a past conviction, the fact that he or she has since acquired the credentials and certification needed to provide professional services would seemingly make the person more—not less—qualified to provide services to incarcerated people.

⁵⁸ *Re-Entry and Reintegration*, *supra* note 2, at 443.

⁵⁹ National Association of Criminal Defense Lawyers, *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime*, May 2014, at 12, available at <https://www.nacdl.org/restoration/roadmapreport>.

New York has long had some limited mechanisms available for rights restoration, though these mechanisms are not always well-known or easily accessible to people with conviction histories. Moreover, these mechanisms go only so far in clearing the path to equal opportunities for people with past convictions, and many needless barriers to employment, housing, higher education, volunteer work, and other opportunities persist.

Below, we examine and make recommendations about: a) the programs that currently exist to assist people in knowing their rights upon release from prison and jail and accessing any available rights restoration mechanisms; and b) the two rights mechanisms that currently exist in New York, namely, sealing of arrests and convictions and Certificates of Relief from Disabilities and Certificates of Good Conduct (together, “Certificates of Rehabilitation”).

A. Programs that Assist Formerly Incarcerated People in Knowing and Vindicating Their Rights and Accessing Available Rights Restoration Mechanisms

During the November 9, 2018, Open Meeting, participants spoke about certain model programs that assist re-entering people in accessing available rights restoration mechanisms and knowing and vindicating their rights. One such program is run by the Center for Community Alternatives (“CCA”), a community-based non-profit organization that works to promote reintegrative justice and a reduced reliance on incarceration through its programs, research, and advocacy. CCA has offices in Syracuse and Brooklyn. Its Syracuse office houses a Reentry Clinic that provides services to CCA program participants with past convictions. Melissa Castor, Assistant Director of the Reentry Clinic, detailed the services offered, which include the following:

- *Assist people in obtaining their official criminal history records and use these records to advise people on their conviction histories, what they are required to report if asked, and their rights.*⁶⁰ Ms. Castor said that in many circumstances, people do not fully understand their conviction histories and thus, sometimes inadvertently provide misinformation on applications for employment, housing, etc., which can result in an automatic denial. Knowing their conviction history and how to accurately report it can empower people as they seek to reintegrate into the community. She described the case of a Reentry Clinic client (“Joe”) who reported to an employer that he had a felony conviction. Subsequently, after working with the Reentry Clinic and obtaining his official criminal history record, Joe learned that he also had a misdemeanor conviction. He immediately contacted the

⁶⁰ New York law affords people with past convictions certain rights in applying for employment and occupational licensing. Specifically, Article 23-A of the Correction Law provides that employers and agencies involved in occupational licensing or employment clearance cannot deny a person employment opportunities based on the person’s criminal conviction history unless the person’s conviction history is directly related to the employment opportunity sought; or hiring the person would create “an unreasonable risk” to property or the safety of others. *See* Correction Law § 752. Correction Law § 753 lists the factors that must be considered in making this determination, while Correction Law § 754 gives people with past convictions the right to request and receive from employers or occupational licensing agencies a reason for any adverse decision. Under Human Rights (Executive) Law § 296(15), failure to comply with Article 23-A is an unlawful discriminatory practice subject to the remedies identified in New York’s Human Rights Law. These protections are critical to promoting employment opportunities for people with criminal records, but too few people know of these protections or the available enforcement mechanisms.

employer, explaining that he had not realized that he also had a misdemeanor conviction and this his failure to disclose it was inadvertent. Because Joe took the initiative to correct the mistaken information on his application, the employer believed that the failure to disclose was inadvertent and offered him a job. If Joe had not had access to Reentry Clinic services, he would not have learned of the mistake he made on the application and likely would have been denied a job once the employer conducted a background check and realized that Joe did not fully disclose his convictions.

- *Identify mistakes on conviction histories and correct these mistakes.* Ms. Castor noted that mistakes are common and records often fail to indicate, for example, that a case has been disposed of, an arrest dismissed and sealed, or a warrant vacated. Yet these mistakes can serve as barriers to many opportunities, including employment and housing.
- *Determine if a person is eligible for “Certificates of Rehabilitation”, and if so, assist in applying.* Certificates of Rehabilitation can be a tool in helping people overcome the barriers to employment, particularly if the employment requires occupational licensing. Yet few people know they exist or how to access them. Moreover, it can be difficult to know how to apply and whether, for example, the application should be submitted to the court or to DOCCS.⁶¹ Legal assistance can help people reentering the community after prison or jail know of the availability of Certificates of Rehabilitation, determine if they are eligible, and if so, how to apply.
- *Determine if a person is eligible for sealing under CPL § 160.58 or § 160.59, and if so, assist with the application.* Since this Association’s 2006 report on re-entry and reintegration, New York has enacted two statutes, Criminal Procedure Law (CPL) § 160.58 and § 160.59 that, in limited circumstances, allow the sealing of criminal convictions. These statutes are discussed further below. Programs that provide rights restoration services can assist people in determining if they are eligible for sealing any convictions, and if so, can assist in the application process.

CCA is not the only organization in New York that provides these critical re-entry services. Indeed, during the November 9th Open Meeting, Judy Whiting, a Task Force member and General Counsel for Community Service Society of New York (“CSSNY”), described CSSNY’s Next Door Project, which trains older adult volunteers to assist people with past criminal justice involvement to obtain their criminal history records, identify and correct mistakes on them, and determine eligibility and how to apply for a Certificate of Rehabilitation and sealing convictions under New York’s limited sealing laws, including CPL §160.59. The Project also assists individuals in creating portfolios of proof of positive change that can be used in the employment, licensing or housing application process. CSSNY attorneys represent Project clients in administrative proceedings and litigation concerning violations of the New York City Fair Chance Act (New York City’s Ban the Box law) and other anti-discrimination laws. They train and

⁶¹ See generally Correction Law §§ 700-703-b. People who have not served a state prison sentence apply to the sentencing court for a Certificate of Relief from Disabilities, while people who have served a state prison sentence must apply to DOCCS’ Certificate Review Unit.

supervise attorneys at major New York law firms to represent CSSNY clients in applications to seal convictions under CPL §160.59. Other New York City groups including the Legal Action Center, the Bronx Defenders, the Legal Aid Society of New York, Youth Represent, Fortune Society, and Brooklyn Defender Services offer related services.

While New York City has a number of providers that offer these services, this is not true statewide. Our preliminary investigation suggests that most urban areas have at least some providers that offer these services. For example, in addition to CCA's Reentry Clinic, in Onondaga County, Legal Services of Central New York ("LSCNY") also provides employment history counselling and rights restoration services to people with past convictions. This project, funded through a partnership with the Onondaga County Bar Associations Assigned Counsel program ("OCBAACP"), allows LSCNY to provide re-entry legal services to people who are current or past clients of the OCBAACP. The program also provides technical assistance to OCBAACP attorneys as they seek to advise their current clients on the life-long consequences of a criminal conviction and, where possible, to ameliorate these consequences. This aspect of LSCNY's program is consistent with the recommendation in the National Association of Criminal Defense Lawyers' ("NACDL's") 2014 report that "[d]efense lawyers should consider avoiding, mitigating and relieving collateral consequences to be an integral part of their representation of a client."⁶²

Similarly, in Monroe County, the Judicial Process Commission collaborates with Legal Assistance of Western New York's Re-entry Project to assist individuals in obtaining their official criminal history records, and if eligible, to apply for a Certificate of Rehabilitation. They also educate people on their rights concerning employment discrimination and, where appropriate, pursue legal remedies when these rights have been violated. In Erie County, the Legal Aid Bureau of Buffalo provides rights restoration services to qualifying individuals on a wide range of matters, including employment, housing, educational opportunities, child support, DMV suspensions, and financial stability, and assists individuals with obtaining Certificates of Rehabilitation. This program is affiliated with the Federal Reentry Court (Western District of New York), the University of Buffalo Law School Reentry Practicum, the Erie County Restorative Justice Coalition, and the Erie County Re-entry Task Force.

In Suffolk County, the Suffolk County Legal Aid Society ("SCLAS") has partnered with Touro College Jacob D. Fuchsberg Law Center to create the "Breaking Barriers Pro Bono Project." Through this program law students, supervised by attorneys, offer formerly incarcerated individuals education on their rights; assistance in obtaining, identifying, and correcting errors on their official criminal history records; assistance in determining eligibility for sealing or for Certificates of Rehabilitation, and if eligible, assistance in the application process. Finally, the program has partnered with the Suffolk County Sheriff to deliver rights education programs to people incarcerated in the Riverhead Correctional Facility and the Yaphank Correctional Facility (two of the county's jails). This program has been in existence since 2015, and has served 437 clients to date.⁶³

Recently, Elizabeth Justesen, SCLAS's Outreach Director and founder of Breaking Barriers, has collaborated with the Nassau Suffolk Law Services Committee to use a Justice for All

⁶² National Association of Criminal Defense Lawyers, *supra* note 59, at 61.

⁶³ See Appendix B, which provides a breakdown of the types of services they provide their clients.

grant to create and implement a Reentry Project staffed by two attorneys. This program provides services similar to Breaking Barriers. In addition, staff attorneys assist recently released people in securing housing, and toward that end have been given use of an office at the DOCCS field office (parole) to work with people recently released to parole in completing applications for public assistance. Staff attorneys also assist people in matters involving denial of public assistance or public housing because of a past conviction, unlawful employment discrimination, and assistance in overcoming bars to occupational licensing erected by a past conviction.

The above programs illustrate the creativity and ingenuity required to implement and maintain a rights restoration program. There is no single, steady source of funding for this critical legal service, and as a result these programs rely on a variety of mechanisms and funding sources to keep their doors open, including partnerships with community-based organizations and law schools, using pro bono attorney time, and securing a combination of federal, state, local, and foundational grants. But most of these funding sources are time-limited; usually the grants are for one to five years. The partnerships may also be fragile, often depending on the time and good-will of one or two key people. Additionally, the funding is never enough to serve everyone who needs the service, and eligibility for these programs is typically limited. For example, CCA's Reentry Clinic is funded as part of CCA's other programs for people returning to the community from jail or prison, and thus, can serve only these program participants. Likewise, Bronx Defenders and Brooklyn Defender Services serve primarily those individuals to whom they provide criminal defense or family court representation services.

Still, the above counties are fortunate to have these rights restoration programs, even if limited in capacity. Many other counties do not have any organizations that provide similar services. For example, our investigation suggests that there are no comparable organizations in less populous counties. Yet, as illustrated by the story that CCA's Melissa Castor told about Joe, these services are critical to diminishing barriers to living a dignified, law-abiding life in the community. The NACDL emphasizes this point:

It is time to recognize that America's infatuation with collateral consequences has produced unprecedented and unnecessary collateral damage to society and to the justice system. It is time to celebrate the magnificent human potential for growth and redemption. It is time to move from the era of collateral consequences to the era of restoration of rights and status.⁶⁴

People who need rights restoration legal services should be able to access them regardless of where they live or how wealthy they are. We recommend that such access be viewed as a basic, foundational need of people returning to the community from prison and jail. Access should not be dependent on the vagaries of funding; nor should some people be denied access simply because of where they live. These programs should be funded as a critical legal service via a steady stream of state funding which should be sufficient to allow program staff to provide educational programs in jails and prisons. Preference should be given to programs that hire people with prior conviction histories, and jail and prisons should be prohibited from barring these programs' staff simply because of their past convictions.

⁶⁴ National Association of Criminal Defense Lawyers, *supra* note 59, at 12.

B. An Assessment of New York's Rights Restoration Mechanisms

Under current New York law, there are two types of formal rights restoration mechanisms, namely Certificates of Rehabilitation prescribed by New York Correction Law Article 23; and mechanisms under New York's Criminal Procedure Law (CPL) to seal arrests that do not result in a criminal conviction (CPL § 160.50 and § 160.55), to seal of certain convictions (CPL § 160.58 and § 160.59), and to adjudicate the person a Youthful Offender, which protects the confidentiality of arrest and court records (CPL § 720.35). Each is discussed below.

1. Certificates of Rehabilitation

There are two types of Certificates of Rehabilitation in New York. A Certificate of Relief from Disabilities is available to people who have any number of misdemeanor convictions but no more than one felony conviction.⁶⁵ A person who is not sentenced to state prison is eligible to apply to the court at the time of sentencing or any time after.⁶⁶ People who are sentenced to state prison are eligible to apply upon their release from prison; such individuals must apply to the DOCCS' Certificate Review Unit.⁶⁷

Certificates of Good Conduct are available to people who have more than one felony conviction.⁶⁸ These certificates require the completion of a five-year waiting period for people whose most serious felony conviction was a class A or B offense, and a three-year waiting period for people whose most serious felony conviction was a class C, D, or E offense.⁶⁹ These applications must be submitted to DOCCS' Certificate Review Unit.⁷⁰

People who have received a Certificate of Relief from Disabilities or a Certificate of Good Conduct must still disclose their convictions if asked about them during the process of applying for employment, housing, etc. These certificates establish a legal presumption of rehabilitation.⁷¹ Pursuant to Correction Law § 753(2), if an applicant for employment or occupational licensing has a Certificate of Rehabilitation, it must be considered as a factor in favor of hiring the person or granting the license.

During the November 9, 2018, Open Meeting, participants discussed the value of Certificates of Rehabilitation in dismantling the barriers to employment and housing, describing their experiences and the experiences of others in using them to enhance employment and housing opportunities. Participants generally agreed that most private employers and landlords give little or no weight to Certificates of Rehabilitation, and do not know what they are or understand that they establish a presumption of rehabilitation. State agencies, however, seem to better understand the Correction Law, and therefore place a higher value on applicants having Certificates. Thus, for example, people with a past conviction seeking authorization from the New York State

⁶⁵ Correction Law §§ 700(1)(a), 702(2)(a), 703(3)(a).

⁶⁶ *Id.* § 702.

⁶⁷ *Id.* § 703.

⁶⁸ *Id.* § 703-a.

⁶⁹ *Id.* § 703-b(3).

⁷⁰ *Id.* § 703-b(1); the DOCCS application for these certificates, accompanied by instructions, is available at http://www.doccs.ny.gov/pdf/DOCCS-CRD-Application_Instructions.pdf (last visited Feb. 24, 2019).

⁷¹ Correction Law § 753(2).

Department of Health to work in a nursing home have a better chance of receiving this authorization if they have a Certificate of Good Conduct or a Certificate of Relief from Disabilities. Similarly, some local housing authorities, including the New York City Housing Authority, will consider Certificates of Rehabilitation as a factor that weighs in the favor of applicants for subsidized housing.

In sum, Certificates of Rehabilitation have limited value for re-entering people; the value is primarily for people who are seeking employment that requires occupational licensing or state agency clearance. It may be that if private employers and landlords knew more about Certificates and if the Correction Law was better enforced, private employers and landlords would be more willing to view them as a factor in the applicant's favor.⁷²

During the November 9, 2018, Open Meeting, participants also discussed the various barriers eligible people face in applying for Certificates of Rehabilitation. For example, DOCCS has the discretion to issue Certificates of Relief from Disabilities to people who are released from prison and have no more than one felony conviction. It is not clear how often DOCCS exercises this discretion to issue these Certificates. Meeting participants told the Task Force that, even when issued, the Certificate itself goes directly to the parole officer and not the re-entering person, and that parole officers often fail to give these Certificates to the released person, who may not otherwise know that the Certificate was issued.⁷³

If DOCCS does not issue the Certificate upon release, the person can still apply for it; however, meeting participants informed the Task Force that DOCCS insists that while people are on parole, they cannot apply on their own but instead must have their parole officer submit it on their behalf. The Task Force was told, however, that parole officers often refuse to submit such applications, with no apparent reason for this refusal.

Additionally, people who must apply to DOCCS for either a Certificate of Relief from Disabilities or a Certificate of Good conduct are instructed by DOCCS' Certificate Review Unit to include two years of tax return filings.⁷⁴ In many instances this requirement imposes a needless barrier for people who have not filed taxes because they did not earn the minimum income for which filing is required.

We also learned of barriers to applying for Certificate of Relief from Disabilities when the application must be submitted to the court, as set forth in Correction Law §702. While many courts are aware of what these Certificates are and who is eligible, some courts are not. As a result, there are times that court clerks provide applicants with incorrect information. For example, we learned of instances in which clerks informed applicants that they must first serve a copy of the application

⁷² The need for more enforcement is yet another reason to better fund the rights restoration programs discussed previously. Many of these programs educate employers about these certificates and seek to enforce them via informal advocacy, complaints with the Human Rights Division, and/or litigation.

⁷³ Some of the service providers with whom we spoke during our county survey corroborated this information.

⁷⁴ This requirement is included in the instructions that accompany the application, which can be found at: http://www.doccs.ny.gov/pdf/DOCCS-CRD-Application_Instructions.pdf. Notably, there is nothing in Correction Law Article 23 itself that requires a person to support an application with tax filings, so it is not clear why DOCCS has created this requirement.

on the District Attorney's office, or that they cannot file an application unless they are represented by counsel.

Finally, some courts remain reluctant to grant applications for a Certificate of Relief from Disabilities, despite the legislative recognition that these Certificates are an important tool for re-entering people. Indeed, in 2011, the Legislature amended Correction Law § 702(1) to encourage courts to grant these Certificates, stating as follows in the bill support memorandum:

Certificates of Relief from Disabilities are a powerful tool created by the Legislature to promote and encourage successful reintegration after conviction. Issued at sentencing, a Certificate can prevent eviction, loss of a job and loss of an occupational license. It can lay the groundwork for re-entry into society, allowing individuals to obtain, for example licenses essential to employment, which can empower them to make child support payments and break the cycle of poverty.

Despite their utility, Certificates of Relief from Disabilities are vastly underutilized; only a tiny fraction of the tens of thousands of people who are eligible actually hold them.⁷⁵

Task Force members were told, however, that despite this legislative change, there are still courts that tend to exercise their discretion against granting applications for Certificates and they rarely grant them, particularly at sentencing. It seems that more education for courts might be helpful in encouraging judges to exercise their discretion more often in favor of granting these Certificates.

2. Sealing and Youthful Offender Adjudication

New York has long had mechanisms in place for sealing arrests that do not result in a criminal conviction. Since 1991, arrests that result in a termination of the proceeding in favor of the accused person have been automatically sealed pursuant to CPL § 160.50 (sealing of such arrests that took place prior to 1991 requires a motion). Likewise, since 1991, arrests that result in a non-criminal disposition are sealed pursuant to CPL § 160.55 (sealing of such arrests that predated 1991 requires a motion).⁷⁶ And young people arrested for a crime that occurred prior to their 19th birthday are eligible for Youthful Offender adjudication, with the limitations set forth in CPL § 720.10. Under CPL § 720.35(1), a proceeding that results in a Youthful Offender adjudication is deemed to not be a conviction, and “does not operate as a disqualification of any person so adjudged to hold public office or public employment or to receive any license granted by public authority.”

In 2009, as part of the Drug Law Reform Act, New York enacted CPL § 160.58 which allows for the conditional sealing of certain drug-related convictions for people who have completed a judicially sanctioned treatment program and their sentence. The sealing is both civil in

⁷⁵ See Bill Memorandum, ch. 488, 2011 N.Y. Laws.

⁷⁶ CPL § 160.55 has two exceptions from to sealing: Driving While Ability Impaired (“DWAI”) convictions and conviction for loitering pursuant to Penal Law §§ 160.10(d), (e). Note also that Unlawful Possession of Marijuana convictions, though non-criminal, are sealed pursuant to CPL § 160.50(k), after three years have elapsed.

nature and conditional, meaning that it is intended to allow people to continue their recovery from substance abuse through access to employment, housing, education, and volunteer work, but if a person is re-arrested, the arrest and conviction records are automatically unsealed and made available to law enforcement. Since its 2009 enactment, very few New Yorkers have benefitted from conditional sealing: according to DCJS, as of December 2016, only 491 people benefitted from conditional sealing.

In 2012, NYSBA's Criminal Justice Section Sealing Committee ("NYSBA Sealing Committee") issued its Final Report and Recommendations regarding the sealing of conviction histories.⁷⁷ This report made recommendations about eligibility for sealing, including the number, offense level, and types of offenses would render a person eligible, and the waiting period. The NYSBA Sealing Committee also made recommendations about the application process for sealing, factors courts should consider, and the effect of sealing. Regarding the latter, the NYSBA Sealing Committee recommended the following:

A sealed conviction shall not operate as a disqualification of any person to pursue or engage in any lawful activity, occupation, profession or calling unless so ordered by the court. Except where specifically required or permitted by statute or upon specified authorization of a superior court, no such person shall be required to divulge information pertaining to the sealed record. Such person shall be permitted to respond in the negative to the questions "Have you ever been convicted of a crime or violation?" or any question with the same substantive content.⁷⁸

This recommendation acknowledges that sealing will not advance the goal of second chances if people are still required to divulge sealed information when pursuing employment, housing, educational, and other opportunities.

More recently, in October 2017, heeding the recommendations of the NYSBA Sealing Committee, New York State enacted CPL § 160.59 which provides a mechanism for people with certain non-violent convictions to apply to a court to have these convictions sealed. Individuals are eligible to apply for this sealing if they have no more than two criminal convictions in their lifetime, and as long as they have no more than one felony conviction and no more than two criminal convictions total. Like CPL § 160.58 sealing, CPL § 160.59 sealing is "civil" in nature, and law enforcement has access to the sealed convictions; moreover, such convictions may be considered if the person is subsequently arrested. Unlike conditional sealing, CPL § 160.59 requires the satisfaction of a ten-year waiting period.

Although the New York State Office of Court Administration estimates that hundreds of people could potentially benefit from CPL §160.59 sealing, as of January 18, 2019, only 825 people have benefitted, revealing that the new law has been grossly underutilized. We believe there are at least two possible explanations for this.

⁷⁷ New York State Bar Association, *Final Report and Recommendations of the Criminal Justice Section Sealing Committee*, adopted by the NYSBA House of Delegates on Jan. 27, 2012, and subsequently amended in November 2016, available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=76774> (hereinafter "NYSBA Sealing Report").

⁷⁸ *Id.* at 31.

The first is the lack of information available to the public about this new sealing opportunity. Much more needs to be done to bring public awareness to the law. New York State should better publicize this relief. Criminal defense attorneys should also advise clients about these mechanisms, including information about eligibility criteria and existing waiting periods.

The second explanation for the underutilization of CPL § 160.59 is the statute's strict eligibility requirements. The restricted eligibility requirements have led one judge, Queens County Supreme Court Justice Joseph Zayas, to urge the Legislature in two separate cases to expand the statute's eligibility requirements. In the first case, *People v. John Doe*⁷⁹, the sealing applicant, Mr. Doe, had been arrested twice over a 45-day span in 1985 for selling cocaine. Both cases were resolved with a plea to criminal sale of a controlled substance in the third degree, a class B felony, and the sentences were ordered to run concurrently so that Mr. Doe served one prison sentence for both convictions. Justice Zayas noted that, despite the related nature of the offenses and Mr. Doe's exemplary life since, he had to deny sealing because CPL § 160.59 provides that a person is eligible for sealing more than one felony conviction only when the felonies were committed during the course of "the same criminal transaction."⁸⁰ He called upon the Legislature to consider broadening "the sealing statute to encompass cases like this one ...by: amending subsections (2)(a) and (4) to allow for sealing of as many as three drug-related convictions, including up to two felony convictions, when the offenses were committed within a two year period...; and amending subsection (3)(h) so that individuals with two felony or three misdemeanor drug convictions are not barred from seeking relief under the statute." Alternatively, the statute could be amended to more broadly define the meaning of one felony as it is defined in Correction Law § 700(2), which sets forth eligibility for a Certificate of Relief from Disabilities.⁸¹ Using this same definition would capture cases like Mr. Doe's, where two felonies are committed close in time and resolved together. Moreover, since Correction Law § 700 also sets forth a mechanism to provide second chances for people with a felony conviction, it makes sense for CPL §160.59 to borrow from this statute in defining one felony conviction.

In the second case, the applicant, Jane Doe, was seeking the sealing of a 1984 second-degree robbery conviction, which occurred when she was 15 years old.⁸² Since finishing her probation sentence in 1988, Ms. Doe has lived a law-abiding, productive life. Justice Zayas noted that though he felt she was appropriate for and deserving of sealing, he had to deny her application because CPL § 160.59 categorically precludes eligibility for people convicted of a violent felony offense. He urged the Legislature to reconsider this categorical bar, particularly where the offense is reflective of a youthful indiscretion.

⁷⁹ *People v. Doe*, ___ N.Y.S.3d ___, 2018 WL 5093254 (Sup. Ct. Queens Cty., Oct. 18, 2018).

⁸⁰ CPL § 160.59(1)(a).

⁸¹ Under Correction Law § 700(2), one felony conviction includes: "two or more convictions of felonies charged in separate counts of one indictment or information"; "two or more convictions of felonies charged in two or more indictment or information, filed in the same court prior to entry of judgement under any of them"; and "a plea or a verdict of guilty upon which sentence or the execution of sentence has been suspended or upon which a sentence of probation, conditional discharge, or unconditional discharge has been imposed."

⁸² See Andrew Denney, *Queens Judge to Lawmakers: 'Raise the Age' Sealing Law Needs More Work*, N.Y.L.J., Dec. 12, 2018, available at <https://www.law.com/newyorklawjournal/2018/12/12/queens-judge-to-lawmakers-raise-the-age-sealing-law-needs-more-work/>.

This Task Force also urges the Legislature to consider if successful re-entry might be furthered by reducing the waiting period in certain circumstances, and permitting eligibility for class A drug offenses.⁸³ Additionally, the lack of a sealing mechanism for federal convictions makes it extremely difficult for New Yorkers with federal convictions to access the opportunities needed for a dignified, productive life in the community.

Arrests that result in a sealing pursuant to CPL §160.50, § 160.55, §160.58, and §160.59, and in a Youthful Offender adjudication pursuant to CPL § 720.35 receive, protections under New York's Human Rights Law. Specifically, under Human Rights (Executive) Law § 296(16), employers and agencies involved in occupational licensing are not to ask about arrests and convictions that have been sealed, and cannot require applicants to disclose such arrests and convictions.⁸⁴ Yet, employers and occupational agencies commonly do, and applicants are often asked the following types of illegal questions:

- Have you ever been arrested?
- Have you ever been convicted of a crime or other offense?
- Have you ever been convicted of a felony?

When asked such questions, people who have benefitted from sealing face a quandary: should they answer the question and thereby reveal the information they should not have been required to disclose, or should they deny the sealed arrest or conviction, but face the possibility of being accused of lying? As the NYSBA Sealing Committee identified in 2012, sealing cannot be effective in promoting second chances unless the law clearly permits people to answer “no” when asked to divulge a sealed arrest or conviction.⁸⁵

C. Recommendations

Based on the foregoing discussion about Certificates of Rehabilitation and sealing, this Task Force makes several recommendations. First, While DOCCS has made efforts in recent years to ensure that, when eligible, people being released from prison are awarded a Certificate of Relief from Disabilities, the awarded certificates need to be given directly to re-entering people and not to their parole officers so that re-entering people can benefit from having the Certificate of Relief from Disabilities. Additionally, prior to release, people need to be told what a Certificate of Relief from Disabilities is and how to use it effectively, what their rights are under Article 23-A of the Correction Law, and how to vindicate these rights when they have reason to believe that they have been wrongfully discriminated against because of their conviction history. People who are not eligible for a Certificate of Relief from Disabilities should be instructed on their eventual eligibility for a Certificate of Good Conduct, and should be told how to apply.

⁸³ Currently, CPL § 160.59(1)(a) categorically denies eligibility to anyone convicted of a Class A felony offense.

⁸⁴ Executive Law § 296(16) specifically states that it is an “unlawful discriminatory practice” for employers and state agencies to “make any inquiry about,” “act upon adversely” or require an applicant “to divulge information pertaining to” arrests or convictions that are sealed pursuant to CPL §§160.50, 160.55, 160.58, 160.59, and 720.35.

⁸⁵ New York State Bar Association, *Final Report and Recommendations of the Criminal Justice Section Sealing Committee*, *supra* note 77, at 31.

Second, we recommend that barriers to applying to DOCCS for a Certificate of Rehabilitation should be eliminated. People on parole or post release supervision should be permitted to apply directly and not have to wait for their parole officer to apply on their behalf. Additionally, judges and town and village court magistrates should be instructed as to what a Certificate of Relief from Disabilities is, who is eligible, and how awarding these certificates to eligible people promotes public safety by diminishing barriers to living a law-abiding and dignified life.

Third, we also recommend amending Human Rights (Executive) Law § 296(16) to make it clear that applicants asked to disclose an arrest that resulted in a sealing or youthful offender adjudication or a conviction that has been sealed can legally deny the arrest or conviction. Additionally, employers should be better educated as to what they can lawfully ask applicants to disclose about their past criminal records. Finally, there should be better enforcement and real repercussions for employers who ask unlawful questions.

Fourth, we encourage the Legislature to revisit CPL § 160.59 with an eye toward expanding eligibility for this important rights restoration mechanism. In this regard, the Legislature should consider the following: whether a categorical bar to eligibility for people with a violent felony conviction is necessary; increasing the number of convictions for which a person is eligible; re-defining one conviction in a manner that is aligned with the definition in Correction Law §700(2); and allowing eligibility for people with a class A drug conviction.

Finally, we note that decisions about sealing and expungement laws and other rights restoration processes should be informed by research clearly showing that people with convictions that are remote in time are no more likely than people without convictions to engage in criminal activity.⁸⁶ With the passage of time, a conviction is no longer indicative of risk of offending and thus is not relevant to decisions about employment, housing, higher education, volunteer work, etc. This is true of all types of convictions, including violent felony and sex offense convictions. This research challenges all of us to ask whether it makes sense to require people to endure the lifetime of stigma associated with a criminal record, and thus forever be denied the essential features of a law-abiding and dignified life.

III. THE FINANCIAL WELL-BEING OF PEOPLE BEING RELEASED FROM INCARCERATION AND THE NEED TO FACILITATE ACCESS TO PUBLIC ASSISTANCE BENEFITS

In this section, we discuss why most people who leave prison or jail have few to no financial resources, and thus why it is critical to facilitate access to public assistance benefits.

⁸⁶ See, e.g., Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *Criminology* 327 (2009).

A. People Arrested and Convicted of Crimes are Disproportionately Low-Income, and Being Convicted and Incarcerated Further Impoverishes Them.

Research shows that low-income people are disproportionately caught up in our criminal justice system.⁸⁷ In a 2015 report, the Prison Policy Initiative (PPI) examined 2004 data from the Bureau of Justice Statistics on the incomes of people prior to their incarceration. PPI found that prior to their incarceration, people had a median annual income of \$19,185 -- 41% less than the non-incarcerated people of similar ages.⁸⁸ PPI further found that:

The gap in income is not solely the product of the well-documented disproportionate incarceration of Blacks and Hispanics, who generally earn less than Whites. We found that incarcerated people in all gender, race, and ethnicity groups earned substantially less prior to their incarceration than their non-incarcerated counterparts of similar ages.⁸⁹

There are other indicators that people arrested and convicted of criminal conduct are disproportionately low-income. For example, according to a 2000 Bureau of Justice Statistics report, 82% of people whose state prosecutions resulted in a felony conviction were deemed indigent and thus represented by appointed counsel.⁹⁰ And many arrested people are detained prior to trial because they are too poor to afford the cost of bail.⁹¹

A conviction itself drives people further into poverty. As noted in this Association's 2006 report on re-entry and reintegration: "New York and the federal government have developed a vast

⁸⁷ See, for example, Bruce Western, *Punishment and Inequality in America* (2006); Bruce Western & Becky Pettit, *Incarceration and Social Inequality*, 139 *Daedalus* 8 (Summer 2010). See also Radley Balko, *The Ongoing Criminalization of Poverty*, *Wash. Post*, May 14, 2015, available at https://www.washingtonpost.com/news/the-watch/wp/2015/05/14/the-ongoing-criminalization-of-poverty/?utm_term=.c68dba20d06a (discussing three recent reports that discuss how law enforcement tends to focus on low-income communities, thus arresting and incarcerating low-income people at disproportionate rates).

⁸⁸ Bernadette Rabury & Daniel Kopf, Prison Policy Initiative, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, Jul. 9, 2015, available at <https://www.prisonpolicy.org/reports/income.html>.

⁸⁹ *Id.*

⁹⁰ See Caroline Wolf Harlow, Bureau of Justice Statistics, *Special Report: Defense Counsel in Criminal Cases*, November 2000, available at <https://www.bjs.gov/content/pub/pdf/dccc.pdf>.

⁹¹ Udi Ofer, *We Can't End Mass Incarceration Without Ending Money Bail*, American Civil Liberties Union, Dec. 11, 2017, <https://www.aclu.org/blog/smart-justice/we-cant-end-mass-incarceration-without-ending-money-bail?redirect=blog/mass-incarceration/smart-justice/we-cant-end-mass-incarceration-without-ending-money-bail> (last visited Feb. 24, 2019) (noting that "[c]lose to half a million people are in jail today awaiting trial, many of them incarcerated because they are too poor to afford cash bail"). See also Alex Taub, *How Does Bail Work, and Why Do People Want to Get Rid of It?*, *N.Y. Times*, Jan. 11, 2019 (available at <https://www.nytimes.com/2019/01/11/nyregion/how-does-bail-work-and-why-do-people-want-to-get-rid-of-it.html>) (noting that in 2017, 33,000 arrested people in New York could not post bail at their initial court appearance, and thus were jailed). The high pretrial incarceration rates have prompted Governor Cuomo to propose legislation that will reform New York's current bail system eliminating monetary bail in many instances. The Governor first proposed bail reform legislation in 2018. See *2018 Criminal Justice Reform Package*, Jan. 26, 2018, available at <https://www.ny.gov/restoring-fairness-new-yorks-criminal-justice-system/2018-criminal-justice-reform-package>. He proposed bail reform legislation again in 2019. See Dan M. Clark, *Cuomo Details Marijuana Legalization, Criminal Justice Reform in NY Budget Speech*, *N.Y.L.J.*, Jan. 15, 2019, available at <https://www.law.com/newyorklawjournal/2019/01/15/cuomo-details-marijuana-legalization-criminal-justice-reform-in-ny-budget-speech/>.

array of fines, fees, costs, penalties, surcharges, forfeitures, assessments and restitutions that are levied against people convicted of criminal offenses.”⁹² This report further stated:

In light of the fact that the vast majority of people who are processed through the criminal justice system are, as previously discussed, indigent, the impact of the penalties is all the more burdensome, and the actual collection of such penalties is problematic at best.... Financial resources that could assist with the cost of housing, food, and family support are typically meager at the time of the individual’s return from prison so that almost any financial penalty is a setback to the re-entry process.

Upon incarceration, the financial pressures increase. Though there may be opportunities for people to work while in prison, in New York (like most states) incarcerated people are paid pennies per hour for their labor. For example, people incarcerated in a DOCCS facility make anywhere from \$0.10 to \$0.33 per hour for non-industry jobs, and an average of \$0.62 per hour for industry jobs. Incarcerated people who work a food service assignment make between \$0.16 and \$0.45 per hour.⁹³ Imprisoned people typically find that much of their earnings are garnished to pay off criminal justice debt,⁹⁴ the remaining funds often must be used to pay for essentials, such as personal hygiene products, reading material, legal materials, and communication with loved ones, including paper and stamps for letters and phone calls home. Put simply, there are no real opportunities for incarcerated people to save money, and most people leave prison with only \$40 in their pocket and no other source of income.⁹⁵

During this Task Force’s November 9, 2018, Open Meeting, attendees spoke of the negative impact that incarceration has on the financial well-being of individuals and their families. One meeting participant, Evie Litwok, spoke of being incarcerated at age 60, and then released with nowhere to go and no prospects:

I was released to the Port Authority to no one. Just my arrival at the Port Authority was overwhelming and heartbreaking for me. Then I had to make my way to a halfway house. Just that trip being alone was traumatizing, and I was already

⁹² *Re-Entry and Reintegration*, *supra* note 2, at 163.

⁹³ These wages were listed by the Prison Policy Initiative. *State and Federal Prison Wage Policies and Sourcing Information*, Apr. 10, 2017, https://www.prisonpolicy.org/reports/wage_policies.html (last visited Feb. 24, 2019). The information is based on the policies of each state’s prisons, and includes pay scales for non-industry and industry jobs. In New York, non-industry jobs include program assignments, while industry jobs include the Corcraft work program. See New York State Department of Corrections and Community Supervision, Directive 4802 (Inmate Payroll Standards) (Jul. 27, 2018), available at <http://www.doccs.ny.gov/Directives/4802.pdf>; Directive 6922 (Division of Correctional Industries (Corcraft)) (Oct. 3, 2018), available at <http://www.doccs.ny.gov/Directives/6922.pdf>.

⁹⁴ Under New York law, a person is responsible for paying off criminal justice debt while in prison or jail. For example, New York’s Penal Law § 60.35(5), requires that when a person has been sentenced to a term of incarceration, the court clerk must notify the relevant official at the jail or prison of any mandatory surcharges or fees that are unpaid, and the relevant official must then collect the owed money from the incarcerated person’s “inmate funds” or any money earned as part of a work release program. See also New York State Department of Corrections and Community Supervision, Directive 2788 (Collection & Repayment of Inmate Advances & Obligations) (Apr. 18, 2018), available at <http://www.doccs.ny.gov/Directives/2788.pdf>. Section IV outlines the process for collecting from a person’s “inmate account” mandatory surcharges, fees, restitution and fines.

⁹⁵ See DOCCS Directive 2788, *supra* note 94. Section XII provides a mechanism by which a person is released with at least \$40, even if the person does not have a full \$40 in his or her “inmate account” at the time of release.

traumatized [from my time in prison].

Evie further described the demoralizing process of looking for work with the stigma of a criminal conviction. She sent out hundreds of job applications, but received no responses.⁹⁶ Her own experience taught her how isolating the re-entry process can feel, and the need for “communities to wrap around us.... We need communities willing to be inclusive.” To generate community support for re-entering people – and to make something positive out of her experience – Evie has started a “Suitcase Project.” This project seeks monetary and non-monetary support from synagogues for people returning from prison. The goal is to provide reentering people a suitcase that includes a smartphone with a year’s worth of minutes, a laptop, and \$800. Along with the donation of a suitcase and its contents, Evie asks the person donating each suitcase to commit to taking a released person to dinner once a month for a year to simply “check in” and show support. With her project that seeks to address the sense of isolation she experienced upon release, Evie demonstrates the ingenuity and commitment to making a positive difference so many people being released from prison and jail possess.

B. The Importance of Facilitating the Public Assistance Application Process

People like Evie who leave prison and jail with no financial resources or means of supporting themselves must rely on public assistance benefits, including Temporary Assistance, SNAP, and Medicaid, to pay for their basic food, housing, and medical needs. However, applicants for public assistance benefits who do not live with their children face a 45-day waiting period after applying.⁹⁷ Thus, at a time when people need it the most, this safety net assistance is unavailable. Worse, people often face needless bureaucratic hurdles to applying for public assistance benefits. These hurdles were illuminated in a 2014 report by the Safety Net Project at The Urban Justice Center which discusses the results of a survey of 130 New York City Human Resources Administration (“HRA”) public assistance customers conducted between October 2013 and February 2014. Among other findings, this survey revealed that HRA continually failed to properly communicate with public assistance customers: 63% of respondents reported that language translation services are not provided; 88% reported that calls are rarely or never answered; and 50% reported that their questions are not adequately answered.⁹⁸

⁹⁶ Evie’s experience is not unusual, and research shows that people with past convictions face significant barriers in obtaining employment. See NRC Report at 258 (after reviewing the research on employment outcomes for formerly incarcerated people concluding that “the bulk of the evidence supports the conclusion that incarceration is associated with poor employment outcomes”). See also Devah Pager, *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration* (2007) (describing the audit study conducted in Milwaukee which revealed the stigma people with a prior conviction and people of color face in looking for employment).

⁹⁷ See e.g., N.Y. Social Services Law § 153(8) (providing that “state reimbursement shall not be made for any expenditure made ... for any home relief payment for periods prior to forty-five days after filing an application unless the district determines pursuant to department regulations that such assistance is required to meet emergency circumstances or prevent eviction”).

⁹⁸ See Helen Strom & Afua Atta-Mensah, Safety Net Project, Urban Justice Center, *Culture of Deterrence: Voices of the NYC Public Assistance Recipients*, May 2014, available at https://snp.urbanjustice.org/sites/default/files/snp.web.doc_report_culture-of-deterrence_20140611.pdf. The results shown by this survey are not atypical. There have been lawsuits in Erie, Steuben, Niagara, Nassau, Oneida, Monroe and Suffolk counties against local offices of the Department of Social Services challenging policies that turn applicants away from offices and unnecessarily delay the processing of public assistance benefits.

In 1993, the New York State Office of Temporary and Disabilities Assistance (“OTDA”) issued an Informational Bulletin encouraging social services districts to develop protocols for accepting public assistance applications from people who are still incarcerated and due to be released soon. The Information Bulletin, which includes a “Q&A,” states as follows:

Q. A prisoner has been given a release date. Can the prisoner apply 45 days in advance of release?

A. Yes, this *should* become standard with any kind of pre-release and be arranged so that assistance begins on the release date.⁹⁹ (Emphasis supplied.)

Though the Information Bulletin uses the term “should,” thereby seemingly requiring social services districts to allow people to apply for public assistance while incarcerated, OTDA takes the position that this guidance is not mandatory. Thus, social services districts can arrange for benefits to start on the day of release by accepting pre-release applications, or make individuals wait until they are no longer incarcerated to apply for public assistance. Most social services districts have elected to not accept public assistance applications from people while they are in prison or jail.

New York State needs a consistent, statewide policy that ensures public assistance benefits are in place when a person is released from incarceration. We recommend that the policy expressed in 93-INF-11, which would have public assistance benefits in place on a person’s release date, be mandatory statewide. In this regard, we reiterate the recommendations made in this Association’s 2016 report on re-entry to add a subdivision to Social Services Law § 159 and/or Social Services regulation 18 NYCRR 350.3 that would specifically allow incarcerated people to shorten or eliminate the 45-day waiting period by applying for public assistance prior to their release.¹⁰⁰

Allowing people to apply for public assistance benefits prior to their release is a critical step to ensuring that public assistance benefits are in place upon or shortly after release. But it is also imperative that county jails and DOCCS adopt protocols to ensure that incarcerated people are made aware of public assistance benefits, provided a copy of the application, and given assistance in applying. Without such protocols, people will not necessarily know of the public assistance benefits to which they may be entitled; nor will they know, unless told, of the opportunity to apply while incarcerated to avoid the 45-day waiting period.

The experience in Onondaga County aptly illustrates the need for public assistance application protocols to be in place both in and out of prisons and jails. In 2016, at the request of the Onondaga County Re-Entry Task Force,¹⁰¹ the Onondaga County DSS created a protocol

⁹⁹ See New York State Office of Temporary and Disability Assistance, Informational Letter 93 INF-11 (“PA Cost Containment: Implementation of Certain Provisions of Chapter 41 of the Laws of 1992 - Questions and Answers”) (Mar. 16, 1993), available at https://otda.ny.gov/policy/directives/1993/INF/93_INF-11.pdf.

¹⁰⁰ New York State Bar Association, *Report of the Special Committee on Re-Entry*, *supra* note 3, at 73-74.

¹⁰¹ The Onondaga County Re-Entry Task Force is one of nineteen County Re-Entry Task Forces across New York State that receive funding from the New York State Division of Criminal Justice Services (DCJS) “to reduce recidivism by coordinating and strengthening community supports in response to high-risk offenders transitioning from prison back to the community.” See Division of Criminal Justice Services, *DCJS County Re-entry Task Force*

allowing people to apply for public assistance while still in prison or jail.¹⁰² This Task Force learned that shortly after the Onondaga County DSS implemented the protocol, they were informed that DOCCS has elected not to implement, asserting that it lacked the resources.¹⁰³ As a result, people released from state prison must apply in person upon their release and wait 45 days before receiving public assistance benefits. In contrast, the Onondaga County Jail and Correctional Facility, both operated by the Onondaga County Sheriff's Department, have successfully implemented pre-release application protocols. Prior to their release, people are notified of public assistance benefits that may be available to them and given assistance in applying. These applicants must still appear in person at the DSS office upon their release, but their waiting period for public assistance benefits is significantly shortened.

In sum, this Task Force recommends that New York Social Services Law and the regulations and the policies of DOCCS and the local jails ensure that people leaving prison and jail have the resources needed for food, housing and medical care. New York Social Services Law and regulations should be amended to make it clear that soon-to-be-released people can apply for public benefits assistance prior to their release from prison or jail so that these benefits are in place when they are released. In addition, DOCCS and local jails should implement policies and procedures so that soon-to-be-released people are told that they may be eligible for public assistance benefits, are told how to apply prior to their release, and are given assistance in applying.

IV. HOUSING

Is there anything more obvious than a home as a pillar of successful re-entry?
-Elizabeth Gaynes, President and CEO of the Osborne Association¹⁰⁴

Safe and habitable housing is the basis of a stable life in the community and as such, is an “essential feature[] of a dignified, law-abiding life.”¹⁰⁵ As the United Nations’ Special Rapporteur on Adequate Housing succinctly stated: “housing is most importantly a human right.”¹⁰⁶ It is “the basis of stability and security for an individual or family. The center of our social, emotional, and sometimes economic lives, a home should be a sanctuary; a place to live in peace, security, and dignity.”¹⁰⁷

Initiative, https://www.criminaljustice.ny.gov/crimnet/ojsa/initiatives/offender_reentry.htm (last visited Feb. 24, 2019).

¹⁰² This protocol is on file with this Task Force.

¹⁰³ To implement it, DOCCS staff would need to notify people being released to Onondaga County prior to their release of the protocol, provide people with the DSS public assistance application, and provide information about how to complete the application and where to send it. Since people are returning to Onondaga County from any one of the 52 prisons on the DOCCS system, this would require implementation in all 52 prisons.

¹⁰⁴ See Elizabeth Gaynes, Osborne Association, *Devising a Smart, Supportive Housing Strategy for Returning Citizens Upon Reentry*, Jun. 15, 2016, available at <http://www.osborneny.org/news/devising-a-smart-supportive-housing-strategy-for-returning-citizens-upon-reentry/>.

¹⁰⁵ *Re-Entry and Reintegration*, *supra* note 2, at 443.

¹⁰⁶ United Nations Special Rapporteur on Adequate Housing, *The Right to Adequate Housing*, Office of the United Nations High Commissioner for Human Rights, <https://www.ohchr.org/en/issues/housing/pages/housingindex.aspx> (last visited Feb. 24, 2019).

¹⁰⁷ *Id.*

The link between stable housing and reintegration is well known. As the Council of State Governments stated in its re-entry housing guide for policy makers: “When individuals are released from prison or jail, the ability to access safe and secure housing is critical to successful reentry.”¹⁰⁸ Stable housing is not merely a safe, physical place, but it is also a source of positive connections to the community.¹⁰⁹ For recently released individuals, it is also a means of accessing the services and supports necessary to “facilitate their successful reintegration.”¹¹⁰ It is no surprise that there is a wealth of research showing that without stable housing, formerly incarcerated people are more likely to end up back in prison or jail.¹¹¹

Because safe and stable housing is a basic human right and a core need, this Task Force examined access to housing for recently released people. In so doing, we emphasize the goal of *safe and stable housing*, recognizing that being sheltered in unsafe, volatile and barely habitable conditions is demoralizing, a human rights violation, and a recipe for recidivism. Homeless shelters, emergency housing, and three-quarter housing (discussed further below) are examples of living situations that do not constitute safe and stable housing. This Task Force emphasizes that released people who live in such situations are not appropriately housed.

Below we first discuss the existence of programs and services in prisons and jails designed to assist people *prior* to their release in identifying and accessing safe and stable housing. Next, we discuss various barriers to safe and stable housing recently released citizens commonly face. Then we summarize what we learned from the various counties we investigated about housing for recently released people.

A. Pre-Release Planning

This section discusses what we learned about the existence of programs and services available to people while they are still incarcerated to assist in securing housing upon their release from prison or jail.

1. State Prisons- New York State Department of Corrections and Community Supervision

In 2016, 22,628 people were released to the community from one of the fifty-two prisons operated by DOCCS.¹¹² To prepare imprisoned people for their transition to the community,

¹⁰⁸ Katherine Cortes & Shawn Rogers, Council of State Governments Justice Center, *Reentry Housing Options: The Policymakers' Guide*, 2010, at vii, available at https://csgjusticecenter.org/wp-content/uploads/2012/12/Reentry_Housing_Options-1.pdf.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at viii.

¹¹¹ See, e.g., Marie Claire Tran-Leung, Shriver Center, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, February 2015, at 2, available at <https://povertylaw.org/files/docs/WDMD-final.pdf> (summarizing research showing the connection between homelessness and re-incarceration).

¹¹² See DOCCS, *Admissions and Releases: Calendar Year 2016*, at 3, available at http://www.doccs.ny.gov/Research/Reports/2017/Admissions_and_Releases_2016.pdf. For a list of facilities, see DOCCS, *Facility Listing*, <http://www.doccs.ny.gov/faclist.html> (last visited Feb. 24, 2019). The fifty-two facilities include two shock incarceration facilities (Lakeview and Moriah Shock Incarceration Correctional Facilities) and three women’s prisons (Albion, Bedford and Taconic Correctional Facilities). It does not include the Willard Drug

DOCCS offers a three-phase transitional program curriculum.¹¹³ Phase One provides imprisoned people an introduction and orientation to the transitional program. Phase Two requires participation in a gender-specific cognitive behavioral treatment program. For men, the program is called “Thinking for a Change,” and it is a three-to-four-month program that focuses on self-change, social skill development, and problem solving strategies.¹¹⁴ For women, the program is called “Moving On,” a three to four-month program that is “designed to heighten self-awareness, build on existing strengths and competencies, and teach new skills.”¹¹⁵

Phase Three of the Transitional Program is designed to assist people in planning for their release to the community and focuses on the more tangible aspects of release, including: obtaining necessary documents (birth certificate, social security card, etc.); the job search and interviewing for employment; and family reunification. According to the DOCCS’ website, this transitional program does not include a housing component.¹¹⁶

To further facilitate release planning, DOCCS employs Offender Re-Entry Counselors (“ORCs”), prison-based staff who have the responsibility of, among other things, implementing “discharge planning activities in order to prepare inmates for release and reintegration into the community” and coordinating “with field parole staff in the development of final discharge and supervision plans.”¹¹⁷ Additionally, DOCCS Regional Re-Entry Operations staff are to “assist field staff with the identification of appropriate temporary and permanent housing options for parolees, assist with case referral to services, and where appropriate seek to remedy barriers that impede parolee access to housing services.”¹¹⁸ In limited circumstances, DOCCS has some funding for emergency housing for people on parole.¹¹⁹ Finally, according to information that we received from DOCCS in response to our request inquiring about re-entry planning and programs, a small number of prisons have community-based volunteer organizations visit the facility to discuss re-

Treatment Campus or Edgecombe Residential Treatment Campus. In 2016, an additional 1,750 people were discharged from the Willard program and 631 from Edgecombe, with an additional 934 discharged from another diversion program, parole or otherwise. *See Admissions and Releases: Calendar Year 2016, supra*, at 3.

¹¹³ *See* DOCCS, *Transitional Services Program*, <http://www.doccs.ny.gov/ProgramServices/transitional.html> (last visited Feb. 24, 2019). *See also* DOCCS, Directive 4780 (Sept. 22, 2011), available at <http://www.doccs.ny.gov/Directives/4780.pdf>.

¹¹⁴ A summary of “Thinking for a Change” can be found at the National Institute of Corrections’ website, at <https://nicic.gov/thinking-for-a-change> (last visited Feb. 24, 2019).

¹¹⁵ DOCCS, *Transitional Services Program, supra* note 113.

¹¹⁶ *Id.* Some special populations may be provided with more assistance in identifying housing. For example, incarcerated people who have been diagnosed with a serious mental illness are provided mental health treatment while in prison by the New York State Office of Mental Health (“OMH”). Per regulations, OMH is required to assist individuals on their caseload with transition services to ensure a continuum of care upon their release. OMH has some limited housing support programs for people with a serious mental illness being released from prison, including a Parole Support and Treatment Program which provides clinical and housing services for homeless people who are being released to parole supervision in New York City and have a serious mental illness and a co-occurring substance abuse disorder. *See* OMH, *Division of Forensic Services, Bureau of Institutional and Transitional Services (BITS)*, <https://www.omh.ny.gov/omhweb/forensic/bits> (last visited Feb. 24, 2019). Additionally, in a limited number of instances, OMH will petition a court to require a person about to be released to have Assisted Outpatient Treatment. This is discussed in Section VI of this report.

¹¹⁷ *See* DOCCS, Directive 4401 (Apr. 30, 2018, rev. Jan. 23, 2019), available at <http://www.doccs.ny.gov/Directives/4401.pdf>.

¹¹⁸ *See* DOCCS, Directive 9222 (“Emergency Housing – Community Supervision”) (Dec. 3, 2018), available at <http://www.doccs.ny.gov/Directives/9222.pdf>.

¹¹⁹ *See id.*

entry-related issues with their population, which sometimes include housing options. These facilities include: Taconic (various organizations), Bedford Hills (various organizations); Fishkill (Exodus Transitional Community Inc.); and Green Haven (Exodus Transitional Planning, Inc.). Additionally, several facilities have veterans' organizations visit to discuss community-based services available to incarcerated veterans upon their release, including for example, Groveland (Soldier On).¹²⁰

Consistent with DOCCS' description of its Transitional Services Program, people who have served state prison sentences consistently report that DOCCS' transitional programs do not include a housing component. They also report that the ORCs have limited capacity to assist in identifying housing options. Thus, most people are left to their own devices in identifying appropriate housing options, though generally they cannot be released until DOCCS approves the housing.¹²¹ This means that about four months prior to release, incarcerated persons inform their ORC of the address at which they hope to live upon release. A parole field officer then conducts an inspection of this address to approve or disapprove of it. If disapproved, the ORC asks the person to be released to identify another address. People who have been released from prison report that they receive little to no assistance in identifying appropriate housing, and their efforts to do so are stymied by their lack of access to the internet.¹²²

Imprisoned people who cannot provide an approved address are generally released to homeless shelters. A February 2018 Spectrum News One report found that in 2017, 54% of people released from state prison to New York City were released to a shelter, up from 23% in 2014.¹²³ A spokesperson for DOCCS noted that while shelters are not a preferred residence for recently released people, on any given day there are about 1,600 people under supervision living in a shelter.¹²⁴

DOCCS has taken steps to increase the availability of transitional housing for people released from prison, and periodically issues a Request for Applications ("RFA") seeking applications from non-profit and for-profit entities for grant awards to provide transitional housing (of no more than 120 days) to people being released from DOCCS to parole or post release

¹²⁰ See Exhibit F ("Release Planning Program Information From DOCCS")

¹²¹ This is true for everyone who is released to community supervision (parole or post-release supervision). Some people are released after serving their maximum sentence, and thus, are not released to community supervision. In such instances, DOCCS has no authority to require that their housing be approved as a condition of release. In 2015, the most recent year for which a report is available on prison discharges, about 10% of released people had served their maximum sentence and thus were not released to community supervision. See DOCCS, *Releases and Discharges from Incarceration Report - Calendar Year 2015*, available at http://www.doocs.ny.gov/Research/Reports/2016/Statistical_Overview_2015_Discharges.pdf.

¹²² That this is the process was recently corroborated by a Court of Appeals decision, *Matter of Gonzalez v. Annucci*, 32 N.Y.3d 461, 2018 WL 6173959, N.Y. Slip Op. 08057 (2018). In this case, the petitioner, Mr. Gonzalez, was to be released after serving a sentence for a sex offense conviction. As described in this decision, the process for securing housing consisted of Mr. Gonzalez identifying and proposing housing to his parole officer, who would then investigate it to determine if the proposed housing was consistent with Mr. Gonzalez's release conditions. *Id.* at *1. Mr. Gonzalez proposed several housing options—all of which were deemed to not be compliant with his release conditions. *Id.*

¹²³ See Courtney Gross, *The New York Prison-to-Shelter Pipeline*, NY1, Feb. 27, 2018, <https://www.ny1.com/nyc/all-boroughs/politics/2018/02/27/ny1-investigation-more-inmates-released-upstate-prisons-going-into-nyc-shelter-system> (last visited Feb. 24, 2019). See also Shrier et al., *supra* note 5 (reporting that the service providers interviewed consistently stated that "correctional facilities are still actively discharging people to shelters").

¹²⁴ *Id.*

supervision. The RFA establishes the number of beds DOCCS will consider funding within specific counties (e.g., 10-25 beds in more populous counties like Albany, Onondaga, Monroe, Erie, Suffolk, Nassau, and the New York City counties, and five beds in less populous counties like Dutchess, Warren, and Washington).¹²⁵ The grant awards are for a period of three to five years, and limited in the amount provided. For example, in 2018, two grants were awarded: one for Community Mission of Niagara (a 4 year grant of \$429,318, which is a little over \$100,000 per year); and the second to Saving Grace Ministries of Elmira (a five year grant of \$300,000, which is \$60,000 per year).¹²⁶ While this is an important initiative to increase the number of housing options for people returning from prison, it is not enough to meet the full need, as evidenced by the continued reliance on shelters for released people.

People released to shelters are encouraged to apply to the local social service district for Temporary Assistance, SNAP, and Medicaid so they can obtain money for basic needs, including shelter. As discussed previously, people may needlessly face a waiting period before they can receive this much-needed public assistance.

2. Local Jails

The jails in New York City and the 57 other counties include the following populations: people who have been convicted and sentenced to a definite sentence (“sentenced people”); people who are detained pending trial (“pre-trial detainees”); people on parole with an alleged technical parole violation (“alleged parole violators”); people who have been convicted and sentenced to a determinate or indeterminate sentence and are awaiting transfer to a state prison (“state readyies”); people who are incarcerated as a result of a civil process, such as a Family Court matter or a material witness order (“civil”); people held in the local jail pursuant to an agreement with the federal government (“federal”); and people detained prior to arraignment or are alleged to have a parole violation and a new arrest (“other unsentenced”).¹²⁷ For purposes of this report, this section focuses primarily on sentenced people who will be released to the community at a date certain upon completion of their definite sentence. Most counties outside of New York City have one jail, though some of the larger counties have two facilities, one of which typically houses sentenced people and alleged parole violators, and the other which primarily houses the other individuals.¹²⁸

This Task Force sent letters to jails in 12 counties across the state asking about re-entry programs, and we interviewed several jail officials. What follows is a summary of what we learned from three counties - Onondaga, Albany, and Westchester - that have made a concerted effort to assist jailed people in planning for their release to the community.

¹²⁵ DOCCS, *Request For Application (RFA 2017-07): Community Based Residential Programs (CBRP)*, January 2018, available at <http://www.doccs.ny.gov/pdf/RFA-2017-07-CBRP.pdf>.

¹²⁶ Email from Linda J. Mitchell, Contract Management Specialist 2, DOCCS, to a member of this Task Force (on file with a member of this Task Force). Historical information about past grant recipients can be found at: Office of the State Comptroller, *Open Book New York*, <http://www.openbooknewyork.com/index.htm> (last visited Feb. 24, 2019).

¹²⁷ See DCJS, *Jail Population in New York State: Average Daily Census by Month*, http://www.criminaljustice.ny.gov/crimnet/ojsa/jail_population.pdf (last visited Feb. 24, 2019). One county, Schoharie, has a jail population but no physical jail.; the jail population is housed in other county jails.

¹²⁸ The counties with more than one facility are Erie, Monroe, Nassau, Onondaga, Suffolk, and Westchester.

Lavern Arrance-Doud of Onondaga County Correctional Facility provided an excellent overview of the challenges jails face in assisting jailed people prior to their release in identifying safe and stable housing. He noted that people released from jail tend to fall within one of the following three categories:

One: People who have housing and return home to live with family members or friends. These individuals do not need pre-release or transitional support for housing.

Two: People who are provided programming while in the jail because of a special need (such as mental health, substance abuse, or veteran services) and as part of this program, are provided support in pre-release planning for housing.

Three: People who fall through the cracks – *i.e.*, those with no place to live upon release and are not part of a program that provides pre-release planning.

He stated that to facilitate access to housing upon release, jails should seek to maximize the number of people who fall within the second category by developing programs and services internally, partnering with community-based organizations to bring to the facility pre-release planning services, or both. The Onondaga County Correctional Facility has sought to do both. Internally, the jail has a contract with Correct Care Solutions¹²⁹ to provide treatment and support to jailed people diagnosed with a serious mental health problem. This contract specifies that Correct Care Solutions must also provide transitional planning, including support in securing housing upon release. In terms of collaboration with community-based organizations, the jail currently has program run by Catholic Charities which provides jailed veterans with programming while in jail and transitional support upon their release, including support in securing housing. For jailed people with a substance abuse problem, Helio Health Program, a community-based substance-abuse treatment program, has secured a federal grant funding to provide support and transitional services, including assistance in securing housing.

It also bears emphasizing that the Onondaga County Jail and Correctional Facility have taken advantage of the protocols that the Onondaga County Department of Social Services (DSS) implemented to reduce the 45-day waiting period for public assistance by accepting applications from people while they are still incarcerated. According to the Onondaga County DSS, they receive approximately five to ten applications from the jail and the correctional facility each week. DSS notes that about fifty percent of the people follow-up with these applications, and thus can secure public assistance much sooner than if they had waited until after their release to start the application process.¹³⁰

Albany County Sheriff Craig Apple agrees with Mr. Arrance-Doud's assessment, though he added that some jailed people are resistant to assistance and refuse to participate in the supportive programs that are available. He is not giving up on these individuals, however, and as

¹²⁹ For more information concerning Correct Cares, see their website: <http://www.correctcarers.com/> (last visited Feb. 24, 2019).

¹³⁰ DSS speculates that the jail and correctional facility err on the side of being over-inclusive in encouraging and assisting people with these applications, and that many of the people who do not follow-up do not need public assistance.

discussed below, is seeking to engage them. During the November 9, 2018, Open Meeting and in a follow-up interview with a Task Force member, Sheriff Apple described the various strategies the Albany County Jail is using to assist jailed individuals successfully transition to the community upon their release. Like the Onondaga County Sheriff's Department, he is utilizing a combination of bolstering internal services and partnering with community-based partners. The programs he has started or is planning on starting to include the following:

- Partnership with *Soldier On*: Soldier On is a non-profit organization that is committed to ending veteran homelessness.¹³¹ The Albany County Sheriff's Department has partnered with Soldier On to provide support and transition services to jailed veterans, including planning for housing upon release. According to Sheriff Apple, veterans released from the Albany County Jail who are provided services by Soldier On have only a five percent recidivism rate. In partnership with Albany County, Soldier On is currently working to develop a housing facility for veterans,¹³² and Sheriff Apple reports that some of this facility's beds will be used for jailed veterans as a transitional program to the community.
- Creation of the Sheriff's Heroin Addiction Recovery Program ("SHARP"): In partnership with the Albany County Addictions Care Center, this program supports jailed people who are addicted to opioids by providing group and peer substance abuse counseling while incarcerated, and transitional planning and supports upon release. The transitional supports include planning for housing. Sheriff Apple reports that this program has also reduced the recidivism rate of program participants, to only 12-14%.
- Creation of a *New Beginnings* program: To ensure that fewer people "fall through the cracks" and to facilitate engagement of people who are resistant to program participation, Sheriff Apple is implementing a program he calls *New Beginnings*.¹³³ This program will utilize current jail correctional staff to interview each person upon admission to the jail to discuss what can be done to assist the person in refraining from crime upon release. Jail staff will then seek to meet the needs identified, including linkages to substance abuse, mental health treatment, and appropriate housing. This program also partners with Albany Law School for creation of an Albany County Re-entry Manual staff and incarcerated people can use to identify resources and services in the community, and how to access them. The manual will be digitized, and available to jailed people on smart tablets. For housing, Sheriff Apple has obtained the agreement from the local DSS to start accepting public assistance applications while people are still incarcerated to diminish the 45-day waiting period they would otherwise face if they could not submit their public assistance application until released.

Sheriff Apple noted that the Albany County Jail population is comparatively low right now, and thus, he has the luxury of using correctional staff to assist in identifying the needs of jailed people and planning for re-entry. Other jails, however, do not have this luxury and thus would

¹³¹ For more information concerning Soldier On, see their website: <https://www.wesoldieron.org/> (last visited Feb. 24, 2019).

¹³² See Soldier On, *Permanent Housing Projects in Development: Albany, NY*, <https://www.wesoldieron.org/permanenthousingdevelopments/> (last visited Feb. 24, 2019).

¹³³ See Lucas Willard, *Albany County Sheriff's Office Partners With Law School To Reduce Recidivism*, WAMC, Jan. 23, 2019, <https://www.wamc.org/post/albany-county-sheriffs-office-partners-law-school-reduce-recidivism> (last visited Feb. 24, 2019).

likely need additional funding for the staff needed to work on transitional planning. Still, he thinks the investment is well worth it. He emphasizes that the jailed-based programs, the linkages to the community, and the transitional planning have markedly reduced the recidivism rates of the populations served, which not only saves taxpayer dollars but also transforms and saves lives.

Westchester County is another example of a county that has used a variety of funding sources to establish community-based partnerships to assist jailed people in planning for housing prior to their release. The Westchester County Department of Corrections (“WCDC”) has the capacity to house 1,800 men and women, but currently houses slightly more than 1,000 people.¹³⁴ Thus, like Albany County, the WCDC has the resources and staff needed to focus on enhancing the services provided to jailed people with a focus on successful reintegration to reduce recidivism. It also helps that Westchester County is relatively affluent with a variety of willing community and faith-based partners.

According to Lois Molina, First Deputy Commissioner of the Westchester County Department of Corrections, the WCDC has several programs that assist people in planning for their eventual release. People with drug convictions or who have an identified substance abuse disorder can participate in Solutions, which offers prevention, education, and chemical dependency treatment and counseling services. The program offers discharge planning and referrals to aftercare programs upon completion. Participants who successfully graduate from the program continue receiving treatment after release. Solutions tracks graduates for a period of one-year post-release. The jail also offers a program geared at addressing violence called RSVP. Both Solutions and RSVP are managed by the jail’s strategic partner St. John’s Riverside.¹³⁵ Jailed people with serious mental health problems may be deemed appropriate to participate in the CORE program, which is a mental health program run in conjunction with the Department of Community Mental Health (“DCMH”). This program involves a special unit in the WCDC facility which provides focused group programming for mental health patients. Currently, the unit is working with multiple community agencies to run groups and to assist with the coordination of discharge planning. A mental health team identifies the jailed people who are appropriate for this program; each case is reviewed on an individual basis for serious mental illness, capacity to benefit from programming, need for social interactions that are structured, and need for re-entry/discharge planning.

The WCDC facility also has a Re-Entry Initiative, which is a collaborative program involving four local police departments (Mt. Vernon, New Rochelle, White Plains, Peekskill and Yonkers), public libraries, community organizations, and faith based organization that create “re-entry panels” as a way of working with incarcerated persons prior to their release to advise them about the resources and services available to them in the community.¹³⁶ Representatives from various agencies and organizations involved meet with incarcerated people due to be released within 45 days. The soon-to-be-released people receive presentations on services available in the community.

¹³⁴ This population consists of both females and males, and includes primarily people who have been convicted and are serving their sentence, though it also includes some federal pretrial detainees and people charged with a technical parole violation.

¹³⁵ See Appendix A (“Westchester County Department of Corrections Recidivism Rate”).

¹³⁶ See Appendix C (“Westchester County DOC Re-entry Panels”).

In November 2018, Westchester County also received a “My Brother’s Keeper” multi-year grant from the Obama Foundation to partner with the Nepperhan Community Center for peer mentoring and other services for younger individuals returning home to Yonkers. A separate New York State grant will also allow the WCDC to partner with Hudson Valley Community Services to provide Cognitive Behavioral Treatment to younger incarcerated people, furthering the facility’s commitment to rehabilitating young persons who have come in contact with the criminal justice system.

The WCDC has also partnered with community-based service providers to create programs that begin while a person is still in jail and continue upon the person’s release, thereby providing a continuum of care. These programs include CHOICE (a peer mentoring program), Department of Mental Health Services, Braveheart (which is a peer mentoring program for minors), the Empowerment Project, Westchester Mental Health Associates, and a faith based program from Grace Baptist Church. While there are no statistics available to date from the WCDC to show the success rate of this effort, the WCDC is in the process of updating its computer management program to maintain future statistics.

Notably, the Westchester County DSS also has an employee assigned to the jail. This person works with jailed people prior to their release to assist them with completing the applications for public assistance and identifying possible housing options; the DSS employee also assists jailed people in enrolling in DSS-run vocational programs. Having a DSS staff person in the jail allows people to reduce the 45-day waiting period for public assistance.

The Task Force was also able to gather a very limited amount of information regarding pre-release programming for people who are incarcerated in New York City jails. The New York City Department of Corrections manages eleven jails in New York City, eight of which are located on Rikers Island.¹³⁷ In 2018, New York City jails housed on average 8,896 people per day.¹³⁸ This is compared to the total jail population for the rest of the state, which ranged between 14,313 and 14,953 people per month in 2018.¹³⁹ This Task Force learned of one pre-release program, I-CAN, which is operated by the Osborne Association. I-CAN is a jail-based program that “looks at standard administrative data associated with each individual when he or she comes into custody – such as age, charges, and prior record – to identify those who both present a high risk of recidivism and are also likely to be in custody long enough to profit from services (at least 20 days).”¹⁴⁰ Jail based services include: job readiness; hard skills training in construction, plumbing, and electrical; fresh start culinary training; anger management; relapse prevention; healthy parenting and relationships; financial literacy; cognitive behavioral therapy; and creative writing.¹⁴¹ Though these services do not include pre-release planning for housing, it is not because the Osborne Association does not recognize the problems that incarcerated people face in securing safe and

¹³⁷ New York City Department of Correction, *About the Department of Correction*, <https://www1.nyc.gov/site/doc/about/about-doc.page> (last visited Feb. 24, 2019).

¹³⁸ See New York City Department of Correction, *NYC Department of Correction at a Glance: Information for Entire FY 2018*, available at https://www1.nyc.gov/assets/doc/downloads/press-release/DOC_At%20a%20Glance-entire_FY%202018_073118.pdf.

¹³⁹ DCJS, *Jail Population in New York State: Average Daily Census by Month*, *supra* note 127.

¹⁴⁰ Osborne Association, *Reducing Reliance On Incarceration—I-CAN*, <http://www.osborneny.org/services/reducing-reliance-on-incarceration/i-can/> (last visited Feb. 24, 2019).

¹⁴¹ *Id.*

stable housing upon their release. Indeed, in June 2016, Elizabeth Gaynes, President and CEO of Osborne, provided testimony to the New York State Assembly Standing Committee on Corrections and the Standing Sub-Committee on Transitional Services, listing several reasons that housing is such a significant problem for people returning to their communities from prison and jail, and suggesting three key strategies to address the problem.¹⁴² As discussed below, we have adopted many of her recommendations.

Rikers also seeks to establish partnerships with community-based organizations to bring community volunteers to the facility for various services, including: Alcoholics and Narcotics Anonymous Groups; alcohol/drug counseling; alternatives to violence training; a culinary program; HIV/AIDS education counseling; a horticultural program; individual/group counseling; job readiness; legal services; library assistance; life skills classes; literacy assistance; parenting classes; pastoral counseling; self-development classes; transitional assistance; and vocational training.¹⁴³ It is not clear if there currently are any services that assist jailed people in planning for housing upon release.

In our interviews with local jail officials, we asked about State funding for release programs in local jails. To our understanding, the funding tends to be limited to grants from the Division of Criminal Justice Services (“DCJS”) for jail-based cognitive behavioral programs. For example, as described above, Westchester County received state funding to implement a cognitive behavioral program. Similarly, on December 21, 2018, the Broome County Sheriff’s Department announced implementation of a new re-entry program for eighty incarcerated people each year that “will focus on two evidence based programs, the first will help individuals with their thought process and cognitive behavior, while the other one will help them make positive lasting life changes.”¹⁴⁴ A member of this Task Force spoke with Jeff Pryor, the Broome County Re-Entry Task Force Chair, who stated that the Re-Entry Task Force will administer the program, delivering a Thinking for a Change and Interactive Journaling curriculum to jailed people prior to their release. He noted that the program is not intended or designed to assist people with planning for housing upon release.

While these state-funded programs are important, we did not learn of any state-funded programs designed specifically to assist incarcerated people *prior* to their release in identifying potential safe and stable housing options.

3. Summary and Recommendations

People who leave prison and jail should leave with a feasible plan for safe and stable housing. DOCCS and all county jails need to actively assist people *prior* to their release in

¹⁴² See Testimony by Elizabeth Gaynes, President & CEO, Osborne Association, to the New York State Assembly Standing Committee on Correction, Subcommittee on Transitional Services, *Devising a Smart, Supportive Housing Strategy for Returning Citizens Upon Reentry*, Jun. 13, 2016, available at <http://www.osborneny.org/news/devising-a-smart-supportive-housing-strategy-for-returning-citizens-upon-re-entry/>.

¹⁴³ New York City Department of Correction, *Volunteer Opportunities*, <https://www1.nyc.gov/site/doc/volunteer/volunteer.page> (last visited Feb. 24, 2019).

¹⁴⁴ See *Sheriff’s Office Announces New Re-Entry Program*, WBNG, Dec. 21, 2018, <https://wbng.com/news/local-news/2018/12/21/sheriffs-office-announces-new-re-entry-program/> (last visited Feb. 24, 2019).

identifying and securing housing. For DOCCS, the steps to securing housing should be incorporated into Phase III of the DOCCS Transitional Services Program and should include access to the internet when necessary to assist people in identifying housing. Additionally, DOCCS policies and practices regarding the approval of housing should be examined to ensure that field parole officers are not needlessly refusing to approve otherwise appropriate housing.

For both DOCCS and jails, there should be sufficient funding to ensure that every incarcerated person has access to the supports needed to identify safe and secure housing options *prior* to their release. While the jails discussed above have done an admirable job in securing federal, state and foundational funding and partnering with community-based organizations to assist people in planning for release, many other jails lack the staffing and resources needed to seek out the limited funding available and to engage in community-based partnerships. Thus, the State should focus on the jails and prisons that lack much needed resources to ensure that *all* jails and prisons have re-entry counselors/transition planners to assist incarcerated people in identifying and applying for safe and stable housing. These jail and prison-based re-entry counselors/transitional planners should connect with community-based organizations to develop awareness and expertise of the full range of housing options available and any restrictions on such housing. They should develop and maintain a resource guide for each community. Re-entry counselors/transitional planners should conduct an individual assessment of each soon-to-be-released person to discern the person's specific housing needs.

While pre-release planning curriculums and services should be bolstered to include a housing component, this Task Force acknowledges that this alone will not solve the problem of ensuring that incarcerated people are released to safe and stable housing. As was reported in a January 17, 2017 *City Limits* article about the use of shelters and other unstable housing options for formerly incarcerated people, the dearth of appropriate housing options for recently released citizens is a significant problem.¹⁴⁵ As one expert noted: "No amount of discharge planning is going to get folks housing if there's no housing on the back end."¹⁴⁶

Accordingly, we turn to the factors that contribute to a shortage of appropriate housing options for people being released from jails and prisons.

B. The Barriers to Housing for Recently Released People

In this section, we explore barriers people with past convictions face in accessing public housing and private housing.

¹⁴⁵ See Shrier et al., *supra* note 5. This article focused on people released from prison or jails to New York City, and the use of shelters and Three Quarters housing for such individuals. The problem of Three Quarters housing in New York City was discussed in NYSBA's 2016 report on re-entry, *supra* note 3, and is referenced further in this report as well.

¹⁴⁶ *Id.* (quoting Erin Burns, a senior program manager at the Corporation for Supportive Housing (CSH), a national non-profit that seeks to address homelessness and extreme poverty).

1. Public Housing Barriers

As Onondaga County Correctional Facility's Mr. Arrance-Doud noted, housing is not a problem for people being released from prison or jail if they have a family or other supportive people with whom they can live. But if the released person's family or support network lives in public housing, there is often an outright bar to being released to this housing. This is because many public housing authorities target people with conviction histories, barring them from living in public housing for specified periods of time.¹⁴⁷

As used in this report, the term "public housing" refers to two programs administered by the U.S. Department of Housing and Urban Development ("HUD"): conventional public housing, which provides housing units to low-income families; and the Housing Choice Voucher program, which provides "section 8" housing assistance to low-income people who seek housing in the private market. In New York, these public housing options are managed by local public housing authorities ("PHAs"). Though there are federal laws regarding eligibility for public housing and ongoing tenancy, each PHA must develop and maintain its own set of rules and policies. HUD periodically issues letters and guidance to PHAs regarding these rules and policies.

Both of this Association's previously-issued reports on re-entry have discussed the barriers to residing in public housing. For example, this Association's 2016 report states:

Re-entering individuals frequently face problems in seeking temporary shelter or housing with family or friends who reside in public housing. Public housing authorities ("PHAs") often bar applications from individuals with certain criminal convictions, preventing formerly incarcerated individuals from securing public housing or even from reuniting with their families in existing affordable units.¹⁴⁸

This Association's 2006 report details the emergence of barriers to public housing for people with conviction histories. Between 1988 and 1998, three federal laws were enacted that target people with conviction histories, making it harder for them to access public housing.¹⁴⁹

¹⁴⁷ See New York State Bar Association, *Report of the Special Committee on Re-Entry*, *supra* note 3, at 64-67. See also Vera Institute of Justice, *Coming Home: An Evaluation of the New York City Housing Authority's Family Reentry Pilot Program*, November 2016, at 7, available at https://storage.googleapis.com/vera-web-assets/downloads/Publications/coming-home-nycha-family-reentry-pilot-program-evaluation/legacy_downloads/NYCHA_report-032917.pdf. ("Often people leaving jail or prison intend to live with their families, either because of preference or they have no other place to go. However, if their families live in public housing, this may not be possible because public housing authorities (PHAs) may temporarily or permanently bar people with criminal histories... And these rules can be far reaching.")

¹⁴⁸ New York State Bar Association, *Report of the Special Committee on Re-Entry*, *supra* note 3, at 64.

¹⁴⁹ See *Re-Entry and Reintegration*, *supra* note 2, at 228-230. These included the following: 1) a provision of the 1988 Anti-Drug Abuse Act requiring PHAs to have lease provisions calling for the eviction of tenants to drug-related activity on or near public housing; 2) the 1996 enactment of the Housing Opportunity Extension Act, which expanded the authority of PHAs to evict or deny admission to public housing based on criminal activity, and prompted HUD to issue "one strike you're out" guidance to PHAs urging them to exercise their discretion in favor of evicting or denying admission to people with drug-related and other convictions; and 3) the 1998 Quality Housing and Work Responsibility Act, which authorized PHAs to deny admission to any individual who, within a "reasonable time" prior to the date of eligibility for housing assistance, had engaged in "any drug-related or violent criminal activity or other

Under federal law, there are only two mandatory permanent bars to public housing for people with conviction histories: people who are lifetime registrants on a sex offender registry; and people who have been convicted of methamphetamine production on the premises of federally-assisted housing.¹⁵⁰ In other circumstances, PHAs generally have discretion to decide whether to allow people with past convictions to reside in public housing. Unfortunately, many PHAs do not exercise this discretion, and instead have erected automatic bars to public housing for people with a wide array of convictions.¹⁵¹

In 2011, President Barack Obama created the Federal Interagency Reentry Council (“Reentry Council”). “Comprised of more than 20 federal agencies, the Reentry Council coordinates and leverages existing federal resources; dispels myths and clarifies policies; elevates programs and policies that work; and reduces the policy barriers to successful reentry.”¹⁵² HUD is one of the agencies on the Reentry Council, and in accord with the goal of reducing policy barriers to successful re-entry, has issued a series of letters and guidance to PHAs urging them to ease the barriers to public housing for people with conviction histories. To start, in June 2011, HUD issued a letter to all PHA Executive Directors reminding them “of the discretion given to public housing agencies (PHAs) when considering housing people leaving the criminal justice system” and urging them to exercise this discretion in favor of “allow[ing] ex-offenders to rejoin their families in in the Public Housing or Housing Choice Voucher programs when appropriate.”¹⁵³ In 2015, HUD issued guidance to PHAs stating that “arrest records may not be the basis for denying admission, terminating assistance or evicting tenants,” because an arrest alone is not sufficient evidence of criminal activity that can support adverse housing action.¹⁵⁴ This 2015 Guidance further states that PHAs are not required to have “‘one-strike’ rules that deny admission to anyone with a criminal record or that require automatic eviction any time a household member engages in criminal activity in violation of their lease.”¹⁵⁵ Additionally, in 2016, HUD issued guidance to landlords and housing providers noting that though facially neutral, a policy barring people with conviction histories from housing may violate the Fair Housing Act’s prohibition against race-based discrimination in housing.¹⁵⁶

criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents.” Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 2640.

¹⁵⁰ See 42 U.S.C. §§ 13663(a), 1437n(f).

¹⁵¹ See, e.g., Tran-Leung, Shriver Center, *supra* note 111 (after a survey of the policies of various PHAs, finding that many continue to not exercise discretion but instead have automatic bars to public housing for people with past convictions).

¹⁵² See The White House & U.S. Department of Justice, *The Federal Interagency Reentry Council: A Record of Progress and a Roadmap for the Future*, August 2016, at v, available at <https://csgjusticecenter.org/wp-content/uploads/2016/08/FIRC-Reentry-Report.pdf>.

¹⁵³ See Letter from Shaun Donovan, Secretary, U.S. Department of Housing and Urban Development, & Sandra B. Henriquez, Assistant Secretary for Public and Indian Housing, to PHA Executive Director (June 17, 2011), available at <https://www.hud.gov/sites/documents/SOHUDREENTRYLTR.PDF>.

¹⁵⁴ See U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, Notice PIH 2015-19 (“Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions”) (Nov. 2, 2015), available at <https://www.hud.gov/sites/documents/PIH2015-19.PDF>.

¹⁵⁵ *Id.*

¹⁵⁶ See Helen R. Kanovsky, General Counsel, U.S. Department of Housing and Urban Development, *Office of the General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real-Estate-Related Transactions*, Apr. 4, 2016, available at https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

Unfortunately, it seems that many PHAs have not heeded HUD's guidance urging them to use their discretion and refrain from automatic bars to public housing for people with past convictions. Indeed, this Association's 2016 report on re-entry noted as follows:

Most PHAs reject re-entrants' applications, without any sort of individualized assessment. The broad discretion afforded by 42 U.S.C. § 13661(c) is most often not exercised; instead, re-entering individuals are automatically barred from public housing, notwithstanding HUD's admonitions that PHAs take a considered approach. It is far easier for risk-averse PHAs, pressured by various actors, to reject all re-entering applicants out of hand. The mandated discretion has been (for the most part) not exercised by New York State's PHAs -- exacerbating the housing difficulties of those who have been convicted.¹⁵⁷

An examination of the policies of all local PHAs in New York is beyond the scope of this Task Force. Nonetheless, based on the interviews we conducted, it is our understanding that many PHAs continue to have automatic bars against allowing people with conviction histories to live in public housing. For example, Jeff Pryor of the DCJS-sponsored Broome County Re-Entry Task Force told us that there are times when a person being released to Broome County could live with a family member, but is prevented from doing so because of the local PHA bars to housing for people with past convictions. He said that when this happens, the released person typically ends up residing in a homeless shelter, though he works to assist them in securing more stable housing as soon as possible.

There are some PHAs, however, that have heeded the HUD guidance and have sought to make housing more accessible for people with past convictions. The Syracuse Housing Authority ("SHA") is one example. SHA has partnered with the CCA to work on joint projects serving people with past convictions. For example, SHA is one of 18 housing authorities across the country that received a Juvenile Reentry Assistance Program ("JRAP") grant from the U.S. Departments of Justice and HUD to partner with CCA to help young people, age 24 or younger who are coming out of the criminal justice system. The program will help youth, review their record for errors, apply to reinstate drivers' licenses, get a job, or go back to school.

Perhaps most importantly, SHA has partnered with CCA to replicate the Fortune Society's Academy and Castle Gardens, which together provide emergency, transitional, supportive, and permanent housing to people coming home from prison or jail. This replication project was made

¹⁵⁷ See *Report of the Special Committee on Re-Entry*, *supra* note 3, at 65 (citing Jesse Kropf, *Keeping "Them" Out: Criminal Record Screening, Public Housing, and the Fight Against Racial Caste*, 4 *Geo. J. L. & Mod. Critical Race Persp.* 75, 78 (2012); Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 *U. Tol. L. Rev.* 545, 572 (2005); and Nat'l Housing Law Project, *An Affordable Home on Re-entry: Federally Assisted Housing and Previously Incarcerated Individuals*, 2018, at 7-23, available at <https://www.nhlp.org/wp-content/uploads/2018/08/Rentry-Manual-2018-FINALne.pdf>; U.S. Department of Housing and Urban Development, Notice PIH 96-16(HA) ("'One Strike and You're Out' Screening and Eviction Policies for Public Housing Authorities") (Apr. 29, 1996), available at https://www.hud.gov/sites/documents/DOC_10981.PDF ("[F]ocusing on the concrete evidence of the seriousness and recentness of the criminal activity [are] the best indicators of tenant suitability. PHAs should also take into account the extent of criminal activity and any additional factors that might suggest a likelihood of favorable conduct in the future, such as rehabilitation.").

possible by a DCJS grant to the Fortune Society to provide technical assistance to CCA to develop and run a housing program in Onondaga County for recently released people. CCA successfully sought out a partnership with SHA for this project, which is called Freedom Commons. The construction costs for Freedom Commons has been provided by New York State Homes and Community Renewal, OTDA Housing Assistance Corporation, and low-income housing development tax credits. Freedom Commons is scheduled to open in spring 2019, and will provide supportive emergency housing for recently released people, transitional housing and services for recently released people, and quality affordable permanent housing for low-income individuals and families. The facility will include community space, meeting rooms, offices, a kitchen, and a computer lab. SHA will provide property management and leasing services, and CCA will manage the shelter and provide case management and a variety of supportive services to residents of the shelter and supportive housing. Notably, Freedom Commons represents the first known instance of a PHA engaging in a re-entry housing project.

In November 2013, the New York City Housing Authority (“NYCHA”), in partnership with the Vera Institute of Justice, the Corporation for Supportive Housing, the New York City Department of Homeless Services, DOCCS, the New York City Department of Correction, and 13 re-entry service providers, instituted a pilot Family Reentry Program, working to allow up to 150 carefully screened individuals to return to live with their families in NYCHA housing upon release from prison. Individuals were required to engage in various types of programming designed to alleviate reentry barriers and reduce recidivism. The program was an innovative response to the dire housing needs of individuals returning to the New York City area from state prison. While it succeeded in some respects, providing stable housing for people who very much needed it and reducing their otherwise expected rates of recidivism, the Program was able to help fewer individuals than anticipated.¹⁵⁸

2. Summary of Recommendations to Diminish Barriers to Public Housing

SHA and NYCHA are examples of PHAs that have programs designed to allow people with past criminal justice involvement to live in public housing. But these programs have not been enough¹⁵⁹; nor have HUD’s letters and guidance to PHAs since 2011 encouraging acceptance of formerly incarcerated people. Thus, we reiterate and supplement the recommendations this Association set forth in its two previous re-entry reports.

As stated in the 2006 report, we urge Congress to undertake a wholesale review and revision of laws and regulations that require or permit PHAs to screen out people with conviction histories.¹⁶⁰ With the recently enacted First Step Act, Congress has shown a willingness to re-examine “tough on crime” laws and policies that have dramatically increased the number of people in prison and jails and have made it harder for people to return to their communities and access the

¹⁵⁸ U.S. Department of Housing and Urban Development, *PD&R Research Partnerships*, September 2017, available at <https://www.huduser.gov/portal/sites/default/files/pdf/NYCHAEvaluation-Sept-2017-updated.pdf>.

¹⁵⁹ For example, the NYCHA Family Reentry Program had only 108 participants as of 2017, more than three years after it started. *Id.*

¹⁶⁰ See *Re-Entry and Reintegration*, *supra* note 2, at 420 (recommending that Congress “undertake a wholesale review and revision of the barriers to federally subsidized housing for people with criminal records”).

essential features of a law-abiding and dignified life in the community.¹⁶¹ Now is the time to urge Congress to take the next step and to eliminate the needless barriers to housing and family reunification currently erected by public housing laws and regulations.

Until the federal law is changed, all PHAs in New York should be required to implement the HUD letters and guidance urging them to eliminate all outright bars to public housing for people with prior convictions (except where required by law), and to develop policies and practices that give PHAs discretion to allow people with past convictions to reside in public housing. In developing rules and policies that rely on discretion rather than outright bars to consideration of people with convictions, PHAs should implement the following principles:¹⁶²

- Other than the two permanent bars mandated by federal law, PHAs should not have any mandatory or permanent bars to living in public housing. Instead, there should be an individualized consideration of each applicant.
- Not all crimes should be considered. Only those type of offenses that PHAs are required by law to consider and those that are directly related to a person's tenancy should be considered. PHAs should not be permitted to have vague standards, such as "crimes indicating that an applicant may be a negative influence," etc.
- Crimes that are not recent should not be considered. In assessing recency, PHAs should consider the date of the offense, and not the date of conviction or the date of release from incarceration.
- PHAs must consider and give ample weight to mitigating information, including but not limited to a person having been awarded a Certificate of Relief from Disabilities or a Certificate of Good Conduct. Mitigating information should also include an applicant's good conduct and achievements while incarcerated.

Additionally, all PHAs in New York should refrain from using arrests as a reason for adverse housing decisions, as required under the 2015 HUD Guidance. In New York, these are arrests that resulted in a disposition favorable to the arrested person, and thus should be or are sealed pursuant to CPL § 160.50, § 160.55, convictions sealed pursuant to § 160.58, § 160.59, and arrests that resulted in a Youthful Offender adjudication pursuant to CPL § 720.35.

Finally, we recommend a comprehensive review of the policies and practices of all the PHAs in New York to assess the extent to which they have implemented the HUD Guidance prohibiting them from using arrest records in housing decisions and replacing outright bars to public housing with an individualized approach to decision-making.

¹⁶¹ The First Step Act was signed into law on December 20, 2018. Pub. L. No. 105-276, 112 Stat. 2640. For a summary of its provisions, see Van Jones & Jessica Jackson, *10 Reasons to Celebrate the First Step Act*, CNN, Dec. 21, 2018, <https://www.cnn.com/2018/12/21/opinions/ten-reasons-to-celebrate-first-step-act-jones-and-jackson/index.html> (last visited Feb. 24, 2019).

¹⁶² Many of these principles are set forth in Tran-Leung, Schriver Center, *supra* note 111.

3. Private Housing Barriers

When access to public housing is denied, many people released from prison and jail must turn to the private sector. But here again they face barriers to safe and stable housing. A major barrier is the stigma attached to having a criminal conviction history. Many private landlords screen rental applicants for past convictions and deny housing to people with a criminal record. As former HUD Secretary Julian Castro said during an April 2016 speech:

The fact that you were arrested shouldn't keep you from getting a job, and it shouldn't keep you from renting a home...But right now, many landlords use the fact of a conviction – any conviction, regardless of what it was for or how long ago it happened – to indefinitely bar folks from housing opportunities.¹⁶³

This Association's 2006 report on re-entry and reintegration also detailed the problem of private landlords screening for past convictions, stating as follows:

Private landlords and non-profit housing developers often inquire into individual's background and deny housing to those with criminal records. Landlords can access such information without the applicant even knowing. Criminal convictions are often listed in commercial credit reports, or can be easily accessed through the Office of Court Administration statewide criminal record search, the Department of Correction inmate locator, or background checks conducted by private agencies. These records are often rife with bureaucratic errors, such as listing arrests that resulted in dismissals or non-criminal convictions that should be automatically sealed, including incomplete entries of cases that were disposed of, or reporting data that is completely erroneous. Human Rights Watch reports that private landlords are following the lead of public housing authorities in denying housing to those with criminal records and their family members, effectively eliminating access to housing altogether.¹⁶⁴

As stated above, in 2016 HUD issued guidance warning landlords – including private landlords – that denying housing to people with conviction histories can have a discriminatory impact, and thus violate the federal Fair Housing Act. It is unclear the extent to which this guidance has impacted the behavior of private landlords. Currently, New York's Human Rights Law (set forth in Executive Law § 296) does not restrict or limit landlords from making adverse housing decisions based on conviction histories.

During the November 9, 2018 Open Meeting, Marta Nelson, Executive Director, New York State Council on Community Re-entry and Reintegration, spoke of the value of having legislation that would prohibit landlords from needlessly discriminating against people with past convictions. While such legislation does not yet exist in New York, Governor Cuomo has promulgated guidance for the New York State Housing Finance Agency, which is administered by the Fair and Equitable Housing Office at the Department of Homes and Community Renewal.

¹⁶³ The White House & U.S. Department of Justice, *supra* note 152, at 51.

¹⁶⁴ See *Re-Entry and Reintegration*, *supra* note 2, at 221-22 (citations omitted).

Specifically, with regard to criminal convictions, state-funded housing providers may only consider convictions or pending arrests, and with regard to these:

- The housing provider may only consider convictions or pending arrests for offenses that involved physical danger or violence to persons or property or that adversely affected the health, safety and welfare of other people.
- Even where convictions for such offenses exists, those convictions cannot be an automatic bar to the applicant being selected for housing. The housing provider must do an individualized assessment of all applicants.
- In this assessment, no one factor can be considered in isolation; the interplay between the factors must be taken into account (*e.g.* a reviewer may look for stronger evidence of rehabilitation if an applicant has a more serious crime).
- When conducting a background check of an applicant, the housing provider must use a reputable background check company. Further, the housing provider must comply with the requirements of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et. seq.*
- The housing provider must supply the applicant with an application that includes information that explains the procedures and policies with regard to background checks, the applicant's right to review, contest, and explain the information contained in the background check, and the applicant's right to present evidence of rehabilitation.
- These guidelines must be followed by anyone who determines tenant eligibility, including, but not limited to, case managers, project managers, clerks, or independent contractors.¹⁶⁵

The State has provided comprehensive guidance on implementation of this anti-discrimination policy, including a webinar and worksheet materials for housing providers and applicants.¹⁶⁶ It is not clear if data is being maintained on the number of applicants with conviction histories who have been screened, and of these, how many were denied housing versus the number admitted. This data would be helpful in assessing if the policy in practice promotes access to housing for people with past convictions.

¹⁶⁵ See New York State Homes & Community Renewal, *Guide for Applying New York State's Anti-Discrimination Policies When Assessing Applicants for State-Funded Housing Who Have Criminal Convictions*, May 2016, available at http://www.nyshcr.org/AboutUs/Offices/FairHousing/GPCC_Guidance_Document.pdf. This State policy is promulgated in 9 NYCRR §1627.72; New York State Homes & Community Renewal, Section 8 Administration Plan, §1.09.02 (July 2015 Revision); New York State Housing Finance Agency, Fair Housing and Tenant Selection Guidelines, §4.1.2.3. (July 2015 Revision), available at <http://www.nyshcr.org/Forms/MultifamilyOwners/1613.pdf>; New York State Homes & Community Renewal, Management Bulletin Memorandum 2016-B-04 (Apr. 20, 2016), available at <http://www.nyshcr.org/AboutUs/Offices/HousingOperations/2016-B-04.pdf>; and New York State Homes & Community Renewal, Capital Programs Manual § 7.05 (September 2016), available at <http://www.nyshcr.org/Publications/CapitalProgramsManual/CapitalProgramsManual-2016-09.pdf>.

¹⁶⁶ See New York State Homes & Community Renewal, *Affirmative Fair Housing Marketing Plan*, <http://www.nyshcr.org/AboutUs/Offices/FairHousing/GPCC.htm> (last visited Feb. 26, 2019).

Another barrier is, of course, the reality that most people being released from prison and jail have limited or no financial resources, and often must rely on public assistance until they can secure employment. As previously discussed, for single adults who do not have children in their care, there is a 45-day waiting period from the date of application before the public assistance application can be approved.¹⁶⁷ During this time, a person may be eligible for short-term emergency housing which in many communities include shelters and hotel or motel rooms. A 2016 audit by the New York State Office of the State Comptroller assessing 200 emergency shelters and 187 hotels and motels located in 48 different counties found the following:

While many facilities were able to provide “adequate” living conditions (*i.e.*, basic level of habitability), risks to health, personal safety, and fire safety were pervasive. Despite our communities’ best efforts, there continue to be pockets of deficient – and sometimes squalid – properties that pose persistent dangers to the health and safety of this already vulnerable population. Further, the facilities that we visited often indicated that they face an uphill battle in terms of facility maintenance and upkeep – in some cases because of funding, but in others simply by virtue of the transient and temporary nature of the population they serve.¹⁶⁸

Thus, emergency housing does little to promote a person’s successful reintegration into the community and instead potentially exposes recently released people to unsafe and volatile situations. As stated previously, local social services districts can accept public assistance applications from people who are soon to be released, thereby abbreviating the 45-day waiting period. But not all local social services districts have done so, and even where they have (as in Onondaga County) it seems that DOCCS is not notifying soon-to-be-released people that they can apply prior to their release, and how to do so.

Jeff Pryor, the Broome County Re-Entry Task Force Director, provided a bleak picture of what happens when people are released from prison or jail without a stable housing situation, either because they have no family or support network with whom they can live, or because the PHA rules prohibit them from living with these family and supports. In such situations, people are released to a homeless shelter. They then must go in-person to the local DSS office to apply for emergency housing and for public assistance. During the 45-day wait, they may be eligible for some form of short-term emergency housing, whether it is a shelter or a hotel or motel. People remain in this emergency housing until their public assistance application is approved. However, the public assistance grant is usually insufficient to pay for decent housing. For example, in Broome County, the grant is \$401 per month, with the expectation that \$268 will be used for housing and the rest for food, clothing, and other needs. Mr. Pryor noted that typically all or nearly all the \$401 is needed to pay for housing, as there is virtually no rental housing available in

¹⁶⁷ See Social Services Law § 153(8) (providing that “state reimbursement shall not be made for any expenditure made . . . for any home relief payment made for periods prior to forty-five days after the filing of an application unless the district determines pursuant to department regulations that such assistance is required to meet emergency circumstances or prevent eviction”).

¹⁶⁸ Office of the State Comptroller, *Homeless Shelters and Homelessness in New York State: An Overview, Exclusive of New York City*, June 2016, at 2, available at <https://www.osc.state.ny.us/audits/allaudits/093016/16d3.pdf>.

Broome County for \$268 per month. Even when most of the monthly grant is used for rent, the housing available is of substandard quality and very poorly maintained.

Thus, people who must rely on public assistance for housing are susceptible to residing in substandard housing. This is especially true for people being released from prison and jail, who also face the stigma attached to having a conviction history. Indeed, during the November 9, 2018 Open Meeting, several meeting participants noted that all too often, people being released from prison or jail end up living in unsafe and barely habitable housing. They emphasized that this housing situation is demoralizing for people who are trying to put their lives back together after spending time in jail or prison.

In New York City, the particular vulnerabilities of recently released people has resulted in the proliferation of three quarter houses, known also as “transitional homes” or “sober homes.” As described in this Association’s 2016 re-entry report:

Three Quarter Houses ... are usually small buildings operated by private individuals or entities, some of which claim to provide transitional housing to help individuals get back on their feet. Although they hold themselves out as providing services, they have no license or government funding to provide services, and residents quickly discover that no services are provided. Three Quarter Houses often pressure residents to sign purported waivers of their rights as tenants. Most notably, these waivers say that residents can be ejected from the house with no notice. Although courts have held that these waivers are unenforceable contracts of adhesion, the waiver provisions often convince residents and law enforcement that residents can be evicted at any moment for any reason.

Many of the houses have dangerous conditions, including extreme overcrowding and other fire and building code violations. An analysis of building code violations for 317 known Three Quarter House addresses revealed that 88% had a building code complaint between 2005 and 2012 that resulted in at least one violation or stop-work order by the New York City Department of Buildings. Lacking qualified staff to provide supportive services, many residents find that Three Quarter Houses fail to maintain safe, healthy environments.¹⁶⁹

The problem with three quarter housing was recently illuminated by a high-profile conviction. On January 8, 2019, New York State Attorney General Letitia James announced the conviction of a director of a three-quarter housing program, Robert H. Corrado, and the program he oversaw, Interline Employee Assistance Program, Inc., for engaging in a systematic kickback scheme and violating patients’ rights. This conviction stemmed from a 2017 indictment by the Attorney General’s Medicaid Fraud Control Unit. Since 2015, the Attorney General’s Medicaid Fraud Unit has investigated Three Quarter Houses and have brought down three groups of fraudulent housing and treatment providers, including Narco Freedom, the Baumblit Group, and Interline Employee Assistance Program. In her announcement of the conviction of Mr. Corrado, Attorney General James noted that three quarter houses exploit “individuals struggling with homelessness and substance abuse in order pad their bottom line... This series of investigations

¹⁶⁹ New York State Bar Association, *Report of the Special Committee on Re-Entry*, *supra* note 3, at 69.

disrupted a dismal culture where housing was used as bait for the most vulnerable New Yorkers just to have an excuse to bill Medicaid.”¹⁷⁰

4. Summary of Recommendations to Diminish Barriers to Private Housing

The reliance on three quarter houses in New York City and other substandard rental units in upstate communities as shelter for recently released people is unacceptable, and undermines released peoples’ chances of successfully reintegrating into their communities. One way to reduce the vulnerabilities to substandard housing that people with conviction histories face is to provide such individuals legal protections from needless housing discrimination. New York’s Human Rights Law (set forth in Executive Law § 296) has long protected people with past convictions from unnecessary employment discrimination. The law has also protected people from having arrests that resulted in favorable dispositions from being considered in decisions about employment, credit, and insurance. Thus, we offer recommendations to amend New York’s Human Rights Law to build in protections for people with past convictions who seek safe and stable housing.

We suggest that Executive Law § 296(16) be amended to make it an unlawful discriminatory practice for private landlords and public housing authorities to consider a sealed arrest or conviction in making decisions about housing. Doing so is consistent with the 2015 Guidance issued by HUD stating that public and private landlords should not use arrests as a reason for an adverse employment decision. In this regard, we applaud Governor Cuomo for seeking to make this a reality in his 2019-2020 Budget Proposal. Specifically, in Part II, Subpart O of this proposed budget, the Governor proposes to amend Human Rights Law § 296(16) to include “housing” thereby prohibiting private landlords and housing authorities from considering sealed arrests and convictions in making housing decisions. We also applaud the Governor for seeking to ensure that stale prosecutions (arrests that have not been prosecuted or have been dismissed) are not used against people for civil purposes. Specifically, in Part II, Subpart L of his proposed 2019-2020 Budget, the Governor includes a proposal to add a new section to the Executive Law, § 845-c, that would protect people from having stale prosecutions, or “undisposed cases”¹⁷¹ revealed on a criminal history report conducted for civil purposes. Together, these two proposals would go far in ensuring that arrests that did not lead to convictions and sealed convictions are not used against people when they seek housing.

The Human Rights Law should also be amended to prohibit discrimination against people with past convictions who are seeking housing. However, because housing is such a basic, critical need, great care should be taken in crafting such anti-discrimination legislation to ensure that it does not unwittingly give landlords and housing authorities permission to deny people housing in a wide array of circumstances. Governor Cuomo’s promulgated guidance for the New York State Housing Finance Agency, which is administered by the Fair and Equitable Housing Office at the Department of Homes and Community Renewal, may be a model. Before using it as a framework

¹⁷⁰ See Press Release, Attorney General Letitia James, Attorney General James Announces Conviction Of “Three-Quarter House” Director Charged With Defrauding Medicaid Through A Kickback Scheme (Jan. 8, 2019), available at <https://ag.ny.gov/press-release/attorney-general-james-announces-conviction-three-quarter-house-director-charged>.

¹⁷¹ The proposed legislation defines an “undisposed case” as an arrest in which there is no recorded conviction or warrant, and on which there has been no court action for five years or more.

for anti-discrimination legislation, information should be obtained about how this guidance has worked in practice, including the number of people denied housing under this guidance and the reasons for the denial.

C. Barriers to Federally Funded Permanent, Transitional and Supportive Housing

The primary source of federal funding for long term solutions to homelessness is the Continuum of Care (“CoC”) program. According to HUD, “the CoC Program is designed to assist individuals (including unaccompanied youth) and families experiencing homelessness and to provide the services needed to help such individuals move into transitional and permanent housing, with the goal of long-term stability.”¹⁷² HUD started the CoC program “in 1994 as a unified plan to help [communities] address the problems of housing and homelessness in a coordinated, comprehensive, and strategic way... Today, CoCs track the homeless population in their area and manage the services and resources that make up the homeless assistance systems.”¹⁷³

Fifty-nine New York counties participate in a total of 26 CoC coalitions, which manage federal funding to address homelessness.¹⁷⁴ CoC coalitions prioritize permanent and supportive housing solutions for people who are deemed to be “chronically homeless.” Unfortunately, under the current definition of “chronically homeless,” people who have been incarcerated for more than 90 days are excluded because they are deemed to have experienced a break in homelessness.¹⁷⁵ Thus, all people being released from prison and many from local jails are ineligible for the housing programs funded by CoC coalitions. Kelly Gonzalez, CCA’s Deputy Director, succinctly summarized the impact this definition of chronically homeless has on people being released from incarceration:

People who arguably will have a more difficult time coming out of long term incarceration and securing housing themselves wind up having to languish in shelters or on the street if the only permanent housing programs rely on [the HUD definition of chronic homelessness] to pull individuals from the waiting list.¹⁷⁶

Thus, unless and until Congress changes this definition of chronic homelessness, people being released from prison and jail will be at a disadvantage in accessing federally subsidized transitional, supportive, and permanent housing programs. It also means that programs that are committed to providing permanent and supportive housing solutions to people being released from prison and jail may not be able to access this significant source of federal funding.

¹⁷² See U.S. Department of Housing & Urban Development, *Continuum of Care (CoC) Program Eligibility Requirements*, HUD Exchange, <https://www.hudexchange.info/programs/coc/coc-program-eligibility-requirements/> (last visited Feb. 26, 2019).

¹⁷³ Office of the State Comptroller, *Homeless Shelters and Homelessness in New York State: An Overview, Exclusive of New York City*, June 2016, at 5, available at <https://www.osc.state.ny.us/audits/allaudits/093016/16d3.pdf>.

¹⁷⁴ *Id.* Only Essex, Herkimer and Tioga counties do not participate in CoC coalitions, rendering these counties less likely to obtain federal funding to address homelessness.

¹⁷⁵ See 42 U.S.C. 11360(9)(b)

¹⁷⁶ Email from Kelly Gonzalez, Deputy Director, Center for Community Alternatives, to a member of this Task Force (October 2014) (on file with a member of this Task Force).

Accordingly, we urge Congress to amend the definition of chronic homelessness in 42 USC § 11360(2) to state that people in jail and prison who have insufficient financial resources to pay for stable housing upon release are deemed to be “chronically homeless.” In the meantime, CoC coalitions should use their discretion whenever possible to make federally funded transitional, supportive, and permanent housing solutions available to people being released from prison or jail.

D. County Observations

In Appendix D, we set forth observations from the following counties: Wyoming, Albany, Schenectady, Rensselaer, Onondaga, Broome, Franklin, Westchester, Brooklyn, Queens, the Bronx, Manhattan, Nassau and Suffolk. These observations are based on information we obtained during the November 9, 2018 Open Meeting, internet searches, email exchanges and phone interviews with service providers and jail staff, and some limited data provided to us by providers and jail staff. Although a formal letter was sent to each jail in the seventeen counties of our focus requesting information about their programming, very few provided formal responses. Therefore, the observations incorporated herein do not reflect a detailed survey or comprehensive information from the counties. Still, there were three themes that consistently emerged from our investigation and interviews:

1. There is a dearth of affordable housing, and public assistance grants are insufficient to pay for the limited housing that is available.

As was stated in this Association’s 2016 report on re-entry:

New York State faces an affordable housing crisis and has the fifth highest housing costs in the nation. The affordable housing crisis is affected by price as well as supply (which in turn affects price). Wage earners are enduring an ongoing, decades’ long stagnation in wages while the cost of renting has steadily and precipitously climbed over the past twenty years.¹⁷⁷

Providers in the various counties we interviewed consistently told us that there is not enough safe and stable affordable housing to meet the need, and that there are long waiting lists to access public housing. They also reported that the public assistance grant in each county is insufficient to pay for safe and stable housing, and that many people who must rely on this grant are able to live only in housing that is unsafe or in squalid condition.

The issue of a having a sufficient number of affordable housing units in each county is a complex issue beyond the scope of this Task Force. However, the State can and should take steps to ensure that public assistance grants are sufficient to pay for safe and stable housing. Accordingly, we recommend that OTDA review the public assistance grant awards allowed in

¹⁷⁷ New York State Bar Association, *Report of the Special Committee on Re-Entry*, *supra* note 3, at 64 (citing Office of the State Comptroller, *Housing Affordability in New York State*, March 2014, at 16-17, available at https://www.osc.state.ny.us/reports/housing/affordable_housing_ny_2014.pdf; and the National Low Income Housing Coalition, *Out of Reach 2014*, at 13, available at <https://web.archive.org/web/20180207063609/http://nlihc.org/sites/default/files/oor/2014OOR.pdf>).

each county to ensure that the grant award provides a sufficient amount of money to allow a person to rent safe and stable housing.

- 2. In most counties, there is a patchwork of housing options for people being released from prison or jail. This patchwork includes shelters, emergency housing, treatment facilities, and some transitional housing options run by non-profit organizations. Generally, counties have no or very limited housing options designed specifically for people being released from incarceration.**

What emerged as the most pronounced feature of housing options for re-entering people in the counties we surveyed was the patchwork-nature of these options, with no county having a comprehensive, targeted approach to ensuring access to safe and stable housing for people being released from prison or jail. Coupled with the lack of pre-release planning while in prison or jail, this means that many too many people end up being released to shelters or emergency housing.

A few larger counties have some housing options specifically for re-entering people. For example, in Buffalo (Erie County), Peaceprints WNY has a Re-Entry and Housing program that includes a 120-day transitional residential program, a supportive housing program for men, and some independent living apartments for people who have some limited form of income. And, in Rochester, New York (Monroe County), Saving Grace Ministries of Rochester provides 120-day transitional housing for returning men, while Spiritus Christi runs Nielson House, a halfway house for returning men who are willing to undergo a chemical dependency and mental health evaluation. But for all of these housing programs, funding is fragile and capacity is severely limited. As previously stated in Section I, A, many of these programs have bolstered their capacity through the limited DOCCS funding available for community based transitional housing.

A model housing program for people being released from prison or jail is the Fortune Society (discussed previously). Based in New York City, the Fortune Society has three housing programs for returning citizens: 1) The Fortune Academy, located in West Harlem, which is a safe, rehabilitative community for people coming home from incarceration that provides regular case management and assists residents with an array of needs, including gaining and maintaining stable housing and employment, substance use treatment and recovery, financial planning and management, and family reunification; 2) The Castle Gardens, which is adjacent to The Fortune Academy in West Harlem and which is a mixed-use, supportive, and affordable residential development and service center in an environmentally sustainable building. It provides long-term housing solutions for justice-involved individuals facing homelessness and their families, as well as low-income individuals and families from West Harlem and the greater New York area; and 3) The Scattered-Site Housing Program, in which Fortune staff serve as mediators between landlords and tenants, ensuring homeless, formerly incarcerated individuals living in neighborhoods across the five boroughs of New York City have access to safe, stable, and affordable housing. As previously discussed in this report, the Fortune model is being replicated in Syracuse (Onondaga County) via a joint project between the Syracuse Housing Authority and CCA, with technical assistance from Fortune. While an ideal model for supportive re-entry assistance to people coming home from prison, neither Fortune nor the new program in Syracuse have the capacity to serve everyone who needs these programs.

While the forgoing are examples of housing that is designed for people coming home from prison or jail, none of these programs has the capacity to serve everyone who is returning to the community from prison or jail and who needs housing. Moreover, the funding for many of these programs is fragile. These programs are just one part of the patch-work approach to housing for re-entering people that exists in all communities.

3. There was agreement amongst those with whom we spoke of the need for a more structured and supportive approach to re-entry.

People being released from prison and jail have unique housing needs. Normally, people with a history of chronic homelessness have experienced a lack of structure in their lives. In contrast, incarceration is an intensely structured environment that deprives people of personal autonomy.¹⁷⁸ As one incarcerated person has stated: “I can’t remember the last time I had to make a major decision ... for myself. I grow nervous just imagining the prospect.”¹⁷⁹ People being released from prison need to adjust to having more personal autonomy and far less structure than they experienced while in prison.

Several people we interviewed for this report identified the need for a “step-down” approach to release. This was discussed during the November 9, 2018 Open Meeting, and in his discussions with a member of this Task Force, Jeff Pryor, Chair of the Broome County DCJS Re-entry Task Force identified this as a need, stating: “There is a need for good, transitional, stabilization housing.”

There are various models available for a more supportive and structured approach to re-entry. In the federal system, for example, the Bureau of Prisons (“BOP”) contracts with residential re-entry centers, commonly called halfway houses, “to provide assistance to inmates who are nearing release.” These halfway houses “provide a safe, structured, supervised environment” and other supportive services to “help inmates gradually rebuild their ties to the community” while being supervised during their readjustment from prison.¹⁸⁰

In New York, the Temporary Release Program (commonly called “work release”), provides a supportive, structured transition from prison to the community. Set forth in NY Correction Law Article 26 (NY Correction Law §§851- 854), the Temporary Release Program allows people who are within two years of release to leave the prison to engage in work and education. The program has great potential to assist imprisoned people successfully transition from prison to the community, while simultaneously enhancing their ability to obtain housing.¹⁸¹ Temporary Release provides for a structured transition from incarceration to life in the community, helping participants to develop the work, educational, and basic life management skills they need to become law-abiding, contributing members of their communities. While in the Temporary Release Program, participants earn a taxable income, but are required to set aside a percentage of this

¹⁷⁸ See Section I, Subsection A, which discusses the correctional environment.

¹⁷⁹ Metcalf, *supra* note 39.

¹⁸⁰ Federal Bureau of Prisons, *Residential Reentry Management Centers*, https://www.bop.gov/about/facilities/residential_reentry_management_centers.jsp (last visited Feb. 26, 2019).

¹⁸¹ See generally Patricia Warth & Alan Rosenthal, *How New York Could Save Millions: The Potential Cost Savings and Public Safety Benefits of the Temporary Release Program*, 2009, Center for Community Alternatives, Justice Strategies Initiative, available at <http://www.communityalternatives.org/pdf/TemporaryReleasePolicyPaper.pdf>.

income into their DOCCS inmate account, which is returned to them upon their eventual release from prison. Thus, people who participate in the Temporary Release Program leave prison with significant savings, which can be used to pay for housing. Additionally, because people in the program are out in the community working, they establish community connections and pro-social networks that enhance their ability to secure appropriate housing. Unfortunately, because of an Executive Order that was issued in 1995, the eligibility for the Temporary Release Program has been severely restricted. At its peak in 1994, 27,937 prisoners participated in the Temporary Release program; by 2016, only 1,244 prisoners participated in the program.¹⁸²

There are also community-based options that provide supportive housing for people upon their release from prison. For example, this Association's 2016 report on re-entry described the FUSE Program in New York City.¹⁸³ The Fortune Society's Academy and Castle Gardens, as discussed above, is yet another model. This mixed-use housing program not only assists people in identifying long-term housing solutions but it also provides supportive services, including access to assistance in employment, access to re-entry (rights restoration) services, and group counseling. Perhaps what works so well for Fortune, however, is the emphasis on people with past convictions as having the expertise, experience and commitment to guide recently released individuals through the process of reintegrating into the community.

Recognizing that there is no "one-size-fits-all" solution, this Task Force recommends that the State adopt various strategies for a more supportive, structured approach to release from incarceration. DOCCS should expand eligibility for the Temporary Release Program (most commonly called work release or educational release). The 1995 Executive Order, which has been continued and expanded with every Governor since, should be rescinded and steps should be taken to revitalize and restore the Temporary Release Program so that it can realize its potential in helping people successfully transition to the community.

The State should provide housing stipends to people for a period after their release from prison.¹⁸⁴ These stipends can be used for the person to pay for housing in the community, or to supplement the household income of a family that is willing to take the person in upon release.¹⁸⁵

Lastly, the State should provide the resources needed to develop and provide transitional, supportive, and permanent housing to people being released from prison and jail who need housing. In so doing the State should utilize "an approach that takes into account and addresses specific re-entry challenges" (e.g., seniors, women seeking to reunify with children, LGBT).¹⁸⁶

¹⁸² See *Id.*; see also DOCCS, *Temporary Release Annual Report: 2016*, at 3, available at <http://www.doccs.ny.gov/Research/Reports/2016/TempReleaseProgram2016.pdf>.

¹⁸³ See *Report of the Special Committee on Re-Entry*, *supra* note 3, at 71-72.

¹⁸⁴ See New York State Bar Association, *Special Committee on Collateral Consequences of Criminal Proceedings, Re-Entry and Reintegration*, *supra* note 2, at 258.

¹⁸⁵ See Testimony by Elizabeth Gaynes, President & CEO, Osborne Association, *supra* note 142. ("Affordability of existing housing options is also problematic. While we support the continuation and expansion of various Section 8, SEPS, HASA and other voucher programs designed to assist people to access permanent housing, we believe that a less expensive solution for many is being ignored: SUPPORTING FAMILIES WHO WELCOME PEOPLE HOME." (Emphasis in original.)). Ms. Gaynes' proposal for financial support to families is modeled after the Kinship Foster Care program; she calls it the "Kinship Re-Entry Housing" program. *Id.*

¹⁸⁶ See *Id.*

V. EDUCATION

Some ask why we should spend any money on educating incarcerated individuals. The answer is clear. Education is the most effective tool we have to change the life path of incarcerated persons and positively impact their chances of successful reintegration. By reducing recidivism, education saves money and increases public safety. Education is the cornerstone in the effort to alter criminogenic behavior, provide incentive and enhance the skills and drive necessary to successfully re-enter and reintegrate into the community.¹⁸⁷ However, for education to make a difference, it must be provided by qualified, dedicated and empathetic people.

According to a 2016 RAND study, in 2013 there were over 2.2 million individuals incarcerated in the United States.¹⁸⁸ Of this population, a third never complete their high school education and few learn any new life skills that enable them to integrate into society. However, the study also found that, of individuals who participated in any kind of education during incarceration, up to 43 percent were less likely to reoffend and return to prison.¹⁸⁹ Investing in education during incarceration allows incarcerated persons a means of escaping the cycle of recidivism by engaging in personal growth and development and provides the State a significant return on its investment in the name of public safety.

It is far less expensive to provide educational services in prison than to incarcerate someone. Multiple studies have demonstrated the cost effectiveness of providing education in terms of dollars and public safety.¹⁹⁰ Investing in educational and vocational programs for the incarcerated population benefits the people being educated and their communities upon their release. As one individual noted, “[c]ommitting a crime and being a part of a crime doesn’t mean you’re still a criminal today . . . I’ve come to terms with my crimes. [College programming] helped me become the best person I can be so I don’t have to go down that route again.”¹⁹¹

Education is not only a cost-savings mechanism that helps reduce crime, it also positively impacts the lives of incarcerated persons in prison and when they return to their communities. In prison, educational programs produce “mature, well-spoken leaders who have a calming influence on other [incarcerated people] and on correction officers; and communicat[e] the message that

¹⁸⁷ Jack Bush, *To Help a Criminal Go Straight Help Him Change How He Thinks*, NPR, Jun. 26, 2016, <https://www.npr.org/sections/health-shots/2016/06/26/483091741/to-help-a-criminal-go-straight-help-him-change-how-he-thinks> (last visited Feb. 26, 2019).

¹⁸⁸ Doug Irving, *The Case for Correctional Education in U.S. Prisons*, RAND Rev., Jan. 3, 2016, <https://www.rand.org/blog/rand-review/2016/01/course-correction-the-case-for-correctional-education.html> (last visited Feb. 26, 2019).

¹⁸⁹ Lois M. Davis et al., RAND Corporation, *How Effective Is Correctional Education, and Where Do We Go from Here?: The Results of a Comprehensive Evaluation* 14 (2014).

¹⁹⁰ “At a cost of \$60,000 per year to incarcerate a single person compared with \$5,000 in annual tuition fees to educate them, Hudson Link’s programs have saved New York State taxpayers over \$21 million per year...” Hudson Link, *What We Do*, <http://www.hudsonlink.org/what-we-do/> (last visited Feb. 26, 2019).

¹⁹¹ Anthony Izaguirre et al., *Patchwork of Education Programs for NY Prisoners Who Want to Get Out and Stay Out*, City Limits, Jan. 17, 2017, https://citylimits.org/2017/01/17/patchwork-of-education-programs-for-ny-prisoners-who-want-to-get-out-and-stay-out/?utm_source=January+18%2C+2017+Eblast&utm_campaign=July+5%2C+2012+ebblast&utm_medium=email (last visited Feb. 26, 2019).

society has sufficient respect for the human potential of incarcerated people.”¹⁹² Upon release, incarcerated individuals who come home with an education are able to become productive members of society and role models for their families. Gregory Brown, a student in the Hudson Link College program noted: “I believe education can mean the difference between a life of crime and a productive life. My educational level can influence whether my twin sons aspire to be criminals or whether they have the self-confidence to pursue occupations that challenge their minds.”¹⁹³ Educating incarcerated parents enhances their ability to change and mature which directly impacts the future of their children and, in turn, the future of their communities.

The following sections explore the changes that have occurred recently in the effort to provide education in prisons in New York, and the measures that should be taken to further expand these opportunities.

A. Education During Incarceration

Hundreds of studies have found that successful re-entry begins while a person is in prison; it may be too late to begin the process once a person is released.¹⁹⁴ Obtaining the necessary programming and treatment, education, medical and mental health care while incarcerated are all crucial factors to increasing the chances of successful reintegration upon release.

As early as 1994, the Federal Bureau of Prisons found that “there is an inverse relationship between recidivism rates and education. The more educational programs successfully completed for each six months confined, the lower the recidivism rate. For inmates successfully completing one or more courses per each six months of their prison term, 35.5 percent recidivated, compared to 44.1 percent of those who successfully completed no courses during their prison term.”¹⁹⁵

We have known this fact for decades. Over 50 years ago, in 1965, Congress passed Title IV of the Higher Education Act. This Act permitted incarcerated individuals to apply for financial aid through Pell Grants. In the 70’s, studies were conducted to determine the success rate of in-prison higher education programs by measuring the re-arrest rate and the formerly incarcerated person’s ability to obtain and maintain employment. The studies found that formerly incarcerated individuals with at least two years of college education had a 10% re-arrest rate compared to a national re-arrest rate of approximately 60%.¹⁹⁶

In 1993, the Texas Department of Criminal Justice undertook a study of recidivism rates (noting that the average recidivism rate in Texas was also 60%) and found that individuals with associates’ degrees had a recidivism rate of 13.7%, those with bachelor’s degrees a rate of 5.6%

¹⁹² Prison Studies Project, *Why Prison Education*, <http://prisonstudiesproject.org/why-prison-education-programs/> (last visited Feb. 21, 2019).

¹⁹³ *Id.*

¹⁹⁴ Alan Rosenthal & Elaine Wolf, *Unlocking the Potential of Reentry and Reintegration*, October 2004, available at http://www.communityalternatives.org/pdf/unlocking_potential.pdf.

¹⁹⁵ Miles D. Harer, Federal Bureau of Prisons, Office of Research and Evaluation, *Recidivism Among Federal Prisoners Released in 1987: A Preliminary Report*, Aug. 4, 1994, at 4, available at https://www.bop.gov/resources/research_projects/published_reports/recidivism/oreprecid87.pdf.

¹⁹⁶ Alexandra Marks, *One Inmate’s Push to Restore Education Funds for Prisoners*, *Christian Science Monitor*, Mar. 20, 1997, available at <https://www.csmonitor.com/1997/0320/032097.us.us.4.html>.

and those with masters' degrees a recidivism rate of zero.¹⁹⁷ In 2013, DOCCS researchers examined the effect of prison-based college education on recidivism. The results of their study showed that the re-arrest rate for individuals who did not participate in prison-based college programs was 3.8 times greater than for those who successfully completed such programs (35.9% v. 9.5%).¹⁹⁸ The study concluded that prison-based college education lowers recidivism and in the process may affect crime and incarceration rates.

The salutary effects of providing prison-based college programming expand beyond reducing recidivism: it has also been found to improve the health of New York's communities as well as the safety and security of all people being held in prison or jail.¹⁹⁹ A 2015 assessment of prison educational programs found the following in-prison college education benefits:

- The economy: In-prison college education is a cost-effective investment in reducing crime and recidivism. A study on crime control strategies found that every \$1 million spent on building more prisons prevents about 350 crimes, but the same amount invested in correctional education prevents more than 600 crimes.
- Local communities: When students return to the community, they engage in lower rates of crime and have a higher level of civic engagement when compared to other formerly incarcerated people returning to the community.
- Personal growth: College teaches critical thinking skills that help people better understand the consequences of their actions. It also improves opportunities for getting a job, reuniting with family and finding a place in society.
- Family: For children of incarcerated persons, benefits of in-prison college education include improved parenting behaviors, higher family income, increased likelihood that children and family members achieve higher levels of education, and reduced likelihood that children experience behavioral problems and get involved in the criminal justice system themselves.
- The prison itself: for other people in prisons, college education improves relationships and reduces conflicts, resulting in a safer environment.²⁰⁰

Results such as these warrant a significant governmental investment in education programs in prison; unfortunately, federal and state governments have historically done just the opposite. In 1994, the U.S. Congress included a provision in the Violent Crime Control and Law Enforcement

¹⁹⁷ James Beard et al., *Proposal to Reduce Recidivism Rates in Texas*, Earl Carl Institute for Legal and Social Policy, 2003, available at http://www.tsulaw.edu/centers/ECI/pubs_files/Criminal%20Justice/Recidivism%20Position%20Paper%20-%20PDF%5BFinal%5D.pdf.

¹⁹⁸ Ryang Hui Kim & David Clark, *The Effect of Prison-Based College Education Programs on Recidivism: Propensity Score Matching Approach*, 41 J. Crim. Just. 196 (2013).

¹⁹⁹ Human Impact Partners, *Turning on the TAP: How Returning Access to Tuition Assistance for Incarcerated People Improves the Health of New Yorkers*, May 2015, available at https://humanimpact.org/wp-content/uploads/2018/10/HIP_TAP_ExecSummary_final.pdf.

²⁰⁰ *Id.*

Act which denied incarcerated persons' access to federal Pell Grants.²⁰¹ New York soon followed suit in 1995 by taking away their access to Tuition Assistant Program ("TAP") grants.²⁰² As a result, a number of college prison programs were closed.²⁰³

1. Renewed Interest In Education As A Re-Entry Tool

A 2006 report from a NYSBA special committee entitled *Re-Entry and Reintegration: The Road to Public Safety* found that a variety of "collateral" consequences of a criminal conviction – consequences rarely spelled out in a criminal sentence – can have a profound and often negative effect on the ability of incarcerated individuals to re-enter society.²⁰⁴ Consistent with numerous prior studies, this report found a critical connection between education and recidivism rates. It acknowledged that DOCCS had set, as a goal, that every person released from incarceration have a high school diploma or its equivalent and the necessary skills to obtain a job. Yet, the report found that limited resources, poorly designed and executed prison programs, frequent transfers of inmates from one facility to another, and greater interest in short-term substance abuse and anger management treatment programs have sharply limited the effectiveness of in-prison education programs. The report also recommended that education be made available to all incarcerated persons until they have obtained a GED.

As referenced earlier, the 2016 report of NYSBA's Special Committee on Reentry²⁰⁵ made nine principal recommendations with respect to the following areas: diversion programs, pre-release planning, individualized assessment of collateral consequences, employment, education, housing, medical and mental health care and juveniles.²⁰⁶ The Special Committee suggested that the state use education as an alternative to incarceration, that prisons and jails should expand and improve available educational programs in prisons and jails, that New York State should restore TAP eligibility during incarceration and pass a "ban the box" statute with regard to college applications.²⁰⁷

2. Educational Programs Currently Available In DOCCS Facilities

In an effort to learn more about educational and vocational programs inside NYS prisons, the Task Force reached out to DOCCS with a number of questions, including questions about its screening process, the availability of various programs and the budget for certain educational programs. In response to our inquiry to DOCCS regarding the screening process, we learned that DOCCS evaluates each person entering its custody at reception by using a standardized test to determine his or her academic level. The test provides the baseline for that person's academic and vocational future at DOCCS. DOCCS' Directive 4804 states that "there are clear correlations between level of education and employment and between attainment of a high school diploma and reduced recidivism." In light of this, DOCCS' goal is that every person in its custody obtain a high school equivalency diploma prior to his or her release.

²⁰¹ 42 U.S.C. Ch. 136.

²⁰² Education Law § 661(4)(b-1)(v).

²⁰³ *The Last Graduation: The Rise and Fall of College Programs in Prison* (Zahm Productions 2008).

²⁰⁴ *Re-Entry and Reintegration*, *supra* note 2.

²⁰⁵ *Report of the Special Committee on Re-Entry*, *supra* note 3.

²⁰⁶ *Id.* at 4-5.

²⁰⁷ *Id.* at 5.

The individuals then go through an interview process where they are asked about their work history. If a person is not able to provide documentation that they have vocational training in a trade or employment, then vocational education is provided for them.

DOCCS; provides academic education at levels for Adult Basic Education (“ABE”), Pre-High School Equivalency, High School Equivalency (“HSE”), English as a Second Language and Bi-lingual ABE and HSE classes. DOCCS provides these education programs at fifty facilities. Vocational education is available at forty-seven facilities, but only twenty-seven facilities have shops for vocational programming.

DOCCS reports that it relies on twenty-two different college providers to facilitate college programming in twenty-nine of its facilities. Each program offers courses for credit, to up to the level of a Master’s degree. DOCCS did not provide a breakdown regarding how many programs are available at the different college and master’s levels. DOCCS indicated that it currently offers programs in conjunction with the following colleges:

- North Country Community College
- Medaille
- Genesee Community College
- Cornell University
- Marymount Manhattan
- Jefferson College
- Siena College
- Columbia Greene Community College
- John Jay
- St Lawrence University
- Ulster County Community College
- Herkimer County Community College
- Mohawk Valley Community College
- Mercy College
- New York Theological Seminary
- Sullivan Community College
- St. Thomas Aquinas
- New York University

The DOCCS website lists a number of academic programs that are available to incarcerated persons:²⁰⁸

- Academic Outreach (known as cell study) (available at all general confinement facilities)
- Adult Basic Education (available at all general confinement facilities)
- Bilingual Program (available at most general confinement facilities)

²⁰⁸ DOCCS, *Program Services*, <http://www.doccs.ny.gov/ProgramServices/index.html> (last visited Feb. 26, 2019). *NB*: the drafters of this report reached out to DOCCS to request information regarding the educational and vocational programs available at the fifty-four DOCCS facilities across the State. However, at the time of publication of this report, DOCCS had not responded to our inquiry.

- College Programs (available at 21 of the 54 DOCCS facilities)
- High School Equivalency (HSE) (available at all general confinement facilities)
- Masters of Professional Studies (available at Sing Sing)
- Rising Hope, Inc. Program in Ministry and Human Services (available at Fishkill, Sing Sing and Woodbourne)
- Special Education Program (available at 14 of the 54 DOCCS facilities)
- Title I Program (available at three of the 54 DOCCS facilities)²⁰⁹

On the vocational front, the following programs are available:

- Barbering
- Braille Transcription & Large Print
- Building Maintenance
- Cabinetmaking
- Carpentry
- Commercial Arts
- Computer Information Technology & Support
- Computer Operator
- Computer Repair
- Cosmetology
- Culinary Arts
- Custodial Maintenance
- Drafting
- Electrical Trades
- Floor Covering
- General Business
- Heating, Ventilation and Air Conditioning
- Horse Handling and Care
- Horticulture
- Introduction to Technology
- Machine Shop
- Masonry
- Painting & Decorating
- Plumbing and Heating
- Printing
- Puppies Behind Bars
- Radio and Television Repair
- Sheltered Workshop/Paint Brush & Roller Fabrication
- Small Engine Repair
- Upholstery
- Welding²¹⁰

²⁰⁹ DOCCS, *Education (Academic)*, <http://www.doccs.ny.gov/ProgramServices/academic.html> (last visited Feb. 25, 2019); *see also* Appendix F (“Release Planning Program Information From DOCCS”).

²¹⁰ DOCCS, *Education (Vocational)*, <http://www.doccs.ny.gov/ProgramServices/vocational.html> (last visited Feb. 25, 2019); *see also* Appendix F (“Release Planning Program Information From DOCCS”).

While many of these vocational programs do provide some skill training to incarcerated individuals, long waiting lists, transfers of individuals from one prison to another, disciplinary sanctions and other issues often create barriers to enrolling and/or completing a program. According to DOCCS, people are placed on Required Program Lists based on their earliest release dates and programmed as soon as openings occur, in an effort to facilitate their completion of training programs. DOCCS noted that program availability is restricted due to capacity of classrooms and shops which cannot be exceeded, as well as the availability of resources. Completing a vocational program may not be enough to allow a person to pursue a trade on release from prison: in many instances, an occupational license is required, which requires further education and may be denied to persons who cannot demonstrate “good moral character.”²¹¹

DOCCS reported that site visits to monitor their education and vocational programs are conducted yearly and audits for all academic and vocational programs are done every three years. The participants in academic programming are given the TABE test three times a year to monitor their progress and to use as a basis to move them to higher level classes. When a student reaches the High School Education level then he or she is eligible to take the Readiness Assessment which is a qualifier for the Test Assessing Secondary Completion (“TASC”) and if the student passes in every subject area the student will earn his or her high school equivalency diploma. DOCCS reported that a person being released is tested to determine his/her educational and vocational level in an attempt to match that person with opportunities in the community. No statistics as to changes in a person’s educational level or vocational abilities during his/her time in DOCCS were provided.

DOCCS reports that its entire education and vocational programming budget for non-personal services is \$2.2 million, but DOCCS did not provide a specific number as to what the total budget for education and vocational programming.

3. Education/Vocational Opportunities/Programs in the County Jails

Depending on the particular county, one may or may not have access to vocational and/or educational programs in a county jail. For instance, Westchester County Department of Correction (WCDOC), established in 1969, operates a 21-acre correctional complex in Vahalla, New York. In 2018, for the first time in the history of the correctional facility, WCDOC, in partnership with Manhattan College, began offering onsite college courses. “The program provides a pathway for students to pursue a bachelor’s degree upon their release, at low- or no-cost to them or to taxpayers.”²¹² The incarcerated individuals who participate in the Manhattanville College Program attend classes in the jail facility with non-incarcerated Manhattanville students and obtain college credits for their successful completion of the course which are transferable to all colleges. The individuals enrolled in these courses have access to laptop computers in the jail to enable them to be successful students.

In addition, WCDC partners with Pace University to provide “Parenting, Prison and Pups,” an animal-assisted therapy program and with Sarah Lawrence College to provide “Mommy

²¹¹ New York State Department of Labor, *The Road to Re-Entry, Supplemental Guide*, 2014, available at <https://labor.ny.gov/workforcenypartners/toolkits/The-Road-to-Reentry-Supplemental-Guide.pdf>.

²¹² See Appendix E (“WCDOC Informational Flyer and Course Syllabi”).

Reads,” a literacy program as well as creative writing literature courses. The jail also offers educational programs for the incarcerated population which includes interactive journaling, cognitive behavioral therapy programs and art therapy classes. Some of these programs are offered through the jails partnership with Westhab and the Yonkers Nepperhan Community Center.

The WCDC offers a Linking Employment Activities Pre-Release (“LEAP”) program in partnership with Westhab that provides individuals with a six to eight week life skills and job readiness course. This class prepares the participants to complete a vocational course and receive career guidance in the community upon their release from incarceration as well as providing people with a case management and employment placement program.²¹³ In the 2017-2018 reporting year, the WCDC LEAP program worked with one hundred participants in the jail. Eighty-four of those participants completed the program in the community by participating in vocational training courses or securing employment.²¹⁴

The Nepperhan Community Center facilitates a six week course in which incarcerated men and women work to identify and develop life skills such as job retention, interviewing skills and resume writing. In 2018, this collaboration began assigning each incarcerated participant to a case management service. This services then follows an individual’s after his or her release by referring the person to the Nepperhan Community Center for education and employment services.

The education center at the Westchester County Jail has a contract with Board of Cooperative Educational Services (B.O.C.E.S.) which requires that the jail be provided a certain number of teachers for their High School Equivalency courses. The jail encourages individuals to stay at their facility until they complete high school or their high school equivalency course and obtain either a diploma or G.E.D. before being transferred to the DOCCS State Prison system. The jail works with the courts, defense attorneys and the District Attorney’s office if necessary to accomplish this.

Similarly, the Wyoming County Jail and B.O.C.E.S have in place a Workforce Innovation and Opportunity Act federal grant that provides educational opportunities and re-entry services.

4. Special Education Services for Incarcerated Persons

Approximately 2,200 incarcerated New Yorkers are between the ages of 16 and 21. Many have heightened needs: incarcerated youth are three times more likely to be eligible for special education services than their counterparts who attend public school. Incarcerated youth who have unaddressed special education needs when they leave prison are less likely to have the skills they need to successfully transition back to the community. The Individual with Disabilities Education Act (“IDEA”)²¹⁵ guarantees the right to a free and appropriate public education (“FAPE”) for all individuals under the age of twenty who have either an intellectual and/or mental disability. As such, all county jails and DOCCS are required to provide special education services to any incarcerated youth in their custody with either type of disability. In response to our questionnaire

²¹³ See Akil Childs, *Tawan Frazier—Ain’t No Mountain High Enough*, Westhab, Sept. 20, 2018, <https://www.westhab.org/tawan-frazier-aint-no-mountain-high-enough/> (last visited Feb. 25, 2019).

²¹⁴ See, e.g., *id.*

²¹⁵ 20 U.S.C. Ch. 33.

about how DOCCS identifies individuals who may need special education services, DOCCS noted that it relies on DOCCS Directive 4805 on Special Education Services, BETA²¹⁶ and TABE (Test of Basic Adult Education) standardized testing a person's history of special education services, Individualized Education Plans ("IEP") and self-reporting. Special education classes in DOCCS are taught by NYS Education Department certified special education teachers. DOCCS also informed the Task Force that if a person is placed in keeplock disciplinary confinement, protective custody, involuntary protective custody, or any other form of isolation, vocational programming is interrupted and academic education is continued through a Cell Study program.²¹⁷

Failure to provide these services can result in a court order requiring DOCCS or a local jail to provide the disenfranchised youth to compensatory educational services, including special education and related services, both of which can cost the State a significant amount of money. In the 2018-2019 \$472,971.00 from the General Education Budget was allocated to Special Education. In total, DOCCS has forty-five special education staff members to service the two hundred and ninety individuals in the State prisons that DOCCS has identified as eligible for special education services. DOCCS reports that sixteen of their facilities have special education staff on site, but that students can receive special education services at any/all DOCCS facilities.

B. Progress In Certain Areas

1. Ban the Box

Progress has been made in some areas. After years of activism by education and criminal justice policy organizations, including College and Community Fellowship and the Center for Community Alternatives, in 2016 the State University of New York ("SUNY") announced a major policy revision: the university system would be "banning the box," *i.e.*, eliminating questions about applicants' arrest and conviction history from the 2018 admissions application. However, there has been some criticism regarding the new policy because, upon a closer look, it appears the questions have not been banned, but instead, moved to another place in the application process. Now students must answer questions about past felony convictions if they seek on-campus housing or participate in internship, clinical, field or study abroad programs. The problem with this is that most colleges in the SUNY system require first year students to stay on campus and a large percentage of students either study abroad or engage in internships, or both. As such, as noted by William G. Martin, a professor of Sociology at SUNY-Binghamton: "while well-intentioned, the new policy all too easily renders the formerly incarcerated segregated, second-class students, excluded and alienated from normal student life and social rights."²¹⁸

²¹⁶ "The Army Beta 1917 is the non-verbal complement of the Army Alpha—a group-administered test developed by Robert Yerkes and six other committee members to evaluate some 1.5 million military recruits in the United States during World War I. The Army used it to evaluate illiterate, unschooled, and non-English speaking army recruits." *Army Beta*, Wikipedia, https://en.wikipedia.org/wiki/Army_Beta (last visited Feb. 27, 2019).

²¹⁷ "The Academic Outreach (Cell Study) Program provides instructions, tutoring services, and materials to inmates at all levels from literacy through college studies. The program is provided to inmates who are not enrolled in formal education programs due to inability to function in a regular classroom or facility needs/security reasons; or who are in 'limited access' areas of the facility (Hospital, SHU, RMU, RMHU, Protective Custody)." DOCCS, *Education (Academic)*, <http://www.doocs.ny.gov/ProgramServices/academic.html> (last visited Feb. 27, 2019).

²¹⁸ William G. Martin, *Did SUNY Ban the Box, Or Just Move It?*, The Nation, Oct. 25, 2016 available at <https://www.thenation.com/article/did-suny-ban-the-box-or-just-move-it/>.

NOTE: the above information applies to SUNY programs and colleges only. Late in 2018 it was announced that, starting in 2019, the Common Application – a single form that prospective students can use to apply to any college that uses it, including many private colleges across the country – would discontinue asking questions about applicants’ past arrest and conviction histories.²¹⁹ This change resulted from activism by civil rights organizations and members of Congress, and had its origins not only in successful employment-related “ban the box” movements, but was also affected by the SUNY decision.

2. Expanding In-Prison College Programs

On August 7, 2017, Governor Cuomo and Manhattan District Attorney Cyrus R. Vance, Jr. took an important step in putting Chief Justice Warren Burger’s words²²⁰ into action when they announced an award of \$7.3 million to fund educational programming and re-entry services at seventeen New York State prisons over the next five years. The “College-in-Prison Reentry Program” will create more than 2,500 seats for college-level education and training for incarcerated New Yorkers across the state. While this funding will provide education and training opportunities to only 5% of New York’s current prison population, it is a huge step in the right direction.

In announcing the new program, Governor Cuomo noted that “New York State currently spends \$60,000 per year on every prisoner in our system, and those who leave have a forty percent chance of ending up back behind bars.” Under the new program, it will cost the State less than \$3,000 to provide one year of college education per person. “Existing programs show that providing a college education in our prisons is much cheaper for the state and delivers far better results. Someone who leaves prison with a college degree has a real shot at a second lease on life because their education gives them the opportunity to get a job and avoid falling back into a cycle of crime,” said the Governor.²²¹

A study conducted by the Lumina Foundation found that two-thirds of job postings in the United States will require some level of education by 2020.²²² In light of all that we know regarding the fiscal, societal, safety and health benefits of providing an education to those we incarcerate, efforts should be made to continue expanding access to college prison programs by pushing for reinstatement of both Pell and TAP grants.

²¹⁹ See Alia Wong, *The Common App Will Stop Asking About Students’ Criminal Histories*, The Atlantic, Aug. 10, 2018, available at <https://www.theatlantic.com/education/archive/2018/08/common-app-criminal-history-question/567242/>.

²²⁰ See Hon. Warren E. Burger, *supra* note 1.

²²¹ Press Release, Governor Andrew M. Cuomo, Governor Cuomo Launches Initiative to Provide College Classes in New York Prison (Feb. 16, 2014), available at <https://www.governor.ny.gov/news/governor-cuomo-launches-initiative-provide-college-classes-new-york-prison>.

²²² Ashley Smith, *Momentum for Prison Education*, Inside Higher Education, Nov. 6, 2018, <https://www.insidehighered.com/news/2018/11/06/colleges-push-more-resources-support-prison-education-programs> (last visited Feb. 25, 2019).

C. Post Incarceration Educational Opportunities

In today's economy, a college education is increasingly necessary in order to earn a living wage and provide for oneself and family. Recent studies show that individuals with college degrees earn on average \$32,000 more per year than those whose highest degree is a high school diploma,²²³ and this figure balloons over a lifetime. This earnings gap is no less true – and likely more pronounced – for individuals reentering after a period of incarceration. Yet for many a college degree may seem impossible to obtain. Most individuals are released from prison to poverty, and struggle to meet basic needs such as housing, employment and health care. Most lack the free time with which to fill out applications and the income or savings with which to pay for them, and dreams of completing a college education are usually put on indefinite hold. It is supremely difficult to move beyond the day to day struggle, yet many yearn to, including individuals who started college coursework while incarcerated but were unable to complete it.

Starting and completing a college degree was not always so difficult. After a slow beginning, by the 1990s college education programs flourished in New York State, funded in good measure by the national Pell grant program and its New York State equivalent, the Tuition Assistance Program (“TAP”). But in 1994 Congress passed the Violent Crime Control and Law Enforcement Act,²²⁴ which terminated eligibility of people in prison from the Pell grant program, and in 1995 New York followed suit: Governor Pataki signed legislation banning New York State prisoners from receiving TAP assistance.²²⁵ As a direct and foreseeable result, college programming plummeted: reduced from 45 to 4 as funding to support student enrollment evaporated.²²⁶

But while massive efforts by incarcerated and formerly incarcerated individuals to return college to prisons have had extraordinary results as reported in section D(2) above, completing a college education remains a difficult prospect for individuals with conviction histories.

In New York City, five programs, the College and Community Fellowship (“CCF”), Educational Pathways (“EP”), Career Pathways (“CP”), the College Initiative (“CI”) and the Post-Prison Initiative (“PPI”) aim to make higher education a reality for individuals with past criminal justice involvement. CCF is an independent nonprofit organization. EP, CP and CI are programs of the Prisoner Reentry Institute (“PRI”) of John Jay College, City University of New York (“CUNY”), and while the vast majority of participants are CUNY students, students at any local college may join the programs. CP is also open to any low-income individual with past criminal justice involvement. PPI, located at St. Francis College in Brooklyn, is supported by the school in partnership with Hudson Link, a nonprofit organization. While each has a different mission and methodology, all four programs have made a significant difference in the lives of hundreds of students. All provide assistance beyond simple academic advising; the programs’ wrap-around support is crucial, and valued.

²²³ Association of Public & Land-Grant Universities, *How Does a College Degree Improve Graduates' Employment and Earnings Potential?*, <http://www.aplu.org/projects-and-initiatives/college-costs-tuition-and-financial-aid/publicvalues/publicvalues-resources/q3/employment-and-earnings.pdf> (last visited Feb. 25, 2019).

²²⁴ 42 U.S.C. Ch. 136.

²²⁵ Education Law § 661(4)(b-1)(v).

²²⁶ See Marsha Weissman & Sandy Lane, *College in Prison: Why It's A Smart Choice for Everyone*, Center for Community Alternatives, <http://www.communityalternatives.org/college-education.html> (last visited Feb. 25, 2019).

1. College and Community Fellowship

CCF was founded in 2000 by a veteran educator who taught in the college program at Bedford Hills Correctional Facility, a women's prison located in Westchester County. The multivalent power of education for all who engaged in the program was beyond dispute, but many women were unable to complete credits necessary to earn a degree before being released. For those who had started but not completed the program while on the inside, there were few supports to assist in applying to college on the outside, to help with financial aid, transferring credits, and simple encouragement. CCF, now located at the Interchurch Center in Morningside Heights, was created to provide the supports and resources these students needed, and was one of the first organizations dedicated to re-entering women's higher education, sustainable socio-economic stability, and full civic participation. Its student base is primarily comprised of mothers of young children living at or below 200% of the federal poverty level. All have past conviction histories and most have served a sentence in state custody.

Over the ensuing 18 years, CCF has grown to provide academic counseling, financial and peer supports, career development assistance and leadership development not just for those who seek to complete degrees started while incarcerated, but for women at all stages of readiness for college and advanced degrees. CCF recruits participants while they are still in state custody – introduction to CCF may come by way of an in-prison visit by one of the organization's counselors – and from the community, by referral from one of CCF's many community partner organizations. Current CCF programming includes college awareness workshops conducted in correctional facilities and at community-based organizations. Women who express interest receive further consultation on college readiness. For those who have not completed high school or have outstanding personal or family needs, the Community Sisters program offers resources, support and peer networking to help women move forward on their path to college. CCF's Career Education Enhancement Program assists women who may wish to pursue business or health-related accreditation to help with career development or as a step toward a college degree. For those ready for college, CCF academic counselors help in navigating the application, admission and registration processes; with completing financial aid paperwork; and with goal setting for their academic careers. CCF also provides career development assistance for program participants and graduates, including resume assistance and interview skills workshops. In addition, CCF provides financial development assistance, working with students and graduates on financial literacy as well as individual support for students to achieve financial stability.

CCF students have earned 332 postsecondary degrees (including a PhD and JD). It maintains an active and vibrant alumnae network, and, through its THRIVE program, provides technical assistance to organizations across the Northeast that are interested in supporting women on the path to higher education. It also hosts the Theater for Social Change, a performance ensemble comprised of CCF students and alumnae who perform at colleges, correctional institutions, community convenings and conferences with the goal of enhancing awareness of mass incarceration's impacts on women, families and communities.

2. Educational Pathways

EP works to create “on-routes” to higher education for students with criminal justice system involvement based on the precepts that education is a fundamental right and that engaging in higher education provides individuals with the framework for personal and social transformation. The program, housed at John Jay College of Criminal Justice on the far West Side of Manhattan, consists of four separate components: a college readiness course provided at Rikers Island; the Prison-to-College Pipeline; college-in-prison programming in two state prisons; and CI, a community-based college access program for CUNY students. CP in turn supports justice-involved students pursuing human services careers by providing tailored certificates, technology workshops and other special programming. [Focus for this report will be limited to CI and CP, programs that work with students who are not currently incarcerated, including students who have conviction histories but did not serve a prison sentence.]

3. College Initiative

When funding for in-prison college programming evaporated, individuals who had started coursework toward a college degree were unable to complete it, and upon re-entry found it exceedingly difficult to continue with their education. CI was created in 2002 to assist those individuals – and other persons with past criminal justice involvement – in creating a pathway to college enrollment and completion. CI conducts workshops and presentations in prisons and at community groups to help people see college as an option and to demystify the college experience and application process. The organization helps in college enrollment, including assistance with navigating applications and financial aid. Once students are enrolled, CI provides academic counselling and assistance with juggling competing obligations and setting academic and employment goals. It also engages the Community Service Society of New York to provide legal services for students facing conviction-related barriers to housing and employment that may interfere with pursuit of studies. A core component of CI is its peer mentoring program, which pairs academically successful college seniors with first year students. Peer mentors understand the challenges individuals with conviction histories may face in navigating challenges both inside and outside the classroom. Since its founding CI has helped more than 300 students enroll in and complete college, and currently supports hundreds of students at more than 24 college campuses across New York City.

In 2016, the founder of CI replicated the program in Ithaca, New York through auspices of Tompkins County Opportunities, Alternatives and Resources agency. The Ithaca program, CI Upstate, is tailored to meet specific needs of an upstate New York student body. In addition to assistance in navigating the college admissions process, tutoring for college placement exams and help with accessing financial aid, CI Upstate provides individual re-entry support in collaboration with community partners, individual academic counseling and ongoing peer-led meetings to discuss challenges students face. The program also provides very practical help to ensure students’ success: semester-long bus passes, book stipends, and computers. More information can be found at <https://www.oartompkins.org/college-initiative-upstate/>.

4. Career Pathways

The Prisoner Reentry Institute at John Jay College of Criminal Justice recently created CP, a program that promotes access to training and employment opportunities for people who have been involved in the criminal justice system, with a special focus on careers in human services. CP, which is housed at John Jay, does not focus on immediate enrollment in college programming. Instead, its goal is to bridge the worlds of higher education, criminal justice reform and workforce development, and to provide essential skills and assistance. CP's inaugural offering is "Tech 101," an entry-level course that provides fundamental technology skills individuals need to succeed in the workforce. The program, which is supported by the New York City Mayor's Office of Criminal Justice, recognizes that there is a deep divide between technology training provided at correctional institutions and what employers expect "on the outside." Topics covered in this free ten-session course include learning to use the internet, Microsoft Office and email and how to find jobs and apply for them online. Prospective students are referred by re-entry services organizations and word of mouth.

5. Post-Prison Initiative

The Post-Prison initiative at St. Francis College in Brooklyn (PP) is supported by and is an outgrowth of Hudson Link, discussed earlier in this section of this report. Also known as Hudson Link @ St. Francis, PP provides financial, social and academic supports to formerly incarcerated students that enables them to enroll in and complete degree programs at St. Francis College, a private Franciscan institution. It primarily assists students who started college while incarcerated but were unable to complete their degrees, and focuses on preparing them for social services, criminal justice and advocacy careers. The program is led by dedicated St. Francis staff and by staff at Hudson Link. For students needing it, PP provides for-credit remedial programming. It also assists students in transferring college credits they earned while incarcerated, and pairs them with mentors and college advisors to provide enhanced academic support. Where necessary, PP staff engage with parole or probation departments to ensure that supervision is consistent with college completion.

In conclusion, post-prison college programming not only helps ensure that individuals with past criminal justice involvement obtain better-paid employment and career advancement, it also offers structure and purpose. Organizations that provide supports to help individuals realize college dreams and higher education goals have succeeded in changing lives. Replicating these programs across New York State should be a legislative and grant-making priority.

D. Feedback From Incarcerated Individuals Regarding Availability Of Educational And Vocational Programs Within DOCCS

What do currently incarcerated individuals have to say about educational programming? We conducted an extensive survey to find out. The following questions and responses - condensed for space purposes - provide a snapshot of incarcerated persons' observations about programming and recommendations for change. Their responses helped inform our recommendations, which follow this section.

1. *Upon entering DOCCS custody, did DOCCS evaluate your educational and vocational needs? If so, what was involved in that process? What improvements, if any would suggest to the process?*

Most who responded indicated that they did have an initial screening where they were evaluated for educational needs. However, most also indicated that the screening was very brief and that there was little concern or interest by the person screening them regarding their actual programmatic needs. Many noted extreme difficulties in obtaining past educational records or vocational certificates and thus were not able to prove their current educational status to DOCCS and they did not receive assistance from DOCCS in trying to gather that information.

One individual noted that when he came to prison in 1989 he received the “standard TAB testing that is still used today.” The difference, he commented, between then and now is that “individuals fail to take this testing serious today. I remember when I took the test, both an instructor and inmate facilitator encouraged individuals to do the best that they could on the test. From what I have seen and heard this is no longer encouraged.” As a result, many students view the test as a joke and are misplaced, often in Adult Basic Education (ABE) classes when they actually should be in high school. This responder suggested “an orientation process that encourages individuals to do their best to gain a proper assessment and placement.” This responder also noted that he underwent a vocational assessment similar to what the Army testing does and commented that “this vocational assessment should never have been discontinued.”

One individual noted that before he came to prison he had vocational training in a CISCO networking program and was certified as a technician. However, he was told that if he had records from that program sent to DOCCS he would be deemed “vocation satisfied” and would therefore be disqualified from making his merit board. This individual commented that such a policy appears to punish people who come into prison with an education/vocation in that if they want any chance of going home early, they have to enroll in a vocational program, even if they don’t need it.

Most suggested that the screening procedure should be enhanced and counselors/screeners should care more about what they are trying to accomplish. Responders also commented that the screening process should be a cooperative experience where both the counselor and the incarcerated individual are involved in the process and incarcerated individuals’ various interests taken into consideration in setting up programming. One responder summed it up by noting that what is missing in the process is “the human factor” – having a counselor who cares about his client and treats the client like a human being. One responder suggested that removing debilitating “criminal” labels that promote racially biased behavior and employing staff members that reflect the race of the prison population would help in this regard.

2. *What educational and/or vocational programming has DOCCS provided to you since you were incarcerated?*

Responders mentioned being placed in ABE, High school Equivalency (HSE), and a multitude of various vocational programs including plumbing and hearing, cosmetology, masonry, barbering, computer repair and carpentry. Others noted that, while they tested well at screening, and came to prison with some college courses, they were still placed in a General Education Development (GED) program.

Many individuals indicated that they were placed in vocational programs without regard to their skills or interest. One individual noted that he had indicated that he wanted to pursue paralegal studies but was instead placed in the “print shop and painting class” that did not interest him.

3. *Did the educational/vocational programming that DOCCS provided to you meet your needs? If your answer is no, what programming would have been more appropriate?*

Some responders noted that the educational and vocational programs they were enrolled in *did* meet their needs, but the majority indicated that improvements were needed. Many also indicated that they were frequently placed in the wrong programs and/or were transferred after spending months in a program and forced to start all over again. One responder noted that he was initially placed in a GED program but because he was serving a life sentence, he was removed.

One individual noted that Taconic Correctional Facility has only had one active vocational program for the past two years, cosmetology. Another person noted that two monolingual Vietnamese individuals were put into Spanish speaking education classes because that is all that DOCCS had. Many noted that current vocational programs are outdated and that those offered don’t have updated tools or technology. Another individual noted that he was removed from his vocational program after he complained to the Superintendent of Programs regarding the lack of updated material available – they were using 2003 materials in 2016. One individual noted that such programs are farcical because, in many of them, the only requirement is attendance.

A number of other individuals noted that the programs they were placed in failed to take into consideration their skills and/or health. One individual noted that he was assigned to building maintenance but due to his medical condition (seizure disorder) he was often placed in harm’s way. Another noted that he was placed in masonry but was old and infirm and unable to perform the heavy-duty work. Another person said that while his vocational needs were met, he has been in prison for 23 years and he has “no new knowledge of life out there now.”

4. *How would you rate the educational and/or vocational programming you have received thus far?*

Most responders rated the educational programs they have received very low, noting that many of the teachers do not teach but instead hand out books and tell the students to complete various assignments. Some noted that this is probably because education is used primarily as a time management tool and, as such, there are many people in the classroom who do not want to learn, so teachers appear to get frustrated and stop teaching.

Some responders indicated that many teachers appear to hate their jobs. Many noted that as a result, not only are they are not receiving the education they need, but due to poor teaching techniques many individuals lose interest and fail to complete their mandatory programmatic assignments which often results in them losing good time so they end up spending even more time in prison.

It was suggested that instructors should be certified and evaluated by the New York State Department of Education. It was also noted that, because you can't force people to learn, those who are not interested should be moved to a different facility and DOCCS should focus on those who want to learn. Teachers should be given the tools they need to teach (e.g., in science and math courses a scientific calculator is not allowed due to security reasons and there is either no or very limited access to the internet.)

As far as vocational programming was concerned, again, the issue was the quality of the teachers. One individual who started with plumbing and then moved to electrical trades training indicated that the plumbing program was useless because the class was "often cancelled and when it was open the teacher didn't teach anything."

Responders indicated that training for trades like heating and plumbing was very useful because these trades can be put to use upon return to society.

5. *What improvements, if any, could be made in the educational and/or vocational programming that DOCCS offers?*

In terms of improvements, the majority of people suggested that DOCCS should treat education like a priority instead of a privilege. From the initial screening interviews to the quarterly meetings with Offender Rehabilitation Coordinators (ORCs), education should be encouraged. ORCs should advocate on behalf of their clients to ensure that they know about and are being provided the best educational opportunities available within DOCCS.

Vocational and educational programs should be lengthened, said responders, as many are limited to two hours a day. One person noted, "nobody is going to learn astronomy by just walking outside. That is basically what school is now. A.M. module walks to school between 8:00 and 8:30 and comes back at 10:30 – 10:45. Day over. P.M.

module is 11:45 -2:45. Day over.” “All day school would keep minds at school” and would allow for less time to get in trouble.

DOCCS should offer programming consistent with the job market, responders note. DOCCS should “modernize education and open doors to effective curriculums that are in sync with today’s world: computers, automotive, housing repair, landscaping, industrial, etc., and provide real hands-on application versus just sitting in the classroom.” One person relayed that in the general business class, students use “Microsoft Windows 2003 which is 15 years outdated along with all of the books.”

Responders state that there should be courses that focus on marketable skills such as computer, paralegal studies and business management, and teachers and students should be provided filtered internet access. One person suggested that DOCCS should offer a solar panel manufacturing program in each DOCCS HUB in both one maximum and one medium security facility.

Responders also suggested that DOCCS provide additional “life skills” classes such as programs on work-related topics, love and relationships, paying bills, cooking and surviving in the real world. Providing updated text books and vocational supplies (tools, etc.) was also mentioned.

Updating the vocational programs and connecting the programming with the New York State Department of Labor so as to help in transitioning from prison to the community was mentioned by a number of individuals. Along these lines, one individual noted that although he had completed his vocational programs in barbering and cosmetology, upon release DOCCS failed to assist him in obtaining a license.

Many noted that DOCCS only allows incarcerated individuals to take one vocational program every ten years. Some noted that they completed their vocational programs years ago and have forgotten most of what they learned. All responders would like the option of taking additional vocational programs. Some commented that there is insufficient funding for some vocational programs so that there are often times when they cannot get the materials they need to complete the course.

Another problem noted is that each prison facility makes its own policies regarding what credit is transferable, so individuals never know if they are going to get credit for all the time they have spent in a certain program when they arrive at a new facility.

One responder noted that there is also a monetary consideration when it comes to choosing between getting one’s education in prison, or taking on a prison job. If a person goes to school in prison, he receives between \$5.00 and \$7.00 every two weeks. If he works an industry job he can make up to 25 cents an hour which can amount to \$20.00+ every two weeks. “A decent tube of toothpaste at the prison commissary costs nearly \$5.00, a decent deodorant costs nearly \$2.00. Rice, beans and a box of chicken costs approximately \$10.00.” For these reasons, many individuals choose jobs over education.

It was suggested that if DOCCS wanted to make education a priority, it should designate two maximum security facilities and two or three medium security facilities as education facilities where the main focus is education. It was also suggested that individuals who go to school should receive 25 cents an hour and that for every five days a person attends school they receive two or three days' good time credit.

Many responders noted that the majority of people coming to prison have emotional, intellectual, physical and/or mental health issues and are often in prison because of those issues. These issues should have been addressed on the outside and must be addressed during incarceration if any progress toward rehabilitation is to be made.

Most responders noted that many teachers do not appear to be qualified to teach the subject matter to which they are assigned. Many complained that the ESL teachers (English as a second language) did not have the basic skills to teach ESL.

Others noted that while education and vocational programs are helpful, "we need programs like work release or others that help a person shorten their sentence and prepare for re-entry back into society (the real world.)"

One person commented about the unavailability of Limited Credit Time Allowance (LCTA) which is time off one's sentence. To be eligible for LCTA, one must meet certain criteria. This responder notes that he has not received a misbehavior report for six years, has taken several college courses, has paralegal experience, food service experience and all of his vocational requirements satisfied. However, he is still not eligible for LCTA because DOCCS does not offer the programs LCTA requires at the facility where he is incarcerated.

It was suggested that DOCCS offer training that corresponds to the latest technology. Suggested courses: Pest/Rodent Control Training, Pestilence Control Training, Health Care Education, Educational/ Certification Training (for DOL truck drivers, moving companies, etc.), job interview training, business entrepreneurship, real estate, computer coding, fashion and farming courses. "If DOCCS provided a program based around becoming a musical engineer along with learning the business aspect of the entertainment industry, it would be much more effective," noted one responder, "because there are a large number of people in DOCCS' custody with the passion for creating music."

For programs like general business, it was suggested that the computer programs be updated with Adobe, Word Press, etc., that a "soft skills" component be included and that people be taught actual business skills. For cosmetology, it was suggested that the make-up techniques be updated and that hair dying/highlighting and acrylic nails be taught so as to make the training more marketable upon release.

Accountability of staff and incarcerated individuals is also key. "When Phase 3 is a three month program and it is only held two days or ART which is a two month program and only held four days, there is a problem. When an individual completes building maintenance and cannot read a ruler, then there is a problem. When teachers have to deal with disciplinary issues rather than teaching, then there is a problem."

It was also suggested that anyone who has completed a vocational program should “automatically be placed in an apprenticeship program of that vocational upon their release – call it Operation Second Chance.”

6. *If you came to prison with an IEP (individualized educational plan), what process, if any, did DOCCS use to ensure that your special education needs were met? Are there areas of improvement you think are needed in the special education assessment process?*

Individuals with special education needs responded that their needs were either not identified in the screening process or not met in the classroom. Many commented that there needed to be more understanding, patience and compassion from staff assigned to work with individuals with special education needs. Often the needs of special education students are not met due to language barriers and “teachers who do not have the patience to deal with [these students] on an individualized level.”

Special education should also be provided for those who need it who are over 21. “DOCCS should provide a real assessment of the needs of those with learning disabilities. Further, more emotional intelligence classes should also be a part of education for anyone with a learning disability.”

7. *If your educational or vocational programming was interrupted by confinement in solitary confinement (DOCCS’ Special Housing Unit), did you receive cell study? If so, were the materials you received effective?*

People who served time in solitary confinement (DOCCS’ special housing unit or “SHU”) complained that, if they were given cell study, it was limited, boring and ineffective. No cell study for college course is provided. One individual, a special education student who came to prison with an IEP, noted that he only saw a teacher two times in a five month SHU span even though he requested assistance on numerous occasions. Another indicated that they are issued paper lessons which are never corrected and the teachers don’t take the time to explain the work. Education is often interrupted by SHU or transfers.

One responder noted: “I’ve been down for six years. I haven’t completed any of my programs and every time I go to the SHU it is for 90- 180 days. Then they move me to another jail and I have to start all over. Cell study is a joke. . . . They bring around 2nd grade and 8th grade material. It is highly unlikely that I will make my C.R. date due to non-completed programs. This is not fair.”

A number of responders also indicated that there are no educational or vocational opportunities if a person is in protective custody (PC) or involuntary protective custody (IPC), however, one individual indicated that there is a cell study program available to PC individuals at Elmira Correctional Facility Most individuals stated that no college courses are offered while someone is in SHU, but one person indicated that while in SHU, Bard

Prison Initiative sent study materials to him. A suggestion was made that DOCCS allow for some weekly out of cell classroom time for individuals in PC.

8. *When you finished your SHU sentence, how quickly did you transition back into your educational or vocational programming?*

Almost all individuals indicated that if they served time in solitary confinement, upon release it often took months or years to be re-enrolled in educational or vocational programs. One person noted that it really depends on the prison, in that “most prisons closer to NYC have better vocational and education” programs.

9. *Was there a waiting period for specific educational or vocational programs that were recommended to you? If so, how long did you have to wait and what did you do in the meantime?*

Almost everyone reported extremely long waiting lists for programming. One person mentioned that he has been on a waiting list for Aggression Replacement Training (ART) and Alcohol Substance Abuse Treatment (ASAT) since 2005. One noted that “people get into trouble when they have nothing to do – they should increase availability of programs.” Another who has been incarcerated since 2006 said that he is still waiting for programming, due to the length of his sentence. Another noted that he has been waiting to enroll in ART for three years and noted that, if ART is recommended for a person, until that person has completed ART, he is not eligible for participation in the Family Reunion Program (FRP). Still another has been waiting to take ART since 1999 and another waiting to enroll in Alcoholics Anonymous (AA) since 2013.

Many noted that the only education programs a person is guaranteed to get into are ABE, ESL and courses to obtain the HSE.

One person relayed that it took months before he was put in a program and then, when he was, it was computer repair which was “completely antiquated.” It took a year before he was told that he needed to participate in a DWI program, and by the time he was told that, his merit board had come and he was denied because he had not participated in the DWI program. He sees the parole board in three months but he has not gotten into the DWI program yet so it is unlikely he will be considered for parole.

10. *If you were eligible, did you have the opportunity to enroll in a college program? If so, were you accepted? If not, why not?*

Almost all responders indicated that they are interested in attending college, but that there are not enough slots or enough degrees offered. Suggestions were made to add college courses in business management, health and the medical field, intelligence services and computer technology. There is apparently also a mandatory waiting period for some college programs. One individual indicated that “you have to be at Sing Sing for at least six months before you are eligible to enroll in the college program.” One individual who applied for the Cornell University program was denied because he already had an

Associate's degree. "I only wanted to take classes without earning credits" but was told that since I had my degree "I could sit in my cell until I went home."

Another noted that, while eligible to enroll, he did not "because my industry job pays more than college does and I need the finances for paying fines and to buy my basic needs without being a burden to my family." Yet another person indicated that he applied but was not accepted and was never told why. One individual who applied to Bard Prison Initiative believes he was denied admission due to his age: he is currently 67 years old. Another indicated that he had the opportunity to apply but chose not to enroll because he wanted to gain LCTA, which would take six months off his sentence, so he continued to work as an inmate program assistant.

11. *If you have participated in a college program, what was it and how would you rate it?*

Any responder who had attended college indicated that the experience was good, the teachers were "great" and that the courses were exceptional. College courses that were rated as exceptional were those at Mercy College, Marist College at Green Haven, Cornell Prison Education Program, Bard Prison Initiative (BPI), Hudson Link, Theology at Sing Sing and Sing Sing pre-college, John Jay College, Second Chance Pell Pilot Program through North County Community College, Consortium of the Niagara Frontier which includes Niagara University and Canisius and Daeman Colleges, and Hudson Valley Community College. One person rated BPI as "excellent – a life changing experience." Other programs that were highly rated were: Post GED classes: Rising Hope at Woodbourne. Facilities that offer writing workshops and history programs taught by prisoners and/or volunteers also received high marks. People also mentioned attending Corning CC at Elmira and Ulster Community College.

A few responders complained that while the college programs are good, individuals cannot get a degree in something they can use when they get out. Another commented that BPI apparently doesn't transfer any prior college credits like Hudson Links does. One responder had 48 credits from Marist College towards a Bachelor's degree before Pell Grants were eliminated and 15 credits through a college correspondence program (Ashworth), but BPI would not accept them.

12. *Are there any post-GED, but pre-college programs available within DOCCS, such as programs to prepare a person for college courses?*

Most people did not know of any post-GED-pre college programs although one person noted that Hudson Link offers pre-college math and English courses.

13. *What college education programs are available to you within DOCCS?*

What programs are available depends on the prison. Some programs that were listed included: Cornell Prison Education program, BPI (but waiting list was over a year), Mercy College, Marist College at Green Haven, Hudson Link, Theology at Sing Sing and Sing Sing pre-college, John Jay College, Bennington College, and Hudson Valley Community

College. Also, one person noted that “you must have at least two years left to serve to be eligible to enroll” in a college program.

A number of responders also mentioned paying for correspondence courses with various colleges including Ashworth College and others.

14. *Do you have a counselor who monitors your educational and/or vocational progress? If so, how often do you meet with your counselor and is the counselor helpful to you? If not, why not?*

Most responders indicated that they do have counselors [now referred to as Offender Rehabilitation Coordinators (ORCs)] who are supposed to monitor their educational and vocational programming progress, but that they rarely meet with them (apparently meetings are supposed to be quarterly) and do not find them very effective. If the quarterly meetings do occur, they typically last no more than 10 minutes. A majority of responders referred to their ORCs as “paper pushers.” Many noted that their counselors treat them with “contempt.”

A few people opined that each ORC is different and that, while most of the ORCs are not helpful, there are a handful who work hard to help their clients learn how to better themselves.

It was suggested that ORCs should have access to the internet to help people look for jobs.

15. *While on parole, were the vocational skills that you learned in prison useful in the jobs you applied for and accepted? If so, what skills and what type of employment? If not, what vocational programs would have better prepared you for available jobs?*

Most people replied that the skills they learned in prison were not that helpful upon release. One person noted: “I had learned small engine. In the class we were taught how to fix lawn mowers. In NYC finding a job fixing lawn mowers is like trying to sell sandals in Antarctica. Mechanics, audio engineering, computer programming, software, construction, plumbing or truck driving” would have been much more useful. “One of the major problems is that felons are barred from obtaining certain licenses so even if you learned a trade, often you can’t practice it upon release.”

Another person noted that parole officers constantly put formerly incarcerated persons into programs they don’t need, “and no account is taken for their need for psychological or mental health treatment.”

One responder relayed his own personal story about why he ended up coming back to prison even though he was able to get a job in construction when he was initially released. He shared the following:

"I was released in 2015 and I had all intentions of doing the right thing. I started out by going to agencies and working measly jobs for several months until I landed a good job in Manhattan doing construction. My pay was \$20.00 an hour, this was great pay for me and I took advantage and worked a lot of overtime hours. I was able to move out of my sister's house and get my own place within a month. I was paying all of my child support arrears and court appointed fines. After three months of working hard, I was let go because I didn't have my OSHA certification. I had to pay rent along with my other bills, so I asked my family for a loan of \$1000, but they couldn't help me, so I committed a crime and was arrested.

This is why I'm here, so when I reached my designate facility I wrote the head of the Department of Labor requesting information on how an OSHA Certification Program can be established in Corrections. I was told by the Acting Commissioner that OSHA is a Federal Program and that someone for the facility would have to become certified and that person could then certify inmates/prisoners. I wrote the Superintendent and he wrote back telling me that it can't be done. I believe that it can be done, but it has to be approved in Albany.

There are a lot of benefits in this for inmates who are about to reenter society. A large percentage of inmates have previous experience in construction so this certification will help them land a job when they are released. No one can work on any job site unless they have the minimal 10 hour certification. I hope that I shed some light with my experience and that this can be looked at and discussed."

16. *Did parole help direct you to educational/ vocational training upon release? If so, what did they do?*

An overwhelming number of individuals responded that parole never assisted in helping with educational opportunities upon release. "Parole was not helpful at all." "I was told that I had to find a job. I was not even given a list of places that would hire felons." "Parole did not aid in helping me find a job. They just took urine." One person commented that he tried to go back to college but had difficulties with "parole conditions and payment." "Parole just told me to go to AA."

17. *If you have been released from prison prior to your current bid, what educational opportunities were available to you upon your release?*

Most individuals indicated that they knew of no readily available educational opportunities upon release. Many indicated that education was not an option because they had to work to pay bills. One person mentioned the Resource Center for Independent Living (RCIL) in Utica for educational needs, but believes the budget was cut and they may have shut down. A few mentioned ACCES-VR, (formerly VESID), or Adult Career and Continuing Education Services-Vocational Rehabilitation, which is part of the New York State Education Department. ACCES-VR is a New York State agency that administers as well as provides vocational rehabilitation services to individuals with disabilities.

E. Barriers That Continue to Exist

While New York State has made significant strides in expanding educational and vocational opportunities for individuals incarcerated in State prisons and some county jails have also improved access to such programs, there are numerous barriers that continue to exist. The primary barriers identified by individuals incarcerated in New York State prisons are:

- Education is not seen as a priority, but rather a privilege.
- Educational and vocational programs are not available at all facilities.
- Program offerings and outdated equipment hinder marketable skills training.
- Counselors do not provide the assistance necessary to identify needs and follow progress.
- People in Keeplock, Protective Custody, Involuntary Protective Custody, Administrative Segregation, Special Housing, and other non-general population housing status, cannot access the majority of the educational and vocational programs, but for cell study.
- There are extremely long waiting lists for courses and programs.
- There are inadequate opportunities to participate in college programming.
- Transfers and placement in confined housing interrupt classes and progress.
- There are no transitional programs that include life skills training to help people transition from high school to college based courses.

Significant barriers to successful reintegration upon release also continue to exist including:

- Questions about arrest and conviction history continue to appear on college applications.
- Credits earned during incarceration and often not transferable to other educational institutions upon release.
- There continue to be bars to obtaining certain licenses upon release from prison or jail.
- Parole does not provide adequate assistance to individuals seeking to enroll in school or obtain employment.

F. Recommendations

One of the general purposes of New York’s Penal Law is “the rehabilitation of those convicted, the promotion of their successful and productive reentry and reintegration into society. . . .”²²⁷ With that in mind, we need to identify what works and what does not when it comes to adequately preparing people for reintegration. We know that education works.

As mentioned above, in January 2016 the NYSBA Special Committee on Re-entry prepared a comprehensive report on how to assist formerly incarcerated individuals in successfully reintegrating into their communities of origin.²²⁸ The report found that insuring that they receive the education they need is critical to success.²²⁹

Whether education comes in the form of special education services, giving individuals the opportunity to obtain a high school diploma or the equivalent thereof, providing life skills and transitional training to prepare individuals for college, or providing college and master’s degree programs, it is incumbent upon the State to focus on educating the State’s incarcerated population if we are truly committed to working toward their successful and productive re-entry into society. In light of this, we make the following recommendations:

1. Restore Incarcerated Individuals’ Access to both Federal Pell Grants and the New York State Tuition Assistance Program

On February 14, 2018, U.S. Senator Brian Schatz of Hawaii introduced the “Restoring Education and Learning Act” (REAL), legislation that would restore Pell Grant eligibility for incarcerated individuals to reduce the cycle of recidivism, save taxpayer money and improve public safety.²³⁰ We support the passage of the REAL Act as a significant step to restoring Pell Grant assistance.

New York State’s Tuition Assistance Program, “TAP,” is one of the largest state student financial aid programs in the country. We recommend restoration of TAP funding for qualified incarcerated persons, so that they can afford to access college programs and encourage growth and expansion of college in prison.

2. Pass The Fair Access to Education Act

We commend the efforts taken in 2016 by SUNY in implementing a ban the box policy for its application process. The removal from the application form of questions about students’ criminal history is laudable, but does not go far enough. Unfortunately, SUNY still asks students questions about prior felony convictions when they apply for campus housing, an internship or

²²⁷ Penal Law § 1.05(6).

²²⁸ New York State Bar Association, *Report of the Special Committee on Re-Entry*, *supra* note 3.

²²⁹ *Id.* at 47.

²³⁰ Press Release, U.S. Senator Brian Schatz, Schatz Introduces Legislation to Restore Educational Opportunities for Those Incarcerated and Improve Public Safety (Feb. 14, 2018), available at <https://www.schatz.senate.gov/press-releases/schatz-introduces-legislation-to-restore-educational-opportunities-for-those-incarcerated-and-improve-public-safety>.

permission to study abroad.²³¹ SUNY may have voiced concerns about the safety of other students on campus interacting with students with criminal records, but there is no statistical data to support these concerns or justify this policy.²³²

The rationale behind removing all questions about past conviction history from college applications includes the understanding that a conviction history is not predictive of future behavior in college, and that including the questions at all has a serious deterrent effect: according to one study, more than sixty percent of people with criminal records never bother to complete a college application form that includes criminal history questions. Once they check the box that says “yes,” they figure their chances of being admitted are dead anyway.

In light of the above, we believe the most effective method to entirely remove consideration of past criminal convictions is through introduction and passage of the Fair Access to Education Act, a bill that would amend the New York Correction and Executive Laws to make it an unlawful discriminatory practice for any college or university in New York to ask about or consider an applicant’s past arrest or conviction during the application process.

3. Ensure Access to Appropriate Education Programming for All Eligible Individuals

All incarcerated individuals should have a program tailored to their educational and/or vocational needs and desires. Whether for special education services, secondary, vocational or post-secondary education, funding must be available to support and expand these programs. We recommend an increase in state funding to insure that all incarcerated persons who have not obtained a high school diploma or high school certificate are given the opportunity to exercise their right to earn it in a timely fashion; that individuals who have obtained their HSE are provided the opportunity to take pre-college and college courses and, where possible, earn a college degree; that vocational courses be expanded and updated so as to provide marketable skills training; and that all incarcerated individuals have the opportunity to enroll in any vocational course that will assist in their reintegration into their communities upon release.

A pre-college preparatory course helps college bound high school students develop better life skills and prepare for the more stringent scholastic requirements of college. College prep courses are particularly appropriate for incarcerated individuals who may need more time to develop proper study habits, improve social skills and expand their academic knowledge to ensure success in a degree program at a college or university. Self-reliance, time management, work ethic, critical thinking skills and communications skills are just some of the life skills every person needs to develop before they head off to college.²³³ To increase an incarcerated individual’s chance of successfully enrolling in, and completing, college courses, we recommend that DOCCS institute pre-college training programs to prepare individuals for the rigors of college.

²³¹ William G. Martin, *Did SUNY Ban the Box? Or Just Move It?*, The Nation, Oct. 25, 2016, available at <https://www.thenation.com/article/did-suny-ban-the-box-or-just-move-it/>.

²³² Editorial, *Ban the Box on Criminal Background Questions in College Applications*, Chi. Sun Times, Nov. 26, 2018, available at <https://chicago.suntimes.com/opinion/ban-box-criminal-past-questions-college-applications-illinois/>.

²³³ Mary Sauer, *5 Life Skills Every Teen Needs to Succeed in College (and Beyond)*, ParentMap, <https://www.parentmap.com/article/life-skills-prepare-teens-college-high-school> (last visited Feb. 25, 2019).

We also commend Governor Cuomo and Manhattan District Attorney Vance for their strong, direct financial support of college programming in prison. Yet, although the amount is substantial, it only provides a small percentage of incarcerated individuals with an opportunity to earn a college education. NYSBA must engage in an effort to increase awareness of the importance of in-prison education in reducing recidivism and enhancing the lives of incarcerated individuals and their families, an effort that can provide DOCCS with the support needed to request additional funding for college courses.

In addition, it is critical to successful job placement for a person to have practical, effective, up-to-date skills training that is recognized by the appropriate industries. Providing funding to DOCCS and local jails to update and expand vocational programming, and forge connections with industry on the outside is imperative.

4. Ensure That Education During Incarceration is a Priority Not a Privilege

Because education is the key to successful reentry and reintegration, we recommend the following improvements to the current educational programs for incarcerated individuals:

- Provide orientation at intake to incarcerated individuals regarding the importance of the educational and vocational screening and train screeners to encourage incarcerated individuals to take the screening seriously.
- Require certification by the New York State Department of Education of all teachers and instructors at local jails and DOCCS facilities and regularly evaluate the teachers and instructors during classroom time.
- Train ORCs and parole officers regarding the availability of educational opportunities upon release and mandate that they focus on and encourage their clients to take advantage of said educational opportunities.
- Remove barriers to education such as conflicts with obtaining Limited Credit Time Allowance (LCTA) and monetary disincentives.
- Ensure proper certifications and licenses are provided to those who complete vocational courses.
- Ensure college credits earned during incarceration are transferable upon release.

5. Hold Legislative Hearings to Assess the Need for Quality of Educational and Vocational Programs for Incarcerated Individuals

The importance of education to public health and safety is a concept that is not totally understood by some and completely rejected by others. To help educate our communities about the fiscal, health and safety implications of providing educational and vocational opportunities to those who are incarcerated, we recommend that oversight hearings be held by both houses of the State Legislature. The purpose of the hearings will be to discuss the need for and the quality of the educational and vocational programs offered in the jail and prison settings. We would recommend the following committees conduct the joint hearings: Corrections, Crime, Crime Victims and Corrections, Education, Higher Education and respective Oversight committees.

Experts agree that re-entry planning begins on the first day of incarceration. From identifying and treating medical and mental health issues, assessing educational and vocational needs and enrolling individuals in appropriate treatment programs, every day of incarceration is a day that can be used to help prepare the individual for successful reintegration into society upon their release. An individual's ability to "make it on the outside depends on whether he is returning to a stable family, whether he has mental health or substance abuse issues, and on his education and employment-related skills"²³⁴ Vocational and educational programs during incarceration "offer a humane, comparatively cheap and effective alternative to the discipline-and-punish approach that all too often breeds only hopelessness and recidivism."²³⁵ If we are serious about our desire to rehabilitate individuals, end mass incarceration and increase public safety, we must focus on providing high quality educational and vocational programming during incarceration.

VI. Protecting the Most Vulnerable: Services for Individuals with Mental Illness Returning to the Community

Many individuals are entering the criminal justice system with undiagnosed and untreated mental health and substance abuse issues.²³⁶ A national report from the Bureau of Justice Statistics, Office of Justice Programs highlights a high prevalence of mental health problems among prison and jail inmates.²³⁷ The report states that female inmates had a higher rate of mental health problems than male inmates.²³⁸ An estimated 73% of females in state prison had mental health problems, compared to the 55% of male inmates.²³⁹ The report also identifies a close relationship between inmates who have both mental health and substance abuse issues, stating that within state prisons 74% percent of individuals had mental health and substance dependence issues and 63% percent of individuals with mental problems had used drugs in the month before their arrest.²⁴⁰

While reliable, consistent data is not readily available in New York State, the Office of Mental Health ("OMH") has identified over 8,000 incarcerated individuals as requiring mental health treatment.²⁴¹ The New York State Assembly's Standing Committee on Correction reports that nearly 75% of female inmates have at least one mental health problem compared to around 50% percent of incarcerated men.²⁴² These numbers are somewhat consistent with the national statistics reported.

²³⁴ David Skorton and Glenn Altschuler, *College Behind Bars: How Educating Prisoners Pays Off*, Forbes, Mar. 25, 2013, <https://www.forbes.com/sites/collegeprose/2013/03/25/college-behind-bars-how-educating-prisoners-pays-off/#313c8ba92707> (last visited Feb. 25, 2019).

²³⁵ *Id.*

²³⁶ See Simmons School of Social Work, *The Challenges of Prisoner Re-entry Into Society*, Jul. 12, 2016, <https://socialwork.simmons.edu/blog/Prisoner-re-entry/> (last visited Feb. 21, 2019). According to the Urban Institute, around 75% of formerly incarcerated men have a history of substance abuse, and a significant percentage suffer from physical and mental health issues. *Id.*

²³⁷ U.S. Department of Justice, Office of Justice Programs, *Bureau of Justice Statistics Special Report: Mental Health Problems of Prison and Jail Inmates*, September 2006, available at <https://www.bjs.gov/content/pub/pdf/mhppji.pdf>.

²³⁸ *Id.* at 4.

²³⁹ *Id.*

²⁴⁰ *Id.* at 1.

²⁴¹ Correctional Association of New York, *Mental Health Care and Incarceration*, <https://www.correctionalassociation.org/issue/mental-health> (last visited Nov. 12, 2018).

²⁴² New York State Assembly Standing Committee on Correction, *2016 Annual Report*, Dec. 15, 2016, at 17, available at <https://nyassembly.gov/comm/Correct/2016Annual/index.pdf>.

The failure to treat incarcerated individuals properly during their time in the prison system leads to the eventual release of these individuals with substance abuse and mental health issues. A review of recidivism in fifteen states found that 25% of individuals released returned to prison within three years for technical violations that included testing positive for drug use.²⁴³ Additionally, evidence suggests that despite the fact that correctional facilities are controlled environments, illicit drugs are provided to and used by inmates.²⁴⁴ This further exacerbates the difficulties in re-entry faced by individuals who are released back into communities where their substance abuse arose, providing opportunity for continued abuse to occur.

OMH's Diversion, Reentry, and Community Education Unit collaborates with the New York State Commission of Correction, Division of Criminal Justice Services ("DCJS"), the Department of Corrections and Community Supervision ("DOCCS"), and the Office of Probation and Correctional Alternatives ("OPCA") to provide suicide prevention services and adequate mental health treatment in local correctional facilities, timely access to mental health services for persons on parole, probation, and alternatives to incarceration programs, and appropriate mental health training for criminal justice staff who routinely come into contact with the mentally ill.²⁴⁵

The failure to address the continued placement in the prison system, and lack of treatment, for individuals who suffer from mental illness will continue to be a barrier to the goal of successful re-entry and reduced recidivism. While we believe a full evaluation and analysis of all of the mental health and substance abuse programs available to former inmates is necessary, for the purposes of this report, we have focused on an analysis and study of the Assisted Outpatient ("AOT") programs that exist throughout our state, specifically with respect to the effectiveness of these programs in providing former inmates with the services that they need to reintegrate effectively.

In 2016, DOCCS released approximately 22,500 inmates from its facilities, approximately 16,500 of whom were released on parole or conditional release.²⁴⁶ This does not include the number of people who were released from our state's sixty-two county jails. As of 2016, approximately 20% of sentence-serving inmates in New York State correctional facilities received required OMH services, 5% of whom are classified as having serious mental illnesses.²⁴⁷ This statistic means that based on a reported total prison population of 51,000, over 10,000 inmates receive services from OMH.²⁴⁸

²⁴³ Redonna K. Chandler et al., *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, Jan. 14, 2010, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2681083/>.

²⁴⁴ *Id.* (citing Amber H. Simpler & Jennifer Langhinrichsen-Rohling, *Substance Use in Prison: How Much Occurs and Is It Associated with Psychopathology?*, 13 *Addict. Res. Theory* 503 (2005)).

²⁴⁵ New York State Office of Mental Health, *New York State Office of Mental Health (OMH) Division of Forensic Services Diversion, re-entry, and Community Education Unit*, <https://www.omh.ny.gov/omhweb/forensic/cfu.htm> (last visited Feb. 21, 2019).

²⁴⁶ New York State Department of Corrections and Community Supervision, *Admissions and Releases: Calendar Year 2016 (Preliminary Data)*, at 3, available at http://www.doccs.ny.gov/Research/Reports/2017/Admissions_and_Releases_2016.pdf.

²⁴⁷ New York State Department of Corrections and Community Supervision, *Under Custody Report: Profile of Under Custody Population as of January 1, 2016*, at 25, available at http://www.doccs.ny.gov/Research/Reports/2016/UnderCustody_Report_2016.pdf.

²⁴⁸ *See id.*; Emily Masters, *By the Numbers: New York's Prison Population*, *Times Union*, Sept. 21, 2017, available at <https://www.timesunion.com/news/article/By-the-numbers-New-York-s-prison-population-12216340.php>.

To put this issue into perspective, on a national scale, the Department of Justice reported in 2005 that “over 700,000 mentally ill inmates were being held in U.S. jails and prisons, accounting for fifty-six percent of inmates in state prisons, forty-five percent in Federal prisons, and sixty-four percent in local jails It was further reported that over seventy-five percent of these mentally ill inmates had served time in jail or prison prior to their current incarceration with twenty-five percent having had more than three prior incarcerations.”²⁴⁹ Reports to this Task Force from knowledgeable sources in Nassau and Suffolk indicate that a majority of individuals returning to the community are impeded by mental illness. In short, mental illness affects a substantial portion of individuals returning to the community from incarceration.

As discussed herein, every individual being released from prison faces a complete upheaval of her life.²⁵⁰ While individuals with mental illness face the same challenges as others returning to the community—post-release supervision, establishing stability and routine while facing change and uncertainty in every aspect of life, including housing, relationships, work, education and medical treatment—they have to also deal with their mental health issues. If a person receives mental health treatment, he or she must also adjust to new treatment providers and possible medication changes.

Mental illness presents former inmates with an additional challenge. In one study of over 200,000 inmates released from Florida prisons from 2004 to 2011, individuals with any mental health diagnosis were found to be significantly more likely than those without a diagnosis to be re-arrested and re-incarcerated.²⁵¹ Individuals with serious mental illness diagnoses were found to be significantly more likely than those with non-serious mental health diagnosis to be re-arrested and re-incarcerated.²⁵² In other words “a significant positive association [exists] between any mental health diagnosis, and particularly a serious mental health diagnosis[,] and the likelihood of recidivating after release.”²⁵³ An inquiry into post-release programs would therefore be incomplete without a look at services for people with mental illnesses.

When a state inmate receiving services from OMH nears release, OMH staff work to connect the individual to services in the municipality. Mental health providers at local jails likewise go through a discharge planning process much as a community-based healthcare provider would. But the programs and services available to individuals with mental illnesses vary from county to county. Just as time and resource limitation prevented this Task Force from performing a county-by-county review of all available re-entry services, so too have such limitations prevented a statewide survey of all mental health programs. Instead, this section of the report first focuses on a program that exists statewide and, in theory, addresses many of the re-entry needs of individuals with serious mental illnesses: Assisted Outpatient Treatment, otherwise known as Kendra’s Law or “AOT.”²⁵⁴

²⁴⁹ William D. Bales et al., *Recidivism and Inmate Mental Illness*, 6 Int’l J. Crim. & Soc. 40 (2017), at 40.

²⁵⁰ See *Experts on Re-Entry*, Section I, above.

²⁵¹ Bales et al., *supra* note 249.

²⁵² *Id.*

²⁵³ *Id.* at 49.

²⁵⁴ See Mental Hygiene Law § 9.60.

At first blush, AOT might seem unnecessary for individuals on parole, as their conditions of parole will include a requirement that they comply with mental health treatment. AOT, which is person- and treatment-focused, has a different focus. The penalty for non-compliance with parole conditions can be violation and re-incarceration; conversely, the consequence of AOT order non-compliance is instead hospitalization. This program also provides additional layers of care oversight that are treatment-focused and not penalties that could land the individual back in jail or prison. But it does significantly impinge on the individual's liberty, as discussed below.

This section will give a brief overview of how AOT works and the services and obligations it imposes on its subjects and county mental health providers. It will then briefly review how the program is working at the state and local level as well as acknowledge criticism of the law. It will go on to identify a major shortcoming impeding the efficacy and greater use of AOT: the insufficiency of both long-term and short-term supportive housing for individuals with mental illnesses. Finally, it will make recommendations for legislative and policy action.

This report does not undertake a comprehensive review of mental health services, and, thus, does not address the plight of people with mental illnesses who do not qualify for intensive services and AOT intervention. While the major issue of substance abuse is an important topic in its own right as well as in its relation to mental illness, this report does not conduct a comprehensive analysis of the availability or lack of availability of substance abuse programs to people upon their release from prison or jail in our state. Mental illness and substance abuse frequently co-occur and implicate MICA (mentally ill, chemical abuser) and similar programs.²⁵⁵

A. Overview of AOT Program

Assisted Outpatient Treatment, otherwise known as Kendra's Law or simply "AOT," is intended to provide stability for the most seriously mentally ill by providing for the assignment of Assertive Community Treatment, medication compliance oversight and stable housing.

Section 9.60 of the Mental Hygiene Law was first enacted in 1999 and has been renewed several times, with the current iteration set to sunset in 2022.²⁵⁶ The idea behind the law is to provide court-ordered community treatment to individuals as a less-restrictive alternative to involuntary hospitalization. That treatment must include care coordination/case management and may include medication, therapy, day programs, educational or vocational training, substance abuse treatment and testing, and "supervision of living arrangements."²⁵⁷ To qualify for AOT, the individual must (1) be at least 18 years old, (2) suffer from a mental illness, (3) be "unlikely to survive safely in the community without supervision, based on a clinical determination," and (4) have a "history of lack of compliance with treatment for mental illness" as demonstrated by psychiatric hospitalization twice in the last 36 months (including treatment in a correctional facility mental health unit) or "serious violent behavior toward self or others or threats of, or

²⁵⁵ See generally New York State Office of Alcoholism and Substance Abuse Disorders, *Co-Occurring Disorders*, <https://www.oasas.ny.gov/treatment/cod/index.cfm> (last visited Feb. 21, 2019).

²⁵⁶ The law was passed in the wake of the notorious murder of Kendra Webdale by an individual suffering from schizophrenia who pushed her into the path of a subway train. AOT should not be confused with Article 10 of the Mental Hygiene Law, which is provides for the civil confinement or "Strict and Intensive Supervision and Treatment" of certain sex offenders after they have completed their terms of incarceration.

²⁵⁷ Mental Hygiene Law § 9.60(a)(1).

attempts at, serious physical harm . . . within the last [48] months”²⁵⁸ The law allows for multiple classes of people to petition for an AOT order, including any adult who the subject resides with, close family, hospital and mental health service directors, treating or supervising psychiatrists, psychologists, social workers, directors of community services and their designees, and parole officers. The petition must be supported by a written treatment plan.²⁵⁹ Office of Mental Health staff and jail mental health providers are among those authorized to bring AOT petitions.

The subject of an AOT petition is entitled to representation by the Mental Hygiene Legal Service.²⁶⁰ At the hearing, the petitioner must prove their case by clear and convincing evidence. The doctor that prepared the treatment plan must testify and be subject to cross-examination.²⁶¹

The AOT order cannot exceed one year.²⁶² The order can provide for self-administration of psychotropic drugs or administration by the AOT program and must require the director responsible for administering the AOT program to provide the types of service requested in the petition.²⁶³ An AOT subject who, in the opinion of a physician, does not comply with treatment and may require involuntary psychiatric hospitalization under Section 9.39 or 9.27, or 9.40 of the Mental Hygiene Law, may be held involuntarily for observation for up to seventy-two hours to determine whether involuntary hospitalization is appropriate.²⁶⁴

An AOT order entitles the subject to priority access to supported housing. Supported housing is a type of subsidized housing available only to individuals with serious mental illness.²⁶⁵ Supported housing is a type of publicly funded, privately run supportive housing.

The stated goal of New York’s supported housing program is “to foster integration of recipients into the existing community services system.”²⁶⁶ Supported housing providers may assist recipients in locating and renting an apartment in the community, or may be the landlords themselves. Recipients of supported housing receive housing services from the supported housing provider and community support services from the provider in conjunction and coordination with the municipality. With respect to housing support, recipients pay 30% of their adjusted gross income. Funds are provided for security deposits, brokers’ fees, and home furnishings. And providers cannot terminate residents from the program without first documenting interventions and consulting with OMH.²⁶⁷ Ultimately, the supportive housing assists in providing formerly incarcerated people with serious mental illness a place to live which they otherwise may not have been able to find due to their illness.

²⁵⁸ *Id.* § 9.60(c).

²⁵⁹ *Id.* § 9.60 (i).

²⁶⁰ *Id.* § 9.60 (g).

²⁶¹ *Id.* § 9.60 (h).

²⁶² *Id.* § 9.60 (j)(2).

²⁶³ *Id.* §§ 9.60 (j)(4), (5).

²⁶⁴ *Id.* § 9.60 (n).

²⁶⁵ New York State Office of Mental Health, *Supported Housing Guidelines: 2015*, at 5, available at https://www.omh.ny.gov/omhweb/adults/supportedhousing/supported_housing_guidelines.pdf.

²⁶⁶ *Id.* at 11.

²⁶⁷ *Id.* at 8.

Empirical data supports the efficacy of AOT. A Duke University study found moderately strong evidence from lifetime arrest records of AOT recipients from the Division of Criminal Justice Services that AOT reduces the likelihood of being arrested.”²⁶⁸ According to statistics collected by OMH, only 8% of active AOT participants were incarcerated while subject to an AOT order.²⁶⁹ 26% of AOT recipients had been incarcerated at some point prior to the AOT order, indicating a population at high risk for incarceration.²⁷⁰ An AOT treatment plan must include Assertive Community Treatment (“ACT”). ACT assigns to service recipients multi-disciplinary teams that include social work, psychiatric, substance abuse and vocational professionals to provide service to the recipients in the community.²⁷¹ The ACT Team model calls for small caseloads, at least six in-person contacts per month, and for the team to tailor the services and treatment to the individual.²⁷² A team member is always designated as on call to provide 24-hour crisis support.

As detailed in OMH’s ACT Program Guidelines,

“The role of ACT in facilitating independence and recovery is organized into three major ongoing and interacting service processes. The first, person-centered service planning and coordination, is accomplished with the active participation of the recipient, and whenever possible, friends and family members. The second, reintegration into community life, focuses on stability, particularly in the areas of housing, symptom management and reduction of harmful behaviors and adverse effects. The third, active participation in normal developmental life roles is evidenced by a return to school, competitive employment, long periods of sobriety with steps towards full recovery, spiritual and recreational pursuits, and participation in social groups in natural settings.”²⁷³

AOT therefore represents a robust tool that focuses multiple aspects of the social safety net to ensure that formerly incarcerated individuals with serious mental illness receive comprehensive treatment and service in the community. Accordingly, the program enjoys support from public health advocates as well as advocates for the mentally ill.

AOT is not a panacea, however. An AOT order directs its subject to comply with a treatment plan, which always includes psychotropic medication, usually by injection. Noncompliance can lead to an involuntary examination, which can lead to involuntary hospitalization. Because an AOT order impinges on its subject’s liberty, it can only be justified

²⁶⁸ Marvin S. Swartz et al., *New York State Assisted Outpatient Treatment Program Evaluation*, Jun. 30, 2009, available at <https://my.omh.ny.gov/analyticsRes1/files/aot/aot-2009-report.pdf>.

²⁶⁹ See the “Reduced Significant Events” dashboard for AOT on the OMH website. Office of Mental Health, *Assisted Outpatient Treatment*, <https://my.omh.ny.gov/analytics/saw.dll?dashboard#reports> (last visited Feb. 21, 2019). OMH makes available to the public numerous current AOT-related statistics.

²⁷⁰ *Id.*

²⁷¹ See New York State Office of Mental Health, *About AOT*, <https://my.omh.ny.gov/bi/act> (last visited Feb. 21, 2019).

²⁷² *Id.*; see also New York State Office of Mental Health, *ACT Program Guidelines 2007*, available at https://www.omh.ny.gov/omhweb/act/program_guidelines.html.

²⁷³ New York State Office of Mental Health, *ACT Program Guidelines 2007*, *supra* note 272.

where the subject is seriously mentally ill and meets a number of criteria meant to show imminent danger to self or others. It must be noted that individuals with serious mental illnesses represent a small subset of individuals with mental illnesses.

B. Discharge Planning from Prisons and Jails

Both OMH and county protocols require that the programs engage in discharge planning to connect clients completing the program with needed services and supports, much as would a hospital outside a correctional facility. According to the Office of Mental Health, Central New York Psychiatric Center “Pre-Release Services, in collaboration with . . . DOCCS, applies for entitlements such as Social Security, Medicaid, the Medication Grant Program, and housing, and arranges post-release appointments with mental health clinics, including Personalized Recovery Oriented Services (PROS) programs. Pre-Release services refers individuals with serious mental illness for mental health housing and mental health care coordination.”²⁷⁴ As part of this process, Pre-Release Services staff screen individuals with serious mental illnesses to determine whether AOT is clinically indicated.²⁷⁵ According to providers contacted by the Task Force, local jail mental health providers undertake a similar process. However, as in non-incarcerative contexts, OMH is limited by the resources available in the community. It cannot send someone to housing or treatment that does not exist.

C. Long Waits for Housing Undermine the AOT Program

The reports this Task Force received uniformly stated that insufficient supportive housing exists in the communities to meet the needs of the mentally ill population as a whole and individuals returning from incarceration in particular (forensic housing). The motels and shelters where people on the waiting lists for housing must reside would exact a toll on any person’s mental health, but can overwhelm a person with a mental illness returning from the highly structured environment of incarceration. Multiple AOT coordinators reported that it is significantly more difficult to provide the wrap-around services contemplated by AOT, when the AOT recipient is in short-term housing with supportive services. Unsurprisingly, the National Alliance on Mental Illness has made “the need for safe and affordable housing with wrap-around services for people with mental illness” a legislative priority, urging the State to increase funding for individuals with mental illness commensurate with savings achieved from closing state psychiatric facilities.²⁷⁶

In January 2019, Disability Rights New York and the Legal Aid Society commenced a lawsuit against the State on behalf of six men with serious mental illnesses who allegedly have been confined to prison after their release dates because DOCCS and OMH are unable to locate safe housing for them.²⁷⁷ According to the complaint, four of the plaintiff have been held past the

²⁷⁴ Email from Office of Mental Health (Dec. 12, 2018) (on file with a member of the Task Force).

²⁷⁵ *Id.*; see Correction Law § 404.

²⁷⁶ Press Release, National Alliance on Mental Illness, 2018 Legislative Action Agenda: The Need for Safe and Affordable Housing with Wrap-Around Services for People with Mental Illness, available at <http://files.constantcontact.com/9d08e137201/1aueb8ff-d2bc-4bed-96f4-a3124b7bd68e.pdf?ver=1516376168000>; National Alliance on Mental Illness, 2019 Legislative Action Agenda, available at <https://files.constantcontact.com/9d08e137201/68929c24-6a05-4cef-906e-eea02e72ec41.pdf>.

²⁷⁷ Ashley Southall, *Mentally Ill Prisoners Are Held Past Release Dates, Lawsuit Claims*, N.Y. Times, Jan. 23, 2019, available at <https://www.nytimes.com/2019/01/23/nyregion/prisoners-mentally-ill-lawsuit.html>.

maximum expiration date of their sentences. Two of the plaintiffs allege that they have been held in prison for over a year past the maximum expiration of their terms of incarceration, and two allege they have been held past their maximum expiration dates for over six months.²⁷⁸

The delays alleged by the plaintiffs comport with reports to this Task Force from advocates and service providers. Knowledgeable sources in Monroe, Onondaga, Albany, Suffolk and Nassau Counties confirmed that housing was the primary obstacle impeding both AOT and the ability of counties to provide services to individuals returning from prison and jail. For instance, in Suffolk County, fewer than two dozen forensic supported housing²⁷⁹ beds exist. Suffolk County manages over 200 active AOT orders and receives multiple AOT referrals from DOCCS each month. Suffolk County has no housing dedicated to people with mental illnesses returning from jail. Sources reported to the Task Force that in Monroe County, with about 300 active AOT orders and 500 supported housing beds, the wait for a supported housing bed in the community can be 2-3 years, while the wait for a bed in a community residence is generally at least six months. In Albany County, one attorney with the Mental Hygiene Legal Service reported to this Task Force that she advises clients not to anticipate receiving housing during the initial 1-year AOT order. Not a single person the Task Force spoke with believed that the current stock of mental health housing was adequate for the population in general or for the forensic population in particular.

Positive action by the State should not be overlooked. The State continues to backfill beds lost due to the closure of state psychiatric facilities with new investment in supportive housing units. In June 2016, the Governor “proposed a historic \$10.4 billion commitment to combat homelessness statewide over the next five years, which includes \$2.6 billion for new supportive housing units and \$7.8 billion for continuing commitments in support of existing supportive housing units, shelter beds, and other homeless services.”²⁸⁰ The State has issued requests for proposals for 1,200 beds, aiming to add 6,000 total by 2023.²⁸¹ In November, 2018, the Governor announced the funding of 276 new supportive housing units across the state, approximately 200 of which will be for residents with serious mental illnesses.²⁸² And in December 2018, the Governor announced funding of approximately 200 more.²⁸³ These units will add to the approximately 44,000 supportive units already existing across the state, but it does not appear that any of them have been designated for people returning from incarceration. Yet, according to advocates and supportive housing providers, the situation is critical now. And the planned increases, while welcome, fall short of what is needed.

²⁷⁸ See Complaint, ¶¶ 58, 107, 100, 127, *M.G. v. Cuomo*, 19 Civ. 00639 (S.D.N.Y. Jan. 23, 2019).

²⁷⁹ A type of long-term housing for individuals with mental illness returning from prison.

²⁸⁰ See Press Release, Governor Andrew M. Cuomo, New York State Launches Phase One of Unprecedented \$10.4 Billion Homelessness Action Plan (Jun. 2, 2016), available at <https://www.governor.ny.gov/news/new-york-state-launches-phase-one-unprecedented-104-billion-homelessness-action-plan>.

²⁸¹ *Id.*

²⁸² Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces More Than \$40 Million for Supportive Housing for Veterans, Survivors of Domestic Violence and Individuals with Mental Illness (Nov. 8, 2018), available at <https://www.governor.ny.gov/news/governor-cuomo-announces-more-40-million-supportive-housing-veterans-survivors-domestic>.

²⁸³ Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces More Than \$29 Million for Supportive Housing and Emergency Shelter Repairs (Dec. 7, 2018), available at <https://www.governor.ny.gov/news/governor-cuomo-announces-more-29-million-supportive-housing-and-emergency-shelter-repairs>.

The foremost concern for people who suffer from mental illness appears to be identical to most anyone returning from incarceration—housing. Supported housing exists to provide subsidized housing and practical support to individuals with serious mental illnesses. But not enough this type of housing exists to meet the needs of formerly incarcerated people with mental illness. After release from incarceration, many people with mental illness spend months in shelters before a room becomes available, making it more difficult for providers to serve them and leaving them in a state of transience and uncertainty. Universal agreement appears to exist among providers and advocates that the amount of supportive housing units for people with mental illnesses should be increased dramatically to eliminate wait times. Increases are needed in both long-term housing, such as supported housing, and short-term transitional housing, so that all individuals returning from incarceration with mental illness have available a safe, structured place to live before moving to permanent housing. Otherwise, we unnecessarily risk re-institutionalizing in correctional facilities and psychiatric centers individuals who could have remained safely in the community. If we can keep individuals with serious mental illnesses in the community, we can both fulfill our constitutional obligation to protect the needy and avoid further taxing our correctional facilities and psychiatric hospitals.

In order to accomplish these goals, the stock of supportive housing for people with mental illnesses, including forensic supported housing and short-term transitional housing, should be increased dramatically statewide so that people with mental illnesses being released from incarceration are not released into shelters and motels or kept in prison beyond the end their sentences. OMH keeps many statistics for AOT, but does not track rates of re-incarceration and involuntary hospitalization for individuals subjected to an AOT order upon release from prison. OMH and/or CJS should begin tracking this statistic to develop a dataset that would provide empirical evidence of how useful AOT is to help individuals with serious mental illness stay in their communities.

VII. Individuals With Sex Offense Convictions

In the past two decades, New York has enacted a statutory framework designed to protect against recidivism by individuals with sex offense convictions. This Task Force is mindful of the importance of this public policy objective, particularly in relation to vulnerable populations such as children. However, empirical research assessing the effectiveness of these policies calls into question their wisdom. This Task Force notes with particular concern the lack of conclusive evidence that registration of such individuals increases public safety,²⁸⁴ the even starker absence of *any evidence* to support onerous restrictions on residence,²⁸⁵ the antiquated and unscientific risk

²⁸⁴ See, e.g., Jeffrey C. Sandler et al., *Does a Watched Pot Boil?: A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 Psych, Pub. Pol., and Law 284, 297 (2008) (finding that the enactment of New York's Sex Offender Registration Act "had no significant impact on rates of total sexual offending, rape, or child molestation"); Cynthia Calkins et al., *Sexual Violence Legislation: A Review of Case Law and Empirical Research*, 20 Psych, Pub. Pol., and Law 443, 452 (2014) (finding empirical studies concerning the utility of registration and notification laws to be "at best, mixed").

²⁸⁵ Association for the Treatment of Sexual Abusers, *Sex Offender Residence Restrictions*, Aug. 2, 2014, available at <http://www.atsa.com/pdfs/Policy/2014SOResidenceRestrictions.pdf>.

determination techniques employed in classifying these individuals,²⁸⁶ and the seemingly arbitrary parole conditions that such individuals often face.²⁸⁷

On the other hand, the detrimental impact of such policies on individuals reentering society is substantial, and well documented. Placement on a public registry often leads to employment discrimination, social ostracization, and even subjection to physical violence.²⁸⁸ Indeed, even the New York State Unified Court System’s website has noted that “registration can lead to social disgrace and humiliation, loss of relationships, jobs, and housing, and both verbal and physical assaults.”²⁸⁹ New York’s restrictions on where certain individuals with sex offense convictions may live can be tantamount to banishment from certain areas.²⁹⁰ Alarming, the lack of suitable housing meeting these onerous restrictions has led to the detention of prisoners beyond the date on which they would otherwise be released.²⁹¹

We recognize that apart from the issues explored by this report, individuals convicted of sex offenses may face other forms of severe monitoring and regulation. In 2007, the Legislature enacted the Sex Offender Management and Treatment Act, which provides for civil management of individuals convicted of sex offenses who are found to have a “mental abnormality” predisposing them to commit such offenses.²⁹² Such individuals may be confined indefinitely even after completing their sentences.²⁹³ If not confined, they may be subjected to a regimen of “strict and intensive supervision and treatment” (“SIST”), which can include monitoring by GPS, polygraph examinations, and specification of residence.²⁹⁴ Individuals indefinitely confined are denied the ability to re-enter society despite completion of their sentences, while those subjected to SIST face severe monitoring as they re-enter. The complexity of these issues precludes us from extensively treating them here, but we nonetheless note the need for further study of civil management in this state.

²⁸⁶ See New York City Bar Association, *Report on Legislation by the Criminal Courts Committee, the Criminal Justice Operations Committee, the Criminal Law Committee, and the Corrections and Community Re-entry Committee*, June 2015, available at <https://www2.nycbar.org/pdf/report/uploads/20072469-SexOffenderRegistrationActReport.pdf>.

²⁸⁷ See, e.g., *Yunus v. Robinson*, 17 Civ. 5839 (AJN) (BCM), 2018 WL 3455408, at *7 (S.D.N.Y. Jun. 29, 2018), report and recommendation adopted, 17 Civ. 5839 (AJN), 2019 WL 168544 (S.D.N.Y. Jan. 11, 2019) (reciting seemingly boilerplate, onerous conditions of release imposed on parolee convicted of a kidnapping that had no sexual element, but was nonetheless categorized as a sex offense).

²⁸⁸ See, e.g., Cynthia Calkins Mercado et al., *The Impact of Specialized Sex Offender Legislation on Community re-entry*, 20 Sexual Abuse 188 (2008).

²⁸⁹ New York State Unified Court System, *Sex Offender Registration Consequences*, <https://www.nycourts.gov/courthelp/Criminal/sexOffenderConsequences.shtml> (last visited Feb. 6, 2019).

²⁹⁰ See, e.g., *Matter of Williams v. Dep’t of Corr. & Cmty. Supervision*, 136 A.D.3d 147, 166 (1st Dep’t 2016) (noting that residence restrictions prevented parolee “from living in or traveling to virtually all parts of Manhattan . . . and large areas of the other boroughs of New York City”).

²⁹¹ See, e.g., Joseph Goldstein, *Housing Restrictions Keep Sex Offenders in Prison Beyond Release Dates*, N.Y. Times, Aug. 21, 2014, available at <https://www.nytimes.com/2014/08/22/nyregion/with-new-limitson-where-they-can-go-sex-offenders-are-held-after-serving-sentences.html>; *Matter of Gonzalez v. Annucci*, 32 N.Y.3d 461, 2018 WL 6173959, N.Y. Slip Op. 08057 (2018); *Alcantara v. Annucci*, 55 Misc.3d 1216(A), 2017 WL 1838729 (Sup. Ct. Albany Cty. 2017).

²⁹² Mental Hygiene Law § 10.07.

²⁹³ *Id.* §§ 10.09, 10.10.

²⁹⁴ *Id.* § 10.11.

A. Overview of Legislative History, and Academic Literature Concerning Recidivism

In this state and nationwide, the legislative history of measures for the monitoring and regulation of individuals with sex offense convictions is underpinned by the assumption that they are uniquely likely to recidivate. Recent research undercutting this assumption, and demonstrating the inefficacy of these policies, should prompt their reconsideration.

In New York, such regulation began with the enactment of the Sex Offender Registration Act (“SORA”) in 1996. The bill’s sponsors in the Legislature explicitly cited the “high risk of reoffending” posed by released individuals who had committed sex offenses, and relied upon statistics that “rapists recidivate at a rate of 7 to 35%.”²⁹⁵ The wide range cited by the Legislature, however, also highlighted the uncertainty concerning just how recidivistic such individuals are.

This assumption of high recidivism rates appears to have driven the enactment of further legislation such as the Sexual Assault Reform Act (“SARA”) in 2000, and its subsequent amendments, which cumulatively prohibit certain categories of individuals with sex offense convictions from residing within 1,000 feet of a school. In 2007, the Legislature enacted the Sex Offender Management and Treatment Act (“SOMTA”), providing for the civil commitment of recidivistic individuals following the completion of their prison terms. In Chapter 568 of the Laws of 2008, the Legislature—recognizing the difficulties faced by individuals with sex offense convictions in obtaining housing—imposed statutory obligations on the former Division of Parole, Division of Criminal Justice Services, and the Office of Temporary and Disability Assistance to ameliorate these issues.

The assumption that such individuals are uniquely dangerous has persisted, often lacking a basis in scientific research. For example, in *McKune v. Lile*, 536 U.S. 24, 34 (2002), Justice Kennedy called the risk of individuals with sex convictions recidivating “frightening and high,” and this language was subsequently quoted in numerous lower court and state court decisions. To support this assertion, Justice Kennedy cited an estimate that recidivism among untreated individuals with sex offense convictions was as high as 80%. However, as a recent analysis of *McKune* found, the original source of the cited statistic was a 1986 article in *Psychology Today*, where the author (not a researcher of recidivism himself) cited this 80% figure without reference to any scientific study of the issue.²⁹⁶ This episode is an illustration of the role of unscientific speculation in assessments of such individuals’ recidivism.

Given the inherent difficulty of arriving at accurate measures of recidivism, it is best to be cautious while citing any statistics in this regard. However, it should be noted that the academic literature *does not* decisively indicate that individuals with sex offense convictions are more likely to recidivate than others with criminal convictions. A study published by the U.S. Department of Justice, for example, tracked nearly 10,000 males convicted of sex offenses and released from prisons in 15 states, and found that only 3.5% were reconvicted for a sex crime in the three-year

²⁹⁵ Joel B. Rudin, *Megan’s Law: Can it Stop Sexual Predators—and at What Cost to Constitutional Rights?*, 11 *Crim. Just.* 3, 6 (1996) (citing Introducer’s Memorandum in Support, ch. 192, 1995 N.Y. Laws).

²⁹⁶ Ira M. Ellman & Tara Ellman, *Frightening and High: The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 *Const. Comment.* 495 (2015).

follow-up period considered by the report.²⁹⁷ Additionally, a number of state-level studies have found that the rate at which individuals with sex offense convictions committed new sex offenses was in the low single digits. See Brief for *Amicus Curiae* Association for the Treatment of Sexual Abusers *et al.* Supporting Petitioner at 9-10, *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (No. 15-1194) (collecting studies finding that rates at which individuals with sex offense convictions committed a new sex offense were between 1.7% and 5.7%). Indeed, one of these studies was conducted by the New York State Department of Corrections and Community Supervision (“DOCCS”), which found that only 1.7% of such individuals released in 2010 had committed another sex offense following release.

As numerous studies published since 1996 have found the recidivism rate to be lower than assumed, the premises underlying SORA and legislation following it have been called into question. Accordingly, these restrictions should be reexamined, taking into account the lack of evidence for their efficacy, and the harm to those subjected to them.

B. Barriers to Re-entry Posed by Collateral Consequences of Sex Offenses

Placement on a publicly accessible registry, banishment from wide swaths of urban areas, and other collateral consequences of sex offense convictions have well documented adverse effects on re-entry. New York lists Level 2 and Level 3 registrants on an online registry.²⁹⁸ Additionally, members of the public may call the Division of Criminal Justice Services to inquire as to whether any individual, regardless of risk categorization, is registered pursuant to a sex offense conviction. Public access to the registry predictably leads to discrimination in housing and employment, social ostracization, harassment, and even vigilante assaults. A review of studies concerning the impact of “community notification,” i.e. the reporting of “sex offender” status to the public, found that a significant percentage of individuals experience adverse effects. Nearly a third reported losing a job, 44% reported threats or harassment by neighbors, and 12% reported being forced to move when a landlord learned of their status.²⁹⁹ Another author, reviewing studies in this area, noted that 20-40% of individuals with sex offense convictions reported having to move because a landlord or neighbor learned of their sex offense conviction.³⁰⁰ Across several studies, a small yet troubling minority (8%) reported experiencing a physical assault or injury.³⁰¹ It is worth noting that these consequences are apart from those mandated by law, such as the ban from federally funded public housing faced by lifetime registrants.³⁰²

Apart from the immediate practical effects of the public registry, individuals with sex offense convictions understandably report experiencing a significant psychological toll from being

²⁹⁷ See Patrick A. Langan et al., U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994*, November 2003, available at <https://www.bjs.gov/content/pub/pdf/rsorp94.pdf>.

²⁹⁸ New York State Division of Criminal Justice Services, *The Official New York State Sex Offender Registry*, <http://www.criminaljustice.ny.gov/nsor/> (last visited Feb. 21, 2019).

²⁹⁹ Michael P. Lasher & Robert J. McGrath, *The Impact of Community Notification on Sex Offender Reintegration: A Quantitative Review of the Research Literature*, 56 Int. J. Offender Ther. & Comp. Criminol. 1, 19 (2012).

³⁰⁰ Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 Am. J. Crim. Just. 54, 55 (2009).

³⁰¹ Lasher & McGrath, *supra* note 299, at 19.

³⁰² 42 U.S.C. § 13663.

on the registry. Across several studies, approximately 40% to 60% claimed “negative psychological consequences such as loss of friends, feeling lonely and isolated, embarrassment, and loss of hope,” and 60% reported that the publicization of their status “interfered with their recovery.”³⁰³ Of particular concern is the experience of close relations of individuals with sex offense convictions. For example, one survey found that 58% of children of individuals with sex offense convictions were believed to be treated differently from other children at school, and alarmingly reported that one in eight of these children exhibited suicidal tendencies.³⁰⁴

Furthermore, the residence restrictions imposed on certain individuals with sex offense convictions are among the most significant impediments to re-entry. Below, we discuss at length their adverse effects, most notable among these the detention of prisoners beyond their release dates for lack of compliant housing. We note that the Legislature has for at least a decade been well aware of the difficulties faced by such individuals in finding housing, which it recognized in enacting legislation in 2008 that imposed obligations on various state agencies in this regard.³⁰⁵ These difficulties are unsurprising, given that the 1,000 foot residence restriction covers the vast majority of Manhattan, wide swaths of the rest of New York City, and other urban areas in the state. Unfortunately, the housing situation faced by released prisoners with sex offense convictions appears to have remained dismal.³⁰⁶

C. Data and Current Programs

According to DCJS, there are 41,180 individuals registered with sex offense convictions in New York State, as of January 8, 2019.³⁰⁷ 14,783 have been assigned a risk assessment of “Level 1,” 15,285 are “Level 2,” and 10,279 are “Level 3.” The below table lists the number of each category of individuals, in each of the counties that this Task Force has focused on:

County	Level 1	Level 2	Level 3	Yet to be determined	Total
Albany	215	199	152	4	570
Bronx	708	845	576	34	2163
Broome	252	231	145	2	630
Chemung	94	123	62	2	281

³⁰³ Lasher & McGrath, *supra* note 299, at 20.

³⁰⁴ Levenson & Tewksbury, *supra* note 300, at 63-64.

³⁰⁵ See, e.g., Sponsor’s Memorandum, ch. 568, 2008 N.Y. Laws.

³⁰⁶ See Shane English, *Sex Offenders Face Housing Maze After Prison Release*, City Limits, Jan. 17, 2017, available at <https://citylimits.org/2017/01/17/sex-offenders-face-housing-maze-after-prison-release/> (last visited Feb. 26, 2019).

³⁰⁷ New York State Division of Criminal Justice Services, *Registered Sex Offenders by County as of January 8, 2019*, http://www.criminaljustice.ny.gov/nsor/stats_by_county.htm (last visited Feb. 5, 2019).

Erie	578	515	334	9	1436
Franklin	49	68	52	2	171
Kings	808	773	527	46	2154
Monroe	607	588	304	18	1517
Nassau	297	185	71	2	555
New York	559	520	436	30	1545
Oneida	261	305	420	2	988
Onondaga	417	412	261	4	1094
Queens	654	569	314	37	1574
Richmond	181	109	85	6	381
Suffolk	529	378	193	4	1104
Westchester	234	229	173	5	641
Wyoming	37	44	14	0	95

DOCCS has informed us that as of November 30, 2018, 3,087 individuals with sex offense convictions were under community supervision, of whom 624 were “Level 1,” 1,105 were “Level 2,” 1,049 were “Level 3,” and 309 “were pending registration or not on the registry.”³⁰⁸ As of December 2018, an average of 2,329 individuals “subject to SARA” had been under parole supervision in the preceding three months.³⁰⁹

We are also aware, per a representation made by DOCCS at the recent oral argument in *Matter of Gonzalez v. Annucci*, 32 N.Y.3d 461 (2018), that 175 individuals were at the time being held beyond their conditional release date due to a lack of SARA-compliant housing.

DOCCS runs an in-prison rehabilitative program for individuals with sex offense convictions known as the Sex Offender Counseling and Treatment Program (“SOCTP”).³¹⁰ In

³⁰⁸ Letter from Anthony J. Annucci, Acting Commissioner, New York State Department of Corrections and Community Supervision, to a member of this Task Force (December 2018) (on file with a Task Force member), at 2-3.
³⁰⁹ *Id.* at 3.

³¹⁰ See New York State Department of Corrections and Community Supervision, *Sex Offender Counseling and Treatment Program (SOCTP) Guidelines*, April 2018, available at <http://www.doccs.ny.gov/ProgramServices/>

response to a request for information sent by the Task Force, DOCCS noted that for the purposes of the SOCTP, it assigns to prisoners “a risk level for the purpose of treatment using a comprehensive process that utilizes both actuarial tools and clinical assessment.”³¹¹ DOCCS then develops an individualized treatment plan for the prisoner, “based on the participant’s risk factors.”³¹² DOCCS also noted that “[s]ex offender treatment is mandatory for the sex offender parolees under DOCCS’s legal jurisdiction,” and stated that in the Task Force’s counties of interest, the “number of DOCCS vetted and approved treatment providers” is as follows: three in Westchester, two each in Albany and Nassau, and one each in Suffolk, Broome, Monroe, Erie, Onondaga, Oneida, Chemung, and Franklin; DOCCS also utilizes seven providers in New York City.³¹³

D. Residency Restrictions Imposed by SARA and Subsequent Amendments

We are alarmed by the extremely harsh repercussions of the residence restrictions imposed on certain individuals with sex offense convictions by the Sexual Assault Reform Act (“SARA”) and its subsequent amendments, particularly because there is no evidence to suggest that such restrictions are effective. This is widely recognized; for example, the Association for the Treatment of Sexual Abusers (“ATSA”) has unequivocally stated that:

There is *no research* to support the effectiveness of residence restrictions in reducing sexual recidivism and these policies often have the unintended consequence that may compromise, rather than promote, public safety.³¹⁴ (Emphasis supplied.)

Likewise, a comprehensive review of empirical studies in this area, published by a group of experts at John Jay College of Criminal Justice and CUNY Law School, concluded that this body of research had shown residence restrictions to be *not effective*.³¹⁵ These findings seem almost intuitive, given that most sex offenses against children—whom residence restrictions are generally designed to protect—are committed by perpetrators known to them, and not mere strangers. Data from the National Crime Victimization Survey shows that only *four percent* of sex crimes against children are committed by strangers.³¹⁶

Given the apparent inefficacy of such laws, this Task Force is gravely concerned by the untenable position that many individuals with sex offense convictions, particularly those from urban parts of the state, face when subjected to the residence restrictions. Currently, individuals under post-release supervision who are designated “Level 3” offenders, or whose victims were children, are prohibited from residing within 1,000 feet of a school. The First Department has

SOCTP_Procedures_and_Guidelines.pdf.

³¹¹ Letter from Anthony J. Annucci, *supra* note 308, at 1.

³¹² *Id.*

³¹³ *Id.* at 2.

³¹⁴ Association for the Treatment of Sexual Abusers, *supra* note 285.

³¹⁵ Calkins et al., *supra* note 284, at 454.

³¹⁶ David Finkelhor & Anne Shattuck, *Characteristics of Crime Against Juveniles*, Crimes Against Children Research Center, May 2012, available at http://www.unh.edu/ccrc/pdf/CV26_Revised%20Characteristics%20of%20Crimes%20against%20Juveniles_5-2-12.pdf.

noted that this covers “most of Manhattan,”³¹⁷ and wide swaths of other urban counties in this state are likewise affected. As the Editorial Board of the *New York Times* and numerous other commentators have noted, such regulations amount to virtual banishment from an urban area.³¹⁸

New York’s residency restrictions differ from those of other states in significant respects. Numerous jurisdictions do not have a statewide law prohibiting individuals with sex offense convictions from living in specific zones.³¹⁹ In many of these states, however, municipalities implement their own residence restrictions. Up until recently, New York municipalities, like those in many other states with a statewide residency restriction law, would implement their own residence laws beyond the threshold set by the state. However, in 2015, the New York Court of Appeals held in *People v. Diack*, 24 N.Y.3d 674, that municipal residence restrictions were preempted by New York’s statutory framework regulating individuals with sex offense convictions. The only other states where the highest court of appeal has held this are New Jersey and Massachusetts.³²⁰ Notably, neither New Jersey nor Massachusetts has a statewide residence restriction, nor have the legislatures in those states felt the need to impose one after the invalidation of municipal restrictions.

We are particularly troubled by the imprisonment of individuals beyond their conditional release date, or even their maximum release date, when they are unable to secure SARA-compliant housing. It appears that this policy is recent on the part of DOCCS: in August 2014, the *New York Times* reported that while individuals in this situation who were unable to find compliant housing would hitherto “typically be released to [homeless] shelters like the men’s intake shelter at 30th Street and First Avenue in Manhattan,” DOCCS changed its practices after State Senator Jeffrey Klein highlighted that individuals with sex offense convictions were often living at homeless shelters within 1,000 feet of a school.³²¹ DOCCS now holds such persons until they are notified by the New York City Department of Homeless Services (“DHS”) that a SARA-compliant shelter bed is available.³²² In response to a request for information by this Task Force, DOCCS stated that per their agreement with DHS, “DHS agreed to accept ten (10) sex offenders each month and place them in SARA-compliant homeless shelters,” and that “[e]ach month, DOCCS identifies the ten individuals to be given the available beds based on length of time waiting and transmits the information to DHS.”³²³ DOCCS recently represented in a court proceeding that approximately 175 individuals were being held in state prison due to lack of SARA-compliant housing.³²⁴

While individuals with sex offense convictions could in theory choose to relocate to less densely populated regions of the state, this would prove to be impossible for most prisoners from

³¹⁷ *Williams*, *supra* note 290, at 150.

³¹⁸ *See, e.g.*, Editorial, *The Pointless Banishment of Sex Offenders*, *N.Y. Times*, Sept. 8, 2015, available at <https://www.nytimes.com/2015/09/08/opinion/the-pointless-banishment-of-sex-offenders.html>.

³¹⁹ These include Alaska, Colorado, Connecticut, Hawaii, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, Pennsylvania, South Dakota, Texas, Utah, Vermont, and Wisconsin.

³²⁰ *G.H. v. Twp. Of Galloway*, 971 A.2d 401 (N.J. 2009); *Doe v. City of Lynn*, 36 N.E.3d 18 (Mass. 2015).

³²¹ Goldstein, *supra* note 291.

³²² *Id.*

³²³ Letter from Anthony J. Annucci, *supra* note 308, at 2.

³²⁴ Oral Argument Transcript at 10, *Matter of Gonzalez v. Annucci*, *supra* note 291.

urban communities. DOCCS personnel are required to investigate the proposed release program of individuals with sex offense convictions being released to any form of community supervision, taking into account, among other factors, “accessibility to family members, friends or other supportive services.”³²⁵ Naturally, such resources would be unavailable to individuals in communities that are not their own. For those persons who hail from New York City and other urban regions of the state, finding a residence that satisfies this condition and the 1,000 foot rule is generally unfeasible.

In a recently decided case, *Matter of Gonzalez v. Annucci*, the New York Court of Appeals considered whether, in the case of a person held beyond his maximum expiration date for lack of SARA compliant housing, DOCCS had met its statutory obligation under Correction Law § 201(5) to “assist” in securing housing.³²⁶ The majority disagreed with the Appellate Division, Third Department’s holding that DOCCS bears a duty of “substantial assistance” towards this subgroup of individuals, but rather held that “DOCCS’ obligation with respect to *all inmates* on or eligible for community supervision is to provide assistance in a *general* manner.”³²⁷

Without taking any position on the merits of this decision, this Task Force notes with concern the plight of individuals in this situation, particularly as highlighted in Judge Wilson’s dissent in *Gonzalez*. Citing the Appellate Division’s findings, the dissent highlighted that the petitioner in that case found himself in the difficult position of having to locate such housing without the “provision of information about potential residence opportunities, . . . referrals to community agencies or opportunities beyond those offered to regular inmates to use a telephone, computer or other resources to research residence opportunities.”³²⁸ Judge Wilson compared the situation of the petitioner, who proposed 58 separate residences only to have each rejected as unsuitable by DOCCS, to that of an “unwinnable game of real-estate Battleship,” and called it “Kafkaesque.”³²⁹ Furthermore, in disagreeing with the majority’s refusal to consider petitioner’s entitlement to “good time credit,” which petitioner lost when he was held beyond his conditional release date, Judge Wilson noted that this frustrates penological objectives, as it “reduces the incentive of [] sex offenders [planning a return to New York City] to earn” good time credit.³³⁰

In light of the absence of *any* research suggesting that SARA’s residence restriction is effective, and the extraordinary burden faced by those who must comply with it, this Task Force recommends immediate legislative action. Specifically, we recommend that the Legislature amend the Sexual Assault Reform Act (“SARA”) to require that instead of an automatic imposition of a “1,000 feet” residence restriction on individuals categorized as Level 3, the decision to impose a buffer zone restriction around schools be made on a case-by-case basis by the Sex Offender Registration Act (“SORA”) hearing court, upon a showing of a need for the restriction based upon the defendant’s offense conduct, history of behavior, or other mental or emotional conditions, with possibility of revision over time.

³²⁵ 9 NYCRR 8002.7(f)(1)(vi).

³²⁶ *Matter of Gonzalez v. Annucci*, *supra* note 291.

³²⁷ *Id.* at *5 (emphasis supplied).

³²⁸ *Id.* at *11 (citing *Matter of Gonzalez v. Annucci*, 149 A.D.3d 256, 263 (3d Dep’t 2017)).

³²⁹ *Id.* at *7.

³³⁰ *Id.* at *14.

While legislative action is clearly needed, we also urge a solution by executive action to the pressing issue of the ~175 individuals held in state prison for lack of SARA compliant housing. As noted in the dissent in *Gonzalez*, “[New York] City guarantees (and indeed must guarantee) housing for every homeless person who requests it,” in accordance with a 1981 consent decree.³³¹ However, per the agreement between DOCCS and the New York City Department of Homeless Services (“DHS”), only ten releasees facing the SARA residence restriction are transferred to DHS each month.³³² Given the relatively small number of individuals in this situation, this situation could likely be ameliorated in the short-term if only more substantial efforts were made by the relevant agencies to arrange for suitable housing.

E. Community Supervision of Individuals with Sex Offense Convictions

Defense attorneys commonly report that their clients with sex offense convictions are issued a boilerplate list of conditions of release. This category of releasees can be subjected to “special conditions” of release by the Board of Parole at the time of their deciding to release a prisoner, or by DOCCS personnel supervising such releasees. One illustrative example of an individual with a sex offense conviction being assigned boilerplate conditions by a parole officer is highlighted in a recent report and recommendation by Magistrate Judge Barbara Moses:

On July 19, 2016, PO Smith assigned plaintiff “forty-eight of the most restrictive special conditions of parole,” printed on a sex-page [*sic*] **document entitled “Special Conditions of Release to Community Supervision for Sex Offenders.”** ... Smith told plaintiff that he gives “all sex offenders” the same restrictions.³³³

The R&R went on to note that the conditions included a prohibition against being within 300 yards of “toy stores, parks, pet stores, schools, playgrounds, video galleries, malls, bike trails, skating rinks, amusement parks...” and various other locations without approval.³³⁴ It also included significant restrictions on his access to phones, computers, and the internet.³³⁵ Notably, at issue in this case, *Yunus v. Robinson*, was the fact that plaintiff’s conviction was for the kidnapping of a minor that had “no sexual component.” While *Yunus* concerns whether the plaintiff’s classification as a “sex offender” was constitutional given the nature of his crime, the facts in *Yunus* suggest that DOCCS does not engage in individualized review of parolees’ backgrounds in determining appropriate parole conditions. Had any such review been undertaken, assigning these conditions to a parolee like *Yunus* would have seemed obviously unreasonable. However, rather draconian release conditions appear to often be imposed as a matter of course.

This is particularly unfortunate given that individuals with sex offense convictions often undergo extensive treatment while in custody and on parole, and that the Board of Parole and

³³¹ *Id.* at *14 (citing *Callahan v. Carey*, 307 A.D.2d 150, 151 (1st Dep’t 2003)).

³³² Letter from Anthony J. Annucci, *supra* note 308, at 2.

³³³ *Yunus v. Robinson*, 17 Civ. 5839 (AJN) (BCM), 2018 WL 3455408, at *7 (S.D.N.Y. Jun. 29, 2018), *report and recommendation adopted*, 17 Civ. 5839 (AJN), 2019 WL 168544 (S.D.N.Y. Jan. 11, 2019) (emphasis supplied).

³³⁴ *Id.*

³³⁵ *Id.*

DOCCS thus have access to significant background information that could be used to fashion individualized release conditions.

In response to an inquiry by this Task Force concerning DOCCS policies with respect to individuals with sex offense convictions under supervision, DOCCS responded that “Parole Officers may impose special conditions of release based upon the circumstances of each case in order to ensure the parolee’s needs are being addressed while protecting the safety of the community.”³³⁶ While DOCCS has represented that the “circumstances of each case” form the basis of conditions of release, it has been nonetheless observed by practitioners that individuals with sex offense convictions are often assigned identical, draconian release conditions. For example, the plaintiff in *Yunus v. Robinson*, *supra*, was assigned 48 special conditions of release through a six-page document titled “Special Conditions of Release to Community Supervision for Sex Offenders,” which appears to be patently boilerplate by virtue of its being a printed form with blank spaces to fill in the names of individual releasees.³³⁷ Having observed that onerous conditions are often unnecessarily applied in a uniform manner, the Task Force recommends that this practice be replaced with an individualized approach, wherein the release conditions bear a reasonable relationship to the underlying offense and subsequent rehabilitation.

F. Risk Classification & Community Notification

The most significant impediment to employment for individuals with sex offense convictions may be their placement on the public registry. A risk classification of “Level 1” places an individual on the registry for 20 years, and “Level 2” and “Level 3” for life. Individuals who are classified as Level 2 or 3 are also placed on an online registry by DCJS.

As detailed previously, the detrimental effect of notification laws on the lives of individuals with sex offenses is well documented by academic literature. Indeed, even the New York State Unified Court System’s website notes that “registration can lead to social disgrace and humiliation, loss of relationships, jobs, and housing, and both verbal and physical assaults.”³³⁸ In addition to the difficulty in finding employment, and social ostracization, lifetime registrants of a sex offender registry face a bar from federally assisted public housing.³³⁹

However, the research regarding the effectiveness of registration and notification laws is inconclusive. A review of empirical studies in this area found that the utility of such laws was “at best, mixed.”³⁴⁰ Furthermore, a recent analysis found that “certain long-term supervision and monitoring policies (e.g., lifetime registration) may be applied to a substantial number of individuals with a low risk for sexual offending.”³⁴¹ Notably, a 2008 analysis of New York’s

³³⁶ *Id.*

³³⁷ Exhibit B to Declaration of Equan Yunus in Support of Motion for Preliminary Injunction, at 5-11, ECF No. 45-2, *Yunus v. Robinson*, 17 Civ. 5839 (AJN) (BCM) (S.D.N.Y. Mar. 26, 2018).

³³⁸ New York State Unified Court System, *supra* note 289.

³³⁹ 42 U.S.C. § 13663.

³⁴⁰ Calkins et al., *supra* note 284, at 452.

³⁴¹ R. Karl Hanson et al., *High-Risk Sex Offenders May Not Be High Risk Forever*, 29 J. Interpersonal Viol. 2792, 2806 (2014).

SORA found that its “enactment . . . had *no significant impact* on rates of total sexual offending, rape, or child molestation” (emphasis supplied).³⁴²

As an initial matter, the process by which New York assigns an individual to one of these three risk categories appears to be flawed. While these determinations are made by a court following a hearing, the hearing court is provided (in the case of prisoners being released) a recommendation by the Board of Examiners of Sex Offenders, a five-member body appointed by the Governor.³⁴³ To obtain an upward departure from this recommendation, the People are required to “prove the existence of certain aggravating circumstances by clear and convincing evidence,” *People v. Gillotti*, 23 N.Y.3d 841, 862 (2014) (internal citations omitted), while to obtain a downward departure the defense “must prove the existence of the mitigating circumstances upon which [it] relies in advocating for a departure by a [] preponderance of the evidence.” *Id.* at 864. As noted by the New York City Bar Association and the SORA Subcommittee of NYSBA’s Criminal Justice Section, the Risk Assessment Instrument used by the Board in arriving at this recommendation is grounded in research more than two decades old, has not been well-tested, and is methodologically flawed.³⁴⁴ Both the SORA Subcommittee and City Bar make reference to Justice Daniel Conviser’s opinion in *People v. McFarland*, 29 Misc.3d 1206(A), 2010 WL 3892252 (Sup. Ct. N.Y. Cty. Oct. 4, 2010), which critiqued the Risk Assessment Instrument (“RAI”) for taking into account factors that are not necessarily correlated with recidivism risk, being untested/unvalidated, arbitrarily assigning “point” values to various factors, classifying most individuals as Level 3 (in marked contrast to the instruments used by other states), not capturing certain significant determinants of recidivism risk, and a variety of other flaws. Like City Bar and the SORA Subcommittee, we recommend that the Legislature require the Board of Examiners to periodically update the Risk Assessment Instrument in line with scientific research.³⁴⁵

Furthermore, the registration periods imposed in New York may be unnecessarily long, as recent research on the long-term risk of reoffending indicates. Reviewing this research, a group of well-regarded researchers in this field recently noted that:

Low risk sex offenders are less likely to be arrested for subsequent sex crimes *than general criminal offenders*. After 10 years, moderate risk sex offenders reach recidivism rates comparable to general offenders, and after 16 years, even high risk sex offenders are no more likely to be arrested for a new sexual crime than an offender with no prior sex crime history. Thus, *it is unlikely that registration periods beyond 20 years (at the longest) provide added value, even for high risk offenders.*³⁴⁶ (Emphasis supplied.)

³⁴² Sandler et al., *supra* note 284, at 297.

³⁴³ Correction Law §§ 168(l), (n).

³⁴⁴ New York City Bar Association, *supra* note 286; New York State Bar Association, Criminal Justice Section, SORA Subcommittee, *Support for Pending Legislation Related to New York’s Sex Offender Risk Assessment Instrument*, Mar. 31, 2017 (unpublished report).

³⁴⁵ New York City Bar Association, *supra* note 286; New York State Bar Association, Criminal Justice Section, SORA Subcommittee, *supra* note 344.

³⁴⁶ Jill S. Levenson et al., *Grand Challenges: Social Justice and the Need for Evidence-Based Sex Offender Registry Reform*, 43 J. Sociol. & Soc. Welf. 2, 18-19 (2016).

In light of this evidence, New York's 20-year registration requirement for "Level 1" registrants, and lifetime registration period for all other individuals, appears to be unnecessarily long. Comparing New York's registration periods with those of other states underscores this: 12 states (Connecticut, Illinois, Indiana, Iowa, Minnesota, New Mexico, Rhode Island, Texas, Utah, Vermont, Washington, and West Virginia) impose a registration period of only 10 years for wide categories of individuals who are first time offenders and/or have committed less serious offenses. We suggest that New York's registration periods be further studied by experts in this field, with a view to shortening them, to determine the optimal length of registration for each risk category.

We are mindful that the Legislature's intent in enacting SORA and subsequent legislation was safeguarding public safety, particularly with respect to vulnerable populations who are disproportionately the victims of sex crimes. While this report has critiqued the efficacy of existing policies implemented to prevent recidivism, and argued against the flawed assumption that those convicted of sex crimes are uniquely recidivistic, we nonetheless recognize that this is an important goal. Though there is no evidence that residence restrictions prevent recidivism, and little support for the effectiveness of blanket registration policies, we suggest that other strategies may be able to successfully stem reoffending.

In particular, we emphasize the potential for treatment of the psychological and behavioral conditions underpinning the actions of those who commit sex offenses. We recognize that, as one comprehensive analysis of studies concerning such treatment efficacy noted, "[all] reviews [of research in this area] have concluded that more and better studies are needed."³⁴⁷ Another such analysis notes that while "hundreds of studies have been published on sexual offender treatment, the conclusions remain tentative because *few high-quality studies have been conducted*."³⁴⁸ Nonetheless, though further study is needed, there is evidence in favor of treatment efficacy, as "most systematic reviews have typically found statistically significant but modest reductions in recidivism rates for treated compared to untreated sexual offenders."³⁴⁹ Further study may yield a better understanding of which forms of treatment are the most effective.

As noted earlier, DOCCS operates an in-prison treatment program known as the Sex Offender Counseling and Treatment Program ("SOCTP"). Additionally, we are aware that individuals on parole are frequently required to obtain treatment from private providers as part of their conditions of release. We recommend that DOCCS, if it does not already, conduct rigorous evaluations of the efficacy of these programs in curbing recidivism. Furthermore, we suggest that the state government invest in experimental research to better understand the efficacy of various treatment forms. Of the limited number of high quality studies that have been conducted nationwide, "there is only one strong study examining a currently plausible treatment for adult sexual offenders,"³⁵⁰ namely the California Sex Offender Treatment and Evaluation Project, a six-year study mandated by California's legislature in the 1980's.³⁵¹ New York's Legislature, in

³⁴⁷ R. Karl Hanson et al., *The Principles of Effective Correctional Treatment Also Apply to Sexual Offenders: A Meta-Analysis*, 36 Crim. Just. & Behav. 865, 866 (2009).

³⁴⁸ R. Karl Hanson & Pamela M. Yates, *Psychological Treatment of Sex Offenders*, 15 Curr. Psychiatry Rep. 348, 349 (2013).

³⁴⁹ *Id.* at 350.

³⁵⁰ *Id.* at 362.

³⁵¹ See J.K. Marques, et al., *Effects of a Relapse Prevention Program on Sexual Recidivism: Final Results from California's Sex Offender Treatment and Evaluation Project (SOTEP)*, 17 Sex Abuse 79 (2005).

consultation with researchers in this field, could similarly mandate innovative research on psychological and behavioral treatment.

Investment in such research would better serve the intent underlying the Legislature's enactment of SORA and subsequent legislation in the past two decades. As detailed above, there is scant justification for key components of New York's regulation of individuals with sex offense convictions. There is a lack of significant evidence that registration curbs recidivism, and *no evidence* that residence restrictions do. Furthermore, the monitoring and housing of such individuals comes at significant cost to the state, and significant detriment to their successful re-entry and rehabilitation. By contrast, research on treatment programs provides an avenue for enacting policies that effectively tackle recidivism while increasing the likelihood that persons with sex offense convictions reintegrate into society and lead law-abiding lives.

While the public policy objective of protecting the public from recidivistic individuals with sex offense convictions is certainly important, there is a paucity of evidence for several policies implemented by New York in this regard. In light of the detriment of these policies to prisoners' re-entry, this Task Force proposes that SARA be amended to require that instead of an automatic imposition of a "1,000 feet" residence restriction on individuals categorized as Level 3, the decision to impose a buffer zone restriction around schools be made on a case-by-case basis by the Sex Offender Registration Act ("SORA") hearing court, upon a showing of a need for the restriction based upon the defendant's offense conduct, history of behavior, or other mental or emotional conditions, with possibility of revision over time. The Risk Assessment Instrument used to make risk classifications should also be amended, to bring it into conformance with the latest scientific research. A reevaluation of the excessively long registration periods imposed on individuals by SORA should be conducted in line with academic research demonstrating that individuals' risk of reoffending decreases considerably over periods of time shorter than those stipulated by SORA. Finally, those individuals with sex offense convictions who are subject to community supervision should have individualized determinations of release conditions to ensure they bear a reasonable relationship to the underlying offense and subsequent rehabilitation, so as to avoid blanket imposition of boilerplate, draconian conditions.

In making these recommendations, we are mindful of the dedicated work of the New York City Bar Association and various other organizations that have done work in these issue areas. We are indebted to them for their prior research and recommendations.³⁵²

³⁵² New York City Bar Association, *supra* note 286; New York City Bar Association, *The Impact and Legality of Sex Offender Residency Restrictions Created by New York's Sexual Assault Reform Act*, Oct. 25, 2016, at 10-11, available at https://s3.amazonaws.com/documents.nycbar.org/files/20073107-SARAResidencyRestrictions_CrimCourt.CrimLaw.CJO.Corrections_Report_FINAL_10.24.16.pdf; Legal Action Center, et al., *Nowhere to Go: New York's Housing Policy for Individuals on the Sex Offender Registry and Recommendations for Change* (unpublished white paper).

VIII. FUNDING

“Investing more money and resources in rehabilitative strategies that support ex-offenders’ efforts to rejoin society is crucial to reducing recidivism and cutting prison operating costs.”³⁵³

As set forth in the various sections of this report, effective re-entry programming requires not only new programmatic initiatives, but also increased and dedicated funding streams as well as innovative thinking to reposition existing resources. This combination of analysis of existing resources coupled with new and dedicated state funding will enable government agencies charged with implementing and managing re-entry programs and their not-for-profit partners to provide more meaningful re-entry services.

Under the now-inactive Serious and Violent Offender Reentry Initiative, the federal government provided \$100 million in funding for re-entry initiatives.³⁵⁴ This funding was directed to programs that provide re-entry services to those offenders at the highest risk for recidivism. Congress recently enacted sweeping criminal justice reform legislation—the First Step Act of 2018.³⁵⁵ The statute mandates an expansion of “effective evidence based recidivism reduction” programs.³⁵⁶ Recognizing that for re-entry programming to be truly effective it must begin upon the commencement of a prison sentence, the statute mandates an initial risk and needs assessment review of each sentenced individual.³⁵⁷ The legislation calls for an annual appropriation of \$50 million for re-entry programming.³⁵⁸ Unfortunately, none of this funding is to be provided for state re-entry programming.³⁵⁹ However, the legislation does re-appropriate funding contained in the Second Chance Act which is available to states and not-for-profits that provide re-entry programming.³⁶⁰

In New York State, funding for re-entry programming comes from a number of sources. The Division of Criminal Justice Services (“DCJS”) receives approximately \$24 million for re-entry and alternative to incarceration funding.³⁶¹ In addition, DCJS funds County Reentry Task Forces (“CRTFs”) in Albany Broome, Bronx, Dutchess, Erie, Kings, Monroe, Nassau, New York, Niagara, Oneida, Onondaga, Orange, Queens, Rensselaer, Rockland, Schenectady, Suffolk, Ulster, Upper Manhattan, and Westchester.³⁶² While there are a number of counties that have CRTFs,

³⁵³ Cynthia Caporizzo, *Prisoner Reentry Programs: Ensure a Safe and Successful Return to the Community*, The White House, Nov. 30, 2011, <https://obamawhitehouse.archives.gov/blog/2011/11/30/prisoner-reentry-programs-ensuring-safe-and-successful-return-community> (last visited Feb. 21, 2019).

³⁵⁴ National Institute of Justice, *The Serious and Violent Offender Reentry Initiative: The Basics*, Mar. 26, 2012, <https://www.nij.gov/journals/269/pages/svori.aspx> (last visited Feb. 25, 2019).

³⁵⁵ First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

³⁵⁶ *Id.* § 101.

³⁵⁷ *Id.*

³⁵⁸ *Id.* § 104.

³⁵⁹ *Id.* § 102.

³⁶⁰ *Id.* § 501.

³⁶¹ Memorandum, New York State Assembly Standing Committee on Ways and Means (Oct. 30, 2018) (on file with a member of this Task Force).

³⁶² Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces More than \$10 Million to Fund Employment and Re-Entry Services Throughout New York (Nov. 22, 2016), available at

many of the smaller upstate counties do not have sufficient resources to fund programs that provide these types of services.

In 2017, New York State provided \$6.4 million in grants to 13 agencies to provide employment services to individuals on parole, on probation or directly to alternative to incarceration programs. These funds were distributed on a statewide basis, and enabled five counties, Ontario, Orleans, Steuben, Tompkins and Wayne to provide these services for the first time.³⁶³

Four million was appropriated to create a CRTF in Queens County and to enable 19 existing CRTFs to hire coordinators and expand services. The role of these coordinators is to work with a diverse group of agencies, such as police departments, community supervision agencies, mental health and social service providers to identify gaps in services and provide coordinated services such as housing, employment and substance abuse treatment to offenders at a high risk of recidivism.³⁶⁴

The New York State Department of Corrections and Community Supervision (“DOCCS”) currently receives \$9 million for vocational training for parolees and formerly incarcerated individuals. While the Task Force has requested specifics as to the total funding DOCCS provides for re-entry programming, no information was provided. DOCCS has provided programmatic information as to what programs exist at each DOCCS facility and a description of each program (Appendix F).

DCJS and DOCCS work in partnership with each CRTF to identify moderate and high risk offenders who are in need of re-entry services. These individuals are provided with services designed to improve their transition back to their communities. We learned that the role and goals of each CRTF are:³⁶⁵

1. Strategic Planning for Re-Entry and Jurisdiction-Wide and System-Wide Collaboration
 - a. Identify gaps in services that are required to reduce risk of reoffending.
 - b. Identify barriers to accessing available services to reduce risk of reoffending.
 - c. Develop strategies to reduce the identified gaps and eliminate barriers, by collaborating with county officials, local service agencies and program providers.
2. Individual Case Management
 - a. Work with local parole to target individuals returning to the community who present high risk of reoffending.
 - b. Assess needs related to reoffending.
 - c. Address needs through case management.

<https://www.governor.ny.gov/news/governor-cuomo-announces-more-10-million-fund-employment-and-re-entry-services-throughout-new>.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ Interview with DCJS staff.

3. Public outreach and/or education efforts.

The New York City Mayor's Office of Criminal Justice ("MOCJ") funds re-entry and discharge planning programs for those individuals released from New York City jails. No re-entry funding exists for formerly incarcerated individuals being released to New York City from State facilities. All programs are run by not-for-profit agencies such as the Fortune Society and the Osborne Association. Some examples include a "jails for job" initiative which provides transitional housing and employment and the Prisoner Reentry Institute at CUNY's John Jay College which offers access to higher education and a "peer navigation" program. The City provides \$10 million dollars over three years to fund these programs.³⁶⁶

New York's recently-enacted Raise the Age legislation³⁶⁷ provides funding for construction of new secure facilities as well as discharge planning services.³⁶⁸ DOCCS, local CRTFs and the Office of Children and Family Services ("OCFS") are charged with creating and administering discharge planning services. OCFS is to coordinate the Supervision and Treatment Services for Juvenile Program ("STSJP") which includes reentry programming. There is to be created a juvenile treatment model that includes academic transition plans, educational programs, vocational training and employment opportunities.

The obvious answer to the question "is the current funding of re-entry programs on national, state and local levels adequate to meet the needs?" is "NO." This applies to programs that provide services to an incarcerated individual before release as well as those programs that provide services to the formerly incarcerated.

As set forth in the various substantive portions of this report, additional funding is required for housing, education, job training, mental health treatment, substance abuse counseling, re-entry of individuals with sex offense convictions, and all other types of services that a formerly incarcerated individual requires prior to and upon release in order to become a productive member of his or her community.

But increased funding alone is not the answer. Effective re-entry programming must be result-based and not just a function of "throwing money" at a problem in the hope that it will be resolved. Just as important as funding are programmatic evaluations to determine what combination of services are required to ensure more successful re-entry, and how to create a funding stream that allows these programs to be created.

At the Open Meeting of the Task Force on November 9, 2018, a common theme from many stakeholders was that funding should not be "single issue" based, but rather structured so that multiple needs of the formerly incarcerated can be met by one provider or a group of providers acting together. Grants or Requests for Proposals ("RFPs") need to be structured so that a formerly incarcerated individual can seek services from a program that has the programmatic

³⁶⁶ Letter from the Mayor's Office of Criminal Justice to a member of this Task Force (Sept. 24, 2018) (on file with a Task Force member); interview with MOCJ staff.

³⁶⁷ Budget Article VII, ch. 59, 2017 N.Y. Laws.

³⁶⁸ See *Raise the Age*, State of New York, <https://www.ny.gov/programs/raise-age-0> (last visited Feb. 25, 2019).

resources to provide most, if not all, of the needed services. Models for this type of funding exist and should be replicated.

Santa Clara County, California is one locality that has developed a “one stop shop” model for providing reentry services. This model combines multiple service providers and government agencies under “one roof” so that the formerly incarcerated individual can obtain all or most of the needed services at one location from various providers or agencies. Not only does this make it easier on the “customer,” but it is also more cost-effective and enables enhanced communication across all of the agencies providing services to the client.³⁶⁹

The Empire State Supportive Housing initiative (ESSHI), is an example of this type of funding and programming currently being utilized in New York.³⁷⁰ In order to qualify for federal capital funding to build transitional housing, there must be a showing that the organization can provide all necessary services to meet the criteria for “supportive housing,” as was discussed at the Open Meeting of this Task Force. Rather than have the individual agencies apply separately, in this program, eight State agencies that deal with the relevant populations and services issued a joint RFP to qualify for the federal funding. The Office of Mental Health was the lead agency and was able to apply for the grants.³⁷¹

Another example of an existing program that provides a multitude of services is run by the Center for Community Alternatives (“CCA”), which this Task Force learned about through the organization’s testimony at the Open Meeting and an interview with David Conliffe, Esq., the organization’s Executive Director. This program in Syracuse provides services to students who are facing lengthy school suspensions. Not only does this program address racial disparity in the suspension process, but it also provides mentors to work with suspended students to prepare them academically and socially to return to school. The mentor stays with the student when he or she returns to school to assist the student with any issues that arise upon re-entry to school. This program has drastically reduced suspensions, but more importantly has significantly increased the success rate of those students remaining in school after suspension. This is exactly the type of program that we need in New York to facilitate re-entry.

The State should adopt a funding stream and RFP process such that agencies can combine to apply for grants that enable the agencies to provide a combination of services. Simply put, the State should develop RFPs for re-entry programming that fund a combination of providers who will make all necessary services available at a central location.

Thinking outside the box when creating grants or RFPs must be the norm rather than the exception. As was discussed at the Open Meeting, the Fortune Society runs a housing program called the Academy. It combines emergency, transitional and affordable housing. This Task Force also learned that CCA is replicating this type of program in Syracuse. This combination of housing

³⁶⁹ Rose Redlich, *The Santa Clara County Reentry Resource Center: Reentry Service Linkage and the One-Stop Model*, 2018, available at https://scholarworks.sjsu.edu/cgi/viewcontent.cgi?article=1648&context=etd_projects.

³⁷⁰ See Empire State Supportive Housing Initiative, *Inter-Agency and Operating Funding Opportunity Request for Proposals 2018*, available at <https://www.omh.ny.gov/omhweb/rfp/2018/esshi/esshi-rfp-2018.pdf>.

³⁷¹ *Id.* at 5.

resources is effective and must be expanded to include those former incarcerated individuals who are embarking on re-entry.

As suggested by a stakeholder at the Open Meeting of the Task Force, for re-entry funding to be most effective it should be “attached” to the formerly incarcerated individual rather than a specific program. “Medicaid”-type funding should be provided to enable the individual to go where he or she can get the combination of services required.

Whatever funding is necessary for re-entry programming must be provided by the State of New York and not passed on to the counties as unfunded mandates.

CONCLUSION

The drafters of this report recognize that this report only addresses some of the significant issues affecting a person's ability to successfully re-enter our communities after incarceration. There are a number of others barriers to re-entry and issues faced by formerly incarcerated people upon which this Task Force was only able to touch, including, for example: the unique issues that women and the LGBTQ community face in the criminal justice system as a whole, while incarcerated, and upon their release; the reality that our prisons and jails have become the *de facto* treatment providers for people with serious mental illnesses and substance abuse issues, and that we seem to have criminalized mental illness and substance abuse; and the reality that incarceration is trauma-inducing.

We also acknowledge that racial justice is an issue of immense significance that warrants far more than a mere mention in the conclusion of a report, and that no report involving the criminal justice system should fail to at least mention. It is apparent to anyone who works in any facet of New York's criminal justice system that people of color are arrested, convicted, and incarcerated at hugely disproportionate rates and numbers. While this report is not a study of the racial and socio-economic inequities that exist in our criminal justice system, it is important to acknowledge that they persist, and that individuals of color being released from incarceration face the same prejudices and biases that may have enmeshed them in the system.³⁷²

Also, populations which face unique vulnerabilities while incarcerated and upon release are women and people who identify as lesbian, gay, bi-sexual, transgender, queer, and gender non-conforming (“LGBTQ+”). During its November 9, 2018 Open Meeting, people spoke eloquently about these unique challenges. They noted that it is hard enough for individuals with the stigma of a criminal conviction to find a home, a job, and adequate medical and mental health care once released from prison without having to also deal with the fear of discrimination based on gender, gender identity and sexual orientation. Add to this the disorienting impact of incarceration (described in Section I of this report), which often includes: the trauma of witnessing or being victimized by violence; the lack of proper medical care and mental health and substance abuse

³⁷² Catherine Lizette Gonzalez, *Why Reentry Is Incredibly Hard for Formerly Incarcerated Black and Latinx People*, ColorLines, May 11, 2018, <https://www.colorlines.com/articles/reentry-incredibly-hard-formerly-incarcerated-black-latinx-people> (interview of Bruce Western, a professor of sociology at Harvard University who studied the re-entry of 122 released prisoners in *Homeward: Life in the Year After Incarceration* (2018), regarding barriers to reentry faced by formerly incarcerated Black and Latinx people).

treatment; disconnection from family members and loved ones; and the impact of the prolonged loss of self-autonomy that accompanies incarceration.

As was stated during the Open Meeting, the disorienting impact of incarceration can be particularly pronounced for woman and LGBTQ+ people. Research suggests that incarcerated women “are more likely to report having experienced physical and sexual abuse as children and adults than their male counterparts” and “high rates of mental health problems such as depression, post-traumatic stress disorder (“PTSD”), and substance abuse.”³⁷³ Incarcerated women are also more likely to have a history of substance abuse.³⁷⁴ LGBTQ+ people, “are more likely to end up behind bars and more likely to face abuse behind bars than the general population.”³⁷⁵ Indeed, being LGBTQ+ in a U.S. jail or prison often means daily humiliation, physical and sexual abuse, and the fear that it will get worse if you complain. Many LGBTQ+ people are placed in solitary confinement for months or years just because of who they are.³⁷⁶

In 2003, the federal Prison Rape Elimination Act (“PREA”)³⁷⁷ was enacted as a means to confront the crisis of sexual abuse in confinement with the intention of protecting people in custody, particularly vulnerable populations like women and LGBTQ+ people, from abuse and harassment.³⁷⁸ PREA sets forth forty-three standards developed by the United States Department of Justice which must be met by a correctional institution to be in compliance.³⁷⁹ This Task Force did not investigate PREA compliance for the New York State Department of Corrections and Community Supervision or for local jails and correctional facilities. Still, during our interviews with staff from the Westchester County Department of Corrections (“WDOC”), we learned that WDOC is the only jail in New York State that is PREA compliant.³⁸⁰ We also learned that as part of this compliance, WDOC has implemented policies specifically for LGBTI+ incarcerated people.³⁸¹ Since the LGBTQ+ incarcerated population is often uniquely at risk for sexual victimization, the WDOC has implemented important protections specific to this population which include the following:

- Screening of all individuals at admission and upon transfer to assess risk of both experiencing and perpetrating abuse;
- Preventing the discipline of those individuals who refuse or chose not to disclose sexual identity or orientation during screening;

³⁷³ National Resource Center on Justice Involved Women, *Fact Sheet on Justice Involved Women in 2016*, at 3, available at <https://cjinvolvementwomen.org/wp-content/uploads/2016/06/Fact-Sheet.pdf>.

³⁷⁴ *Id.*

³⁷⁵ National Center for Transgender Equality, *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights*, October 2018, at 4, available at <https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf>.

³⁷⁶ *Id.*

³⁷⁷ 34 U.S.C §§ 30301-30309.

³⁷⁸ Kimberly Collica-Cox, *Impossible Until It's Done: PREA Accreditation in Westchester County*, American Jails, January/February 2018.

³⁷⁹ *Id.*

³⁸⁰ PREA requires the U.S. Attorney General to “publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape.” 34 U.S.C § 30307(a)(1). These national standards are codified in 28 CFR § 115.

³⁸¹ See Appendix G (Westchester County Department of Corrections PREA and PREA—LGBTI Policies, and Inmate Preference Form).

- Requiring that information about sexual orientation, identity, etc., be used to make appropriate, individualized decisions about a person's security classification and housing placement.³⁸²

The policies are designed to provide LGBTQ+ people with protections in a manner that promotes their dignity and self-worth, and that does not further stigmatize them.

During the Task Force's Open Meeting on November 9, 2018, one attendee (who is an activist for the LGBTQ+ community) spoke of what it means to be a formerly incarcerated gay man. He noted that when LGBTQ+ people are forced to hide their identity while incarcerated because they fear sexual assault, harassment and violence, it makes it even harder upon release to be open and comfortable with their identity. Put differently, having to hide who you are makes incarceration more traumatizing and re-entry more challenging.

It is hoped that PREA compliance in prisons and jails is a positive step toward protecting women and LGBTQ+ people, and facilitating their successful re-entry into the community upon release. This Task Force was not able to do a complete analysis or obtain enough information about PREA compliance statewide to determine whether enactment of the PREA has achieved its intended goal of protecting such individuals in a manner that promotes their dignity and self-worth. However, one thing that was made abundantly clear by the information gathered is that re-entry planning must start while individuals are incarcerated.

Taking this all into consideration, the adoption of the recommendations in this report will provide a framework for the New York State Bar Association to advocate for changes that will expand opportunities for formerly incarcerated people in our communities and lead them on a more successful path of re-entry.

³⁸² Collica-Cox, *supra* note 378.



COMMITTEE ON LEGAL AID

PRESIDENT'S COMMITTEE ON ACCESS TO JUSTICE

DATE: March 27, 2019

TO: The Task Force on Incarceration Release Planning and Programs

Dear Friends,

We write to thank you for your work on the Incarceration Release Planning and Programs Report. Your report recognizes the enormous breadth of issues faced by people with conviction histories. The issues you identified reflect and resonate with those our low income and vulnerable clients face every day. These range from challenges in qualifying for public assistance, finding and maintaining affordable and safe housing, protecting the vulnerable, access to educational programs, and key, the ability to plan for a more stable life in the future. We were particularly impressed by your recognition that people with conviction histories are the experts in this area.

The Committee on Legal Aid and the President's Committee on Access to Justice appreciate in particular the attention you paid to the financial wellbeing of people with conviction histories. You are correct in stating that people arrested and convicted of crimes are disproportionately low income and that incarceration further impoverishes them. Thank you for recognizing their need to access public benefits as easily as possible.

We also appreciate your highlighting the impact that imprisonment and subsequent discharge from prison without adequate planning and resources has on communities of color. In addition, we applaud your highlighting the particular vulnerabilities of LGBTQ prisoners and citizens of our communities. There is no doubt that the impact of incarceration on these most vulnerable communities warrants further study and improved discharge planning in New York.

The members of the Committee on Legal Aid, the President's Committee on Access to Justice, and the legal services community have collected descriptions of some available programming for people with conviction histories. While not comprehensive, we hope that the description of these programs helps your report readers understand the additional resources available throughout this state from members of our profession.

The Committee on Legal Aid and the President's Committee on Access to Justice support your report and thank you for all of your work. If we can provide you with any additional information, please do not hesitate to contact me.

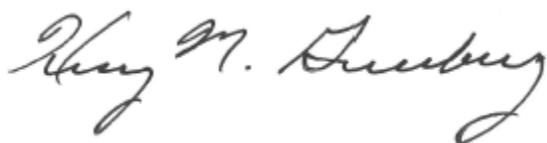
Sincerely yours,

A handwritten signature in blue ink, appearing to read 'S. Jimenez', with a stylized, cursive script.

Hon. Sergio Jimenez
Chair, Committee on Legal Aid

A handwritten signature in blue ink, reading 'Edwina Frances Martin', in a cursive script.

Edwina Frances Martin, Esq.
Co-Chair, President's Committee on Access to Justice

A handwritten signature in blue ink, reading 'Henry M. Greenberg', in a cursive script.

Henry M. Greenberg, Esq.
Co-Chair, President's Committee on Access to Justice

Legal Service Providers with Reentry Programs

This listing represents a sampling of reentry programs from across New York State.

Community Service Society of New York

The Community Service Society of New York Legal Department and its Next Door Project provide reentry-related direct and legal services to low-income New York City residents. Our services include advocacy and representation in criminal records-related employment, occupational licensing and housing matters. We also assist with complex criminal record error correction that requires court intervention and represent individuals eligible for criminal records sealing under New York State's limited sealing laws. Our Next Door Project helps more than 600 New Yorkers each year to obtain, correct mistakes in and fully review their criminal record rap sheets, as well as providing assistance with applications for Certificates of Relief from Disabilities and Certificates of Good Conduct and with creating portfolios of proof of positive change. The Department also engages in city, state and federal policy and legislative advocacy on crucial reentry-related matters and conducts the statewide criminal records Expungement Campaign.

Judith Whiting
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Legal Aid Bureau of Buffalo, Inc.

The Legal Aid Bureau of Buffalo, Inc. provides a comprehensive range of civil legal services to individuals facing barriers arising from arrests, criminal convictions, or incarceration.

Legal Aid provides holistic services to address barriers to employment, housing, financial well-being, and education. Our services include: applications for Certificates of Relief or Good Conduct; challenging the denial of employment or professional licenses; Child Support modification petition; navigating the Child Support Collections Unit and the DMV when driver's licenses have been suspended due to child support arrears; landlord/tenant issues; bankruptcy; divorce; foreclosure defense; RAP sheet correction; and representation in Unemployment Insurance hearings.

Legal Aid attorneys often begin representation while our clients are still incarcerated, especially a child support modification needs to be filed. Child support arrears create long lasting and detrimental consequences upon a client's release.

In addition to direct representation LAB civil attorneys present at various job training programs and parole orientation specifically crafted for returning citizens. These presentations ensure that returning citizens are made aware of the barriers they will be facing and how Legal Aid can assist them.

Paul B. Curtin, Esq.
Deputy Executive Director
Chief Attorney, Civil Legal Services

Legal Aid Society of Northeastern New York

Legal services in the capital region: criminal record sealing, certificates of relief from disability, certificates of good conduct and RAP sheet error correction; employment, professional licensing and housing discrimination cases stemming from involvement with the criminal justice system.

Elizabeth Woods, Senior Attorney
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Legal Assistance of Western New York, Inc. (LawNY)

Legal Assistance of Western New York, Inc. (LawNY) maintains dedicated programming in our offices in Ithaca and Rochester to assist individuals who exit the correctional system or who have past criminal convictions who experience legal barriers to employment. We also prioritize this population in our other practice areas. Employment related legal services offered include but are not limited to: enforcement of New York State laws prohibiting discriminatory hiring practices against persons with criminal records; state agency denial of occupational licenses or criminal background clearances required for employment in the sectors requiring state or federal approval to work (there are over 100 occupations in New York that require a license, registration or certification by a state agency); obtaining certificates of rehabilitation that may be required to obtain employment; enforcement of consumer protections that may serve as a barrier to securing employment; overcoming barriers to employment due to indicated reports from Child Protective Services; and removal from state agency lists barring employment. During the period from 1/1/15 – present, our Rochester office alone has secured more than \$270,000 in settlements in proceedings at the Division of Human Rights and \$48,000 in waivers or reductions of child support arrears.

Ken Perri
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Legal Services of Central New York

We have a multi-year contract with the Onondaga County Assigned Counsel Program to do re-entry work for county residents. We also consult with criminal defense lawyers throughout the process to help them advise and prepare their clients for a variety of issues faced upon release. Onondaga is one of the Hurrell-Harring counties and is looking to keep its assigned counsel program instead starting a public defender office. They're willing to do some innovative things, this being one.

We've also offered technical assistance in welfare fraud cases based on our assessment of the abysmal level of understanding of state and federal law by prosecutors, defense counsel, and judges. The staff attorney and paralegal assigned to the project will also mentor lawyers in our counties on these issues.

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Mobilization for Justice

Mobilization for Justice (MFJ) provides free, civil legal advice and representation to low-income people with criminal records who face employment discrimination. People in this situation often experience difficulty obtaining occupational licenses or clearances for entry level jobs, such as security guards and home health aides, as well as with various city and state agencies. Obtaining these licenses is often critical to preventing individuals from becoming destitute and/or homeless because they cannot obtain or maintain a job. MFJ advocates with private and government employers that summarily deny or terminate employment due to a criminal record. MFJ assists with filing complaints in court and with administrative agencies to challenge unlawful job discrimination, as follows:

challenge unlawful job discrimination due to criminal convictions

obtain occupational licenses for such jobs as security guards, barbers, taxi drivers, and others

appeal administrative licensure denials to the New York Supreme Court advocate with private employers that deny or terminate employment due to past conviction seal past criminal records

Tiffany Liston
tliston@mfjlegal.org

Nassau Suffolk Law Services (NSLS) Committee, Inc.

The NSLS Re-Entry Project handles post-conviction relief in Suffolk County. The Project works with individuals on probation or parole, on civil issues related to previous incarceration, including housing and employment discrimination, and motions to seal criminal records. The Project also handles Social Security and public assistance matters and engages in community outreach.

Beth M. Wicky, Director of Program & Contracts Administration
Nassau Suffolk Law Services Committee, Inc.
1757 Veterans Hwy., Suite 50
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Neighborhood Defender Service of Harlem (HDS)

The Civil Defense Practice at Neighborhood Defender Service of Harlem (NDS) provides civil legal services to low-income residents of Upper Manhattan facing collateral consequences of contact with the criminal justice system. NDS's re-entry services include eviction prevention, representation in forfeiture proceedings, assistance obtaining sealing and other forms criminal record relief, and affirmative actions to reduce housing and employment barriers.

Emily Ponder Williams, Supervising Attorney
Civil Defense Practice Neighborhood Defender
Service of Harlem
317 Lenox Ave., 10th Floor, NY, NY 10027
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F: (212) 876-5586

New Start Reentry Program

The Volunteer Lawyers Project of Onondaga County, Inc.'s New Start Reentry program works to open pathways out of poverty by removing barriers to employment. This is done by assisting those with criminal convictions by correcting their criminal records, obtaining certificates of rehabilitation and sealing records when appropriate so as to improve their chances of obtaining employment, as well as addressing unlawful job discrimination. We work in partnership with the Centerstate CEO Worktrain Program in Onondaga, Cayuga and Oswego Counties.

Sally Fisher Curran, Esq.
Phone 315-579-2576
scurran@onvlp.org

Touro Law School

Breaking Barriers is a student-run project, based in the PAC, dedicated to removing barriers to employment by helping people correct errors on their RAP (Record of Arrests and Prosecutions) sheets and obtain Certificates of Relief from Civil Disabilities and Certificates of Good Conduct, court documents that remove any automatic statutory disqualification from jobs or licenses. The program is co-sponsored by the Suffolk County Legal Aid Society. Held in Room PA205. Call (631) 650-2322.

Thomas Maligno
Executive Director
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New York State Bar Association

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TO: The Task Force on Incarceration Release Planning and Programs

The Committee on Diversity and Inclusion writes in support of the Incarceration Release Planning and Programs Report. We believe that the selection of specific counties in this report appropriately highlights the range of challenges and responses throughout the state for the welfare of incarcerated persons, namely their lives during and after incarceration. The issues the Task Force has identified reflects and resonates with those that low-income and vulnerable clients face every day. These challenges include qualifying for public assistance, finding and maintaining affordable and safe housing, protecting the vulnerable, accessing to educational programs, and, most importantly, planning for a more stable life in the future. Thus, because this report is thoughtful and comprehensive, we support your report and recommendations in every respect.

This Committee appreciates the recognition that incarceration, no, or limited, discharge planning and few resources greatly and disproportionately affect communities of color. We hope that these challenges will be studied in the future through a race equity lens. Such a study would assist all members in the criminal justice community in comprehensively addressing racial injustice in the system.

Thank you for permitting the Committee to review and comment on this report. We support its adoption in its entirety.

Yours truly,

Sandra H. Irby, Esq.

Chair, NYSBA Committee on Diversity and Inclusion

Interest on Lawyer Account Fund of the State of New York

Funding civil legal assistance for low-income New Yorkers since 1984

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March 20, 2019

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The Hon. Eugene Nardelli

This letter is to support the work contained in the Incarceration Release Planning and Programs Report. The Interest on Lawyer Account Fund of the State of New York ("IOLA"), funds over 70 organizations throughout New York State that provide civil legal aid to low-income New Yorkers. The intersection of poverty and civil legal aid requires IOLA grantees to provide services across a spectrum of issues including health, education, immigration, domestic violence, and housing. In 2018 IOLA grantees closed over 322,000 cases benefitting more than 686,000 New Yorkers.

IOLA commends the wide-ranging approach the Task Force took in its recommendations, first identifying people who have been incarcerated as experts on the challenges of re-entry, and then emphasizing the multiple barriers that exist including employment, housing, education, benefits, mental health care, and rights restoration, to the successful reintegration of formerly incarcerated people back to their communities.

Currently, five IOLA grantees provide direct assistance to formerly incarcerated people providing corrected criminal history records, "know your rights trainings", community education trainings on issues like the "ban the box" law, as well as impact case work and advocacy on behalf of formerly incarcerated persons. This is in addition to individual case work done by these organizations, and many other IOLA grantees on ancillary issues like preserving housing and benefits for formerly incarcerated persons.

Unfortunately, given the vast number of people, many of them poor and people of color, who have been brought into contact with the criminal justice system, the need for these services far outstrips the ability of civil legal aid organizations to provide the support needed. Given the scale of the problem and the negative consequences of failing to successfully re-integrate formerly incarcerated persons to individuals and their families, to their communities, and to the entire State, it is imperative that this issue be addressed.

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Interest on Lawyer Account Fund of the State of New York

Funding civil legal assistance for low-income New Yorkers since 1984

By creating this report, which focuses on the need to begin planning for re-entry from the time of arrest, and then addressing the full range of issues hindering successful re-entry, while providing best practices, specific reforms and recommendations for funding, the Task Force has provided a vital service and created road map that will help improve the lives of thousands of individuals, and create a better New York for all.

Sincerely yours,

Christopher B. O'Malley
Executive Director
IOLA Fund of the State of New York

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March 29, 2019

TO: Members of the House of Delegates

RE: Report of the Task Force on Incarceration Release Planning and Programs

The Committee on Mandated Representation commends the Task Force on Incarceration Release Planning and Programs for its work. The Committee urges the House of Delegates to adopt the Task Force's Report.

Every day, public defense lawyers across the state assist clients who face or will face the challenges of reentering society upon release from incarceration. Lawyers providing mandated representation in criminal matters see firsthand the results of punitive approaches to behavior deemed illegal.

The State Bar's 2015 Revised Standards for Providing Mandated Representation require attorneys to obtain information and advise clients on, among other things, collateral consequences of convictions. Standard I-7(a)(v), (e). The Standards also specifically require lawyers to work to avoid collateral consequences for the client. Standard I-7(a)(v). As a result of these Standards, and of their overall concern for clients, lawyers providing mandated representation in criminal matters have a deep interest in the Task Force's Report and recommendations.

The Report addresses many collateral consequences that affect clients' abilities to avoid recidivism and live productive lives following incarceration. These include barriers to housing, education, and employment. The Report also addresses barriers facing some clients due to certain specific circumstances, including mental health issues and the types of offenses for which they were convicted, particularly sex offenses. By its own account, even this extensive Report could not reach every issue affecting the ability to re-enter community following incarceration; most significantly, the Report acknowledges but does not delve into the issue of racial justice.

This Committee finds that the Task Force's Report and recommendations constitute promising steps toward change needed to benefit clients. We urge the House of Delegates to adopt the Report.

Respectfully submitted,

Robert S. Dean
Chair, Committee on Mandated Representation