

NYSBA

**Special Committee on
Re-entry**

January, 2016

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ATTACHMENT:

Pre-release Agreement Proposed by the Social Security Administration and DOCCS in an effort to assure financial help and Medicaid eligibility for some people nearing release from NY correctional or secure Office of Mental Health treatment facilities.

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I. EXECUTIVE SUMMARY

A. Overview

Increasingly, policy makers and the media have urged reconsideration of the size of our prison population and examination of alternatives to incarceration, particularly for those convicted of less serious offenses. Many, including Governor Cuomo, have urged or taken actions designed to address issues facing individuals re-entering the community after incarceration.¹ Thus, it is a particularly appropriate time to examine the re-entry into society of adults and young people post-arrest or post-incarceration.

The underlying rationales for this report's recommendations are: (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.

Assessments of programs discussed herein generally find that successful programs "pay for themselves." The cost of re-incarceration and the cost to victims of recidivism are far greater than the cost of providing the programs described in this report.

To put this in perspective, in New York State about 54,000 individuals are currently incarcerated.² New York's average annual cost of incarceration is \$60,000 per individual.³ Every year, about 24,000 individuals are released from state prisons and more than 100,000 are released from local jails back into the community,⁴ but within 3 years thereafter, two-thirds of them are rearrested, and over 40 percent are again incarcerated⁵ (most often for economically driven crimes).⁶

¹ Of particular note are Governor Andrew M. Cuomo's twelve executive orders, announced on September 21, 2015, based on recommendations of the Council on Community Re-Entry and Reintegration. These orders seek to reduce barriers for individuals with criminal convictions. We also note that on September 28, 2015, the New York City Bar Association issued a report and announced the formation of a Task Force on Mass Incarceration.

² *N.Y. State Dep't of Corrections and Cmty. Supervision ("DOCCS"), Under Custody Report: Profile of Under Custody Population as of January 1, 2014*, http://www.doccs.ny.gov/Research/Reports/2014/UnderCustody_Report_2014.pdf.

³ *N.Y. State Div. of the Budget, Investing In What Works: "Pay for Success" in New York State 1* (2014), https://www.budget.ny.gov/contract/ICPFS/PFSFactSheet_0314.pdf.

⁴ *DOCCS, Admissions and Releases, Calendar Year 2014*, http://www.doccs.ny.gov/Research/Reports/2015/Admissions_and_Releases_2014.pdf. (last accessed December 8, 2015)

⁵ E. Ann Carson, U.S. Dep't of Justice, Prisoners in 2013 at 3 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>. (Last accessed December 8, 2015)

⁶ Nathan James, *Cong. Research Serv., RL34287, Offender Re-entry: Correctional Statistics, Reintegration into the Community, and Recidivism* 2-7 (2015), <http://fas.org/sgp/crs/misc/RL34287.pdf>.

1. Assessing and Coordinating Individualized Needs Beginning with Arrest

There is increased awareness that coordinated attention must be paid long before their eligibility for release, to the approximately 24,000⁷ prison inmates who are released each year. The growing consensus, both in New York and elsewhere, is that individualized assessments of each person who may enter a prison, a jail or a juvenile placement in an institutional facility should occur at the earliest time possible, beginning if possible with the person's arrest. There is an equally strong emerging consensus that planning for virtually all such people's eventual release should begin as soon as an individualized assessment is completed.

Thus, a person's individual needs in specific areas should be assessed and begin to be addressed in a coordinated way early during confinement. The nature of the needs will vary from person to person, but will often involve education, the ability to secure jobs for which the person may become well-suited by the time of re-entry, the availability of affordable housing located near suitable transportation to appropriate jobs, treatment for substance and alcohol abuse and for mental disabilities, as well as general medical care. At the same time, attention must be focused on lining up available financial services and on eliminating or greatly altering financial obstacles.

To the extent that during confinement a person's individualized areas for potential improvement are dealt with in a pro-active way, the person will be less likely to have his or her existing "problem areas" exacerbated or joined by additional "problem areas" while in custody. Experience has amply demonstrated the dangers of inattention to such "problem areas" and of poorly conceived or implemented programs intended to focus on them.

2. Importance of Temporary Community Opportunities as Release Nears

Throughout confinement and as potential release from confinement approaches, programs that provide confined people with temporary opportunities in the community often enhance the likelihood of successful re-entry. These programs have significantly increased in number, programmatic variety and geographic scope, but they are subject to potential short-sighted budgetary reductions. New York's prosecutors oppose reductions in such programs that they have played a leading role in introducing and implementing.

3. Coordinated Attention to Address Post-Release Challenges

Similarly, creating and increasing efforts to help those who have returned to society from confinement have the potential – and often the reality – of greatly enhancing the returnees' chances of success. This is especially true where all efforts affecting an individual are coordinated and anticipated prior to release in the ways noted above. Particularly intriguing are programs that give financial incentives to employers that provide jobs to returnees – such as the Department of Corrections and Community Supervision ("DOCCS") Work for Success program.

⁷ N.Y. State Div. of the Budget, *Investing In What Works: "Pay for Success" in New York State*, *supra* note 3.

4. Exacerbation of Collateral Consequences of Convictions/Juvenile Offense Findings Based on False Social Media/Internet Posts

Such initiatives can, in part, help to alleviate the post-release collateral consequences of having been convicted of crimes or found responsible for juvenile offenses. These consequences for those convicted of adult crimes were discussed in depth in the 2006 report of the New York State Bar Association's ("Association") Special Committee on Collateral Consequences of Criminal Convictions. The policies that the Association adopted in 2006 upon consideration of that report, and similar policies addressing those found to have committed juvenile offenses deserve greatly increased support.

But it also must be recognized that collateral consequences extend beyond those imposed by law. As discussed in detail below, private actors, such as prospective landlords and employers, vastly increase collateral consequences by denying housing and jobs to people they think have either committed such offenses or have been at some point accused of having done so. It has long been counter-productive to have extra-legal penalties when there are *actual convictions or (for juvenile offenders) findings of responsibility*. It is even more unfair and prejudicial when landlords, employers and others discriminate *on the basis of mere accusations, or on accounts in social media or on the Internet* that are often based on distorted or inaccurate accounts from anonymous sources. The increased availability of electronic mechanisms for disseminating false or misleading "information" has greatly exacerbated the problems described in the 2006 report.

5. Growth of Programs Designed to Avoid Convictions/Juvenile Offenses and Formal Accusations or Arrests

All the factors discussed above have been positively affected by the development of another, countervailing trend: the growth of innovative programs designed to avoid *de jure* collateral consequences as well as confinement's tendency to worsen and add to the number of a person's deficits in such areas as education, employability, mental and medical health, housing and financial supports. These innovative programs, which this report refers to as diversion programs, take various forms, but a few goals are common to most or all of them.

Common to virtually all such programs is the chance to avoid a conviction or a juvenile offense finding. Many such programs, implemented particularly at the police department level, provide the opportunity to avoid ending up with an arrest record – even if social media or the Internet may still mention an arrest that has subsequently been expunged. And a vital aspect of most such programs is an inter-disciplinary effort to address the areas in a person's life that – if not addressed effectively – create a likelihood of future crimes or juvenile offenses.

In this respect, diversion programs are similar in their focus to the most effective post-confinement programs. Ideally, measurable successes with particular types of diversion programs will become recognized and justify these programs' expansion. In the meantime, we call attention in the first chapter of the report to many examples of diversion programs – while devoting the remaining chapters to the vast majority of people for whom diversion programs do not presently provide a means of avoiding confinement.

B. Summary of Principal Recommendations

The following is a list, with relatively brief explanations, of our principal recommendations. The various sections of the Report provide further bases for these explanations, and make some additional recommendations. The principal recommendations are presented in the order of the chapters of the report.

1. Provide sufficient funding for diversion programs and offer expanded diversion programs at the pre-charge, pre-trial and trial phases.

Such programs include street-level crisis intervention, problem-solving courts, and co-location with or immediate diversion to behavioral health services, substance abuse treatment, housing and employment community providers, or educational programs.

2. Start pre-release planning at the time of arrest, and accelerate it no less than 180 days before the anticipated release date.

After the ongoing pre-release planning, there should be, no later than 180 days prior to a person's anticipated release, an increased collaborative effort, involving prison management officials, parole officers, community resources and other key actors in improving the prospects for successful re-entry. Such efforts should include, for example, the ability to apply for Safety Net Assistance and Supplemental Security Income benefits, before release.

3. Adopt and implement the notice and relief provisions of the Uniform Collateral Consequences of Conviction Act ("UCCCA"), drafted by the National Conference of Commissioners of Uniform State Laws to provide a more individualized assessment of the application of collateral consequences to a specific re-entrant.⁸

4. Expand and refine the following programs, related to employment: proven temporary release programs and apprenticeship programs; computer and vocational programs that meet market demand; Work for Success (under which parole officers help make appropriate job referrals and employers who hire re-entrants get tax credits and access to federal bonding); and expand Ban the Box (the "Box" being a question on job application forms asking about prior arrests or convictions) statutes statewide and apply them to private and public employers; banning the Box from application forms does not preclude employers before making final decisions on new hires from complying with statutory limitations.

⁸ The UCCCA would make collateral consequences proportionate to the underlying crime and would permit individualized exceptions with proof of rehabilitation. It is an effort to make collateral consequences somewhat proportional to the underlying crime. As last amended in 2010, it can be found at http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf. (Last accessed December 8, 2015)

5. **Implement the following programs, related to education:** use education as an alternative to incarceration; improve and expand in-facility education programs; and restore Tuition Assistance Program eligibility during incarceration; and adopt a "ban the box" statute with regard to college applications.
6. **Implement the following policies, related to housing:** permit public housing authorities to use discretion and individualized assessment, using the best analytical tools available to them; permit construction of private single room occupancy apartments; limit private landlords' discretion to reject or evict tenants solely based on a history of conviction(s) to those cases in which the conviction(s) are substantially related to public safety; eradicate dangerous boarding houses or "three-quarter" houses, and begin a statewide re-entry supportive housing program similar to FUSE, which provides people at high risk of homelessness with job training, mental health and drug rehabilitation treatment, and other services tailored to their particular needs.
7. **Implement the following policies and practices, related to medical care:** convene a focus group to assess medical care delivery in the state prison system; increase professional contacts between correctional and community medical care staff; increase oversight of state prison medical care; and create an effective case management system to ensure continuity of care during transitions.
8. **Implement the following policies and practices, related to mental health care:** Create sufficient capacity to provide integrated substance abuse and mental health treatment programs to people in state custody in a timely manner; monitor *Olmstead* implementation for people with mental health needs in state custody to assure appropriate accommodations are provided to facilitate parole and successful re-entry (see discussion in Section III); and create effective parole supervision plans that provide support and services addressing known recidivism risk factors and assure adequate mental health treatment.
9. **With regard to juveniles:** improve coordination between local school systems and the justice systems; ensure that facilities where juveniles are placed or sentenced are all "registered schools," and provide high school equivalency degree programs for eligible students; expand the Close to Home Program (keeping youths within or relatively close to their families); expand and provide appropriate funding for the Adolescent Diversion Program (with specialized court parts focusing on 16 and 17 year-old defendants); and provide regularized funding, through statutory authority, to Youth Courts.

II. DIVERSION PROGRAMS

Diversion programs have been developed in large part due to the recognition that a criminal conviction, either for a felony or misdemeanor, and sometimes an arrest, can trigger significant collateral consequences, which are particularly damaging to an individual's ability to

pursue employment.⁹ A diversion program, when successful with regard to an individual, provides an alternative to jail and prison and can avert or annul a criminal conviction – and sometimes lead to the person not having an arrest on record.

This success, when achieved, is often due to a diversion program's focus on an individual's particular needs, such as to drug or alcohol dependency, mental or medical health issues, or lack of social services or economic supports. If the individual satisfies the program's requirements, (s)he may avoid prosecution, a conviction or sometimes even a permanent record of having been arrested.¹⁰

Diversion programs are being implemented by three types of institutions in the criminal justice system: police, prosecution, and specialized trial-level courts.¹¹ Similar programs are being introduced with regard to alleged juvenile offenses, as discussed in chapter IX below.

A. Programs Implemented with Substantial Involvement of Police Departments

Diversion involving the police can include (1) street-level crisis intervention, (2) co-location with or immediate diversion to behavioral health services, substance abuse treatment, and housing and employment community providers¹² or (3) a pre-booking program. With regard to those believed to have mental illness, there may be specialized strategies in which mental health professionals provide on-site and telephone consultation to officers in the field, or they coordinate with mobile mental health crisis teams.¹³

Street-level crisis intervention may involve, as in Madison, Wisconsin, crisis intervention teams, "with self-selected and specially trained officers available to respond to situations in which mental illness may be a contributing factor."¹⁴ Another example is the Los Angeles Police Department's mental evaluation unit, the largest mental health policing program of its kind in the nation. That program's 61 police officers and 28 county mental health workers provide crisis intervention when people with mental illness come into contact with police.¹⁵

⁹ *Ctr. For Health and Justice at TASC, No Entry: A National Survey Of Criminal Justice Diversion Programs and Initiatives* 2, 8 (2013), http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversion%20Report_web.pdf (Last accessed December 8, 2015)

¹⁰ *See id.* at 5 ("the economic realities of managing and supervising this enormous population have prompted even the most ardent supporters of tough-on-crime policies to consider more cost-efficient alternatives in effectively and safely addressing the intersection of crime and behavioral health problems"); *id.* at 11-12.

¹¹ *Ctr. for Health and Justice at TASC, No Entry: A National Survey Of Criminal Justice Diversion Programs and Initiatives* 5, 11-12 (2013), http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversion%20Report_web.pdf (last accessed December 8, 2015)

¹² *Id.* at 11.

¹³ Frank Sirotych, *The Criminal Justice Outcomes of Jail Diversion Programs for Persons with Mental Illness: A Review of the Evidence*, 37 J. Am. Acad. Psychiatry L. 461, 462-63 (2009).

¹⁴ *Id.* at 12, 14.

¹⁵ Stephanie O'Neill, *LA Police Unit Intervenes To Get Mentally Ill Treatment, Not Jail Time*, (July 4, 2015), <http://www.npr.org/sections/health-shots/2015/07/04/419443253/la-police-unit-intervenes-to-get-mentally-ill-treatment-instead-of-jail> (Last accessed December 8, 2015).

The second type of police diversion model is exemplified by the Law Enforcement Assisted Diversion ("LEAD") in Seattle, Washington, in which law enforcement diverts low-level drug and prostitution offenders into community-based treatment and support services, including housing, healthcare, job training, treatment and mental health support, instead of processing them through traditional criminal justice system avenues.¹⁶ As stated on April 15, 2015, evaluations have found a decrease in re-arrest rates for LEAD participants by up to 60%, when compared with individuals who were arrested and prosecuted as usual.¹⁷

New York City plans to implement what may be a combination of the first and second approaches discussed above. New York City contemplates expanded training for police officers to enable better behavioral recognition of mental illness and substance abuse, and creating diversion drop-off centers that will provide a link to long-term care and offer crisis beds for short-term stays.¹⁸

The third type of police diversion model, a pre-booking program, empowers individual law enforcement officer to screen and assess whether the person arrested but not yet booked meets certain eligibility requirements for diversion, such as that what is allegedly involved is a minor offense. Once people are enrolled in a pre-booking program, each individual would be given access to mental health, substance abuse treatment, employment training or opportunity, housing and/or Medicaid.

B. Programs Implemented with Substantial Involvement of Prosecutors' Offices

Prosecutor-led programs are often justified as resulting in reduced recidivism, avoidance of criminal convictions that makes finding gainful employment difficult (and thus can lead to recidivism)¹⁹ and allowing the criminal justice system to avoid the high costs associated with jailing non-violent offenders in already overcrowded prisons, and thus – in combination with reducing recidivism – paying for themselves. In particular, prosecutor-led programs have been found to decrease the likelihood of substance abuse and to deal with mental health issues more effectively than regular prosecutions.²⁰

One example of a New York pretrial diversion program involving the prosecutor's office – and others – is the Drug Treatment Alternative-to-Prison ("DTAP") that was developed in 1990

¹⁶ Law Enforcement Assisted Diversion, About LEAD, <http://leadkingcounty.org/about/>. (Last accessed December 8, 2015) See also *Ctr. for Health and Justice at TASC*, *supra* note 11, at 13-14.

¹⁷ Collins, Susan E., Clifasefi, Seema L. & Lonczak, Heather S., *Summary of 'LEAD Program Evaluation: Recidivism Report'* (2015), <http://leadkingcounty.org/lead-evaluation/>. (Last accessed December 8, 2015)

¹⁸ *City of New York Mayor Bill de Blasio, Mayor's Task Force on Behavioral Health and Criminal Justice System, Action Plan 11* (2014), <http://www1.nyc.gov/assets/criminaljustice/downloads/pdf/annual-report-complete.pdf>. (last accessed December 8, 2015)

¹⁹ *Council on Crime and Justice* (2003), *Review of Operation de Novo's Adult Diversion Program: June 1999-June 2001* (2001); Catherine Camilletti, *U.S. Dep't of Justice, Pretrial Diversion Programs: Research Summary* (2010).

²⁰ Catherine Camilletti, *Pretrial Diversion Programs: Research Summary*, Bureau of Justice Assistance, U.S. Department of Justice (Oct. 2010), <https://www.bja.gov/Publications/PretrialDiversionResearchSummary.pdf>.

in Kings County and by 1999 existed in all five New York City boroughs and Nassau County.²¹ And starting in 2003, 16 other counties implemented, based in district attorneys' offices, the Road to Recovery/Structured Treatment to Enhance Public Safety ("STEPS") program.²²

The benefits of such diversion programs typically outweigh the costs of supplying additional assistant district attorneys (ADAs) to oversee the programs. This is the case in New York even in less-well-staffed upstate district attorney offices. While an upstate district attorney's offices must find money in its budget to hire/retain one or more ADAs to administer the program and continue to keep the program innovative, this cost is offset by the reductions in recidivism and applicable criminal justice savings.

In a 2009 letter to then-Governor David Paterson, all 62 New York State District Attorneys expressed concern over proposed budget cuts eliminating funding for the STEPS program.²³ They urged the Governor to reconsider because a DA's "commitment of resources and attention to the program" helped to get offenders into treatment earlier and "...save substantial criminal justice resources."²⁴ The letter pointed out that 11 of the 16 counties receiving this funding, 11 had fewer than 25 ADAs and 5 had fewer than 10 ADAs – making it difficult to "take the lead in innovative programs designed to create alternatives to incarceration: for "drug abusing offenders."²⁵ The letter said that supplying additional ADAs to upstate New York for these diversion programs could help DA's offices to develop important collaborations in their areas, provide sufficient incentive for offenders to complete their programs and help offenders receive the support they need instead of lengthy, costly prison sentences.²⁶

The Manhattan Arraignment Diversion Project (MAP) and the Milwaukee County Treatment Alternatives and Diversion ("TAD") both target those with alcohol or drug abuse problems. Participants who complete the TAD program are nine times less likely to be admitted to state prison than defendants who do not participate.²⁷ A similar diversion program in Hennepin County, Minnesota decreased recidivism to 6% from 40%.²⁸

There are two types of TAD projects. The first type is described above. The other type is the adult drug court model (which falls within type of model discussed in part C, below). Under this model, after a non-violent offender has been convicted of a crime, the judge makes a sentencing recommendation.²⁹ The court then offers an offender the choice of entering a

²¹ 2009 Drug Law Change 2014 Update, <http://www.criminaljustice.ny.gov/drug-law-reform/documents/dlr-update-report-may-2014.pdf>, at 9. (Last accessed December 8, 2015)

²² *Id.*

²³ Letter to the Honorable David A. Paterson from the District Attorneys Association of the State of New York, Jan. 7, 2009, <http://www.daasny.com/wp-content/uploads/2014/08/2009-DAASNY-Request-to-Refund-Road-to-Recovery-STEPS-Donovan.pdf>. (Last accessed December 16, 2015)

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Ctr. for Health and Justice at TASC*, *supra* note 11, at 19.

²⁸ *Ctr. for Health and Justice at TASC*, *supra* note 11, at 17. Additional New York specific diversion programs can be found at *Ctr. for Health and Justice at TASC*, *supra* note 11, at Appendix A, at 52-53.

²⁹ *Id.*

mandatory treatment program and complying with other court ordered requirements, in return for which the judge will not impose the sentencing recommendations.

The Wisconsin Department of Justice reported that the original seven TAD projects had averted a total of 231,533 incarceration days.³⁰

C. Court Programs

Problem-solving or specialty courts³¹ typically include a diversion component.³² Such courts typically address mental illness, addiction or other needs of those who have been charged with a crime and offer behavioral health care in lieu of conviction and incarceration. Such diversion typically results in cost savings for the state and reduces recidivism.³³

Since October 7, 2009, CPL Article 216 has given New York State judges the discretion to order any drug-involved offender charged with certain drug offenses and some property crimes into substance abuse diversion programs.³⁴ The defendant may request the court to order an alcohol and substance abuse evaluation at any time prior to the plea of guilty or trial, which may be used by either the defendant or prosecutor in a hearing on the issue of whether the defendant should be offered alcohol or substance abuse treatment.³⁵ An agreement between the court and the defendant may provide terms for disposition upon successful completion, such as dismissal of the indictment.³⁶ Note that per CPL Article 216 the district attorney's consent is no longer needed for participation in drug courts (which had existed in most New York counties prior to the effective date of CPL Article 216).

An evaluation published in 2014 found the following about the impact of the 2009 drug law reforms: comparing those participating in drug courts in 2010 with similar offenders who had been sentenced to prison in 2008, the study "showed that drug court participants had significantly lower recidivism rates than similarly situated offenders who were sentenced to prison." The same pattern was found with regard to any kind of new arrest and regarding those new arrests for felonies. "These results are consistent with extensive prior research on the effectiveness of drug courts in reducing recidivism."³⁷

³⁰ *Id.*

³¹ Problem-solving courts were established over two decades ago by the New York State Unified Court System to help judges and court staff better respond to the needs of litigants and the community. *Problem Solving Courts Overview*, http://www.nycourts.gov/COURTS/problem_solving/index.shtml (last updated July 30, 2014).

³² National Association of Pretrial Service Agencies, *Promising Practices in Pretrial Diversion*, 26, <https://netforumpro.com/public/temp/ClientImages/NAPSA/20b9d126-60bd-421a-bcbf-1d12da015947.pdf>. (Last accessed December 16, 2015)

³³ NACDL, *America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform*, <https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20217>. (Last accessed December 8, 2015)

³⁴ *Id.*

³⁵ A Quick Guide to Rockefeller Drug Law Reform 2009, New York State Association of Criminal Defense Lawyers, <http://www.communityalternatives.org/pdf/GuideToRockReform09.pdf>. (Last accessed December 9, 2015)

³⁶ *Id.*

³⁷ 2009 Drug Law Change 2014 Update, *supra* note 21, at 12.

Similar results have been found elsewhere. A five-year study of 23 adult drug courts in Vermont found that participants were less likely to experience relapse and reported less criminal activity within the 18 months following their participation in the drug court program.³⁸

An example of a somewhat similar program is the Vermont Court Diversion Program, in which the State's Attorney refers individuals who have been charged with a crime to a community-based program that provides alternative, individually-designed programs for each alleged offender. These programs are run by non-profit agencies that receive funding from the Vermont Attorney General to provide the services. Successful completion of the alternative program allows the offender the opportunity to make amends for the alleged crime, avoid a criminal conviction, have the case dismissed and have its record sealed.³⁹ Participation is voluntary but requires admitting responsibility for one's alleged actions and meeting with a board of community volunteers to complete a contract "designed to repair the harm done to the victim and the larger community, and address underlying factors in the individual's life that contributed to the crime."⁴⁰

In a similar program in Multnomah County Community Court in Oregon, participants plead guilty and are sentenced to community services and social services.⁴¹ The program is designed for those charged with misdemeanors such as theft, prostitution, public drinking and trespass.⁴² Participants receive social services, such as health care, food assistance, access to shelter and clothing and drug and alcohol assessments.⁴³ Successful completion of the program results in dismissal of the charges.⁴⁴

At least two of New York's federal district courts have begun diversion programs. The first to do so was the Eastern District of New York, whose Pretrial Opportunity Program (POP) involving a drug court started in 2012.⁴⁵ POP relies on heavy involvement from the judge and from the defendant's pretrial services officer and treatment provider.⁴⁶ Many participants plead guilty before entering the program but the proceedings are postponed for one year while they go

³⁸ Shelli B. Rossman et al., *Urban Inst., The Multi-Site Adult Drug Court Evaluation: The Impact of Drug Courts* (2011), <http://www.nadcp.org/sites/default/files/nadcp/Multisite%20Adult%20Drug%20Court%20Evaluation%20-%20NADCP.pdf>. (Last accessed December 9, 2015)

³⁹ Vermont Court Diversion, Court Diversion, <http://vtcourtdiversion.org/court-diversion/>. See also *Ctr. for Health and Justice at TASC*, *supra* note 11, at 25.

⁴⁰ *Id.*

⁴¹ Multnomah County District Attorney, Community Court, <http://mcda.us/index.php/community-initiatives-special-programs/community-court/>. (Last accessed December 9, 2015) See also *Ctr. for Health and Justice at TASC*, *supra* note 11, at 26.

⁴² *Id.*

⁴³ *Id.*, at 26.

⁴⁴ *Id.*

⁴⁵ Alternatives to Incarceration in the Eastern District of New York: The Pretrial Opportunity Program and The Special Options Services Program, First Report 3 (Apr. 2014), https://img.nyed.uscourts.gov/files/local_rules/EDNY-TWOYEARREPORT-ATI_Programs_April-2014.pdf (Last accessed December 9, 2015)

⁴⁶ *Id.* at 7.

through the program.⁴⁷ The Eastern District also has initiated a Special Options Services Programs, aimed at young offenders.

An August 17, 2015, report evaluating these programs as of January 31, 2015, found that 19 of the 57 participants had successfully completed their pretrial supervision – with more than 50% getting sentences not including imprisonment and about 25% getting an agreement to deferred prosecution and dismissal.⁴⁸ Although 8 participants were not afforded relief, mostly due to re-arrests or technical errors, the other 30 remained in the programs. The report found that the Eastern District had saved over \$2.1 million through the programs.⁴⁹

On August 27, 2015, the New York Law Journal reported that the Southern District of New York, in view of the success of the Eastern District's programs and similar programs in other federal district courts, had begun a pilot program, entitled the Young Adult Opportunity Program. Under the program, about 12 people (intended to be between 18 to 25 years old but perhaps including some over 25) would be in 12-18 month program in which they would be able to get employment, counseling and treatment. Those who finish the program successfully could get shorter sentences, a reduction or referral of charges, or outright dismissals. A district judge and a magistrate judge, and the court's Pretrial Services Officer will agree with each participant on particularized goals. The judges will determine whether a person has met the goals, and District Judge Ronnie Abrams will impose sentence after the prosecution decides whether to reduce or defer or dismiss charges. Judge Abrams said that in the future, the court might expand this program of possible work with another group of offenders.⁵⁰

Furthermore, the advent of specialty courts for custom-track prosecutions has been a significant advancement in New York's criminal justice system. The past several years have seen the establishment of Human Trafficking Courts, Veterans Courts, Youth Courts, Adolescent Diversion Courts, Treatment Courts, Community Courts, Felony Drug Courts, and Mental Health Courts, to name but a few. Undoubtedly, the state court system is moving towards customized case resolutions – a positive direction. However, it must not be forgotten that, to achieve the "specialized attention" mandated by the specialized courts, additional dedicated personnel are required. Moreover, the defense function must be similarly expanded and properly funded in order for these specialized courts to be successful.

D. Assessments of Certain New York Diversion Programs

The 2012 Alternatives to Incarceration ("ATI") Annual Report prepared by the New York State Division of Criminal Justice Services (DCJS) found that ATI programs funded by the

⁴⁷ *Id.* at 8.

⁴⁸ *Alternatives to Incarceration in the Eastern District of New York: The Pretrial Opportunity Program and The Special Options Services Program, Second Report* 19-20 (Aug. 2015), https://img.nyed.uscourts.gov/files/local_rules/ATI.EDNY_SecondReport.Aug2015.pdf. (Last accessed December 9, 2015)

⁴⁹ *Id.*

⁵⁰ *SDNY Young Adult Opportunity Program* (Aug. 17, 2015), <http://nysd.uscourts.gov/docs/SDNY%20Young%20Adult%20Opportunity%20Program.pdf>. (Last accessed December 9, 2015)

State's Office of Probation and Correction Alternatives were providing critical services to New York's criminal justice system by providing cost effective programs that were reducing recidivism and overreliance on incarceration, and promoting public safety.⁵¹ Data from the Community Service Programs indicated an 84.6% successful completion rate for the ATI programs. The Pretrial Services Programs reported 31,066 releases with an overall Failure to Appear Rate of 2.8%. The Specialized Drug and Alcohol Service Programs reported 9,876 individuals placed in programs, with 70.9% completing them. The Defender Based Advocacy programs, which develop and submit plans specific to each defendant to identify and avoid unnecessary use of incarceration, prepared 2,256 individualized client specific plans, of which 2,045 were accepted by the Courts. Finally, TASC Model Programs reported 3,481 – *i.e.* 81.4% -- successful completions.

E. Software Systems' Potential Use in Implementing Diversion Programs

A software system would help in implementing the various diversion programs available in the state—particularly if the software system includes information about analyses of how well particular programs have been working. Implementation of a non-complex software referral system would aid law enforcement, prosecutors and judges to provide alleged offenders with reliable mental, medical and social assistance.⁵² An automated software system would list all the social service agencies in the geographic area available to help treat the arrestee.⁵³

For example, the prosecutor and defense counsel (with the consent of the judge) could refer an arrestee to the appropriate social service agency at time of arraignment. This would enable the defendant to start getting the needed help on an immediate, same-day basis. Conditions could be put in place such that if the defendant worked with the social service organization for a defined period of time (*e.g.*, 180 days), the criminal charges would be dropped and the individual could live without the threat of arrest or incarceration.⁵⁴

F. Diversion Recommendations

- Implement police-led, prosecutor-led/involved and court diversion programs
- At the police-led phase, there should be street-level crisis intervention teams and programs that facilitate immediate diversion to behavioral health services. This will entail efforts to reduce pressure on police officers to make bookings, plus trainings as to how to identify the treatment needs of individuals.

⁵¹ New York State Division of Criminal Justice Services (DCJS), Statistics/Reports, <http://www.criminaljustice.ny.gov/opca/pdfs/ati2008-2010final.pdf> (last accessed December 9, 2015).

⁵² *Improving Outcomes Through Better Data Tracking: The Use of Technology in Problem-Solving Courts and Beyond*, Center for Court Innovation New York, <http://www.courtinnovation.org/sites/default/files/FutureTrends1.pdf>. (Last accessed December 9, 2015)

⁵³ *Id.*

⁵⁴ *Ctr. for Health and Justice at TASC*, *supra* note 11, at 5; *See also*, Bureau of Justice Assistance, U. S. Department of Justice, *Pretrial Diversion Programs: Research Summary*, <https://www.bja.gov/Publications/PretrialDiversionResearchSummary.pdf>. (Last accessed December 9, 2015)

- With regard to prosecutor led/involved programs, there should be synergy between the prosecuting attorney and pretrial services to defer prosecution, refer individuals to "sentences" of community service or educational programs, set individualized conditions for success and failure in the diversion program and provide for judicial supervision, if necessary.
- Courts should apply deferred adjudication or sentencing, implement multidisciplinary staffing (to meet the needs of those with substance abuse or mental health issues) and refer to community service more often – to reduce recidivism and allow for rehabilitation as the best practice.
- A software system should be implemented to populate social or treatment programs in real time.

III. PROGRAMS IN ANTICIPATION OF RE-ENTRY

A. When Re-Entry's Consideration Should Begin

Typically, programs designed to enhance the prospects for successful re-entry begin in the latter stages of incarceration, and are substantially but inadequately enhanced shortly prior to release. This timeline is ill-suited to achieving meaningful and successful reintegration because it fails to deal with an individual's particularized needs early on and, further, provides inadequate time to form connections that will maximize the likelihood of successful re-entry.

Instead, individualized consideration of re-entry should begin prior to actual incarceration, at the moment of arrest if possible, and programs consistent with that consideration should begin as soon as possible after incarceration begins. Accordingly, individuals should be evaluated by skilled social workers prior to or during entry into prison or jail to determine not only their health and mental care needs but also their educational, employment-related training and future housing needs. "This assessment should form the foundation for services provided while the inmate is in prison or jail and shape discharge planning and services provided after release."⁵⁵

This front-loading of assessment and of re-entry related programs should provide cost benefits. For example, screening those incarcerated individuals who are capable of finding jobs without remedial employment-related training – and sometimes with different types of programs,⁵⁶ such as college educational classes – is more efficient.⁵⁷ Assessments in this regard may be enhanced by surveying people who have already re-entered about whether they are working, how they gained employment and what barriers to employment they experienced. Job market trends should also be analyzed.

⁵⁵ Department of Health and Human Services, *Helping Inmates Return to the Community* (August, 2001), at 1.

⁵⁶ Marta Nelson & Jennifer Trone, *Why Planning For Release Matters*, Vera Institute of Justice, (2000), at 6 http://www.vera.org/sites/default/files/resources/downloads/IIB_planning_for_release.pdf

⁵⁷ *Id.*

More basically, providing early and personalized assessments will limit costs by matching individuals with the programs most likely to meet their well-defined individual needs.

One area warranting special consideration involves DOCCS' in-person therapeutic communities, which place participating offenders in residential units. The therapeutic communities are supposed to provide treatment and support systems that ultimately help incarcerated individuals to develop the social and cognitive skills necessary for successful re-entry. However, with low budgets, such units have inadequate resources and a diminished ability to accomplish their goals.⁵⁸ This is particularly unfortunate, since research shows that recidivism is lowered by effective in-custody therapeutic communities and cognitive-behavioral drug treatment.⁵⁹

Similarly, vocational education, such as carpentry, construction and plumbing, can be provided successfully for suitable incarcerated people, but New York's current vocational training programs have low funding and are not aligned with individualized abilities and needs.

Most fundamentally, there must be a seamless link with community resources while an individual is incarcerated. This will strengthen community ties that are crucial for facilitating successful re-entry and reducing recidivism. The two most important types of community connections are personal community connections, including family, friends and other support systems, and resource connections, including employment assistance, housing and access to basic needs.⁶⁰ Community-based programs can be most effective in promoting these connections when they make frequent visits to the individual and coordinate family and non-family communications. A Minnesota Department of Corrections study found that people who have regular visits while incarcerated are 25% less likely to recidivate.⁶¹ That 25% increases dramatically when visits are from close relatives or friends.⁶²

Community-based programs can help people who are eventually going to be released – particularly when release is to occur fairly soon – to navigate the various barriers to housing and employment by surveying housing and employment opportunities and preparing for such opportunities prior to release. Community-based resources may also provide a safe, structured environment for housing people re-entering their communities.⁶³ For example, the Gemeinschaft House, a 60-bed re-entry program for non-violent offenders with substance abuse problems,

⁵⁸ *Mental Health Program Descriptions*, New York State Dept. of Corrections & Community Supervision, Bureau of Mental Health (July 15, 2011), <http://www.op.nysed.gov/surveys/mhpsw/doccs-att6.pdf>.

⁵⁹ Re-entry Policy Council, "Second Chance Act," June 24, 2009, <https://csgjusticecenter.org/nrrc/projects/second-chance-act/>.

⁶⁰ Paige Paulson, *The Role of Community Based Programs in Reducing Recidivism in Ex-Offenders*, *Masters of Social Work Clinical Research Papers*, Paper 247 (2013), http://sophia.stkate.edu/cgi/viewcontent.cgi?article=1249&context=msw_papers. (Last accessed December 9, 2015)

⁶¹ *Id.*

⁶² *Id.*

⁶³ Amison, Jennie. "Jennie Amison's Testimony," House Appropriations Subcommittee on Commerce, Justice, Science and Related Agencies, March 11, 2009.

contracts with the Virginia Department of Corrections to provide various re-entry programs and becomes a bridge between imprisonment and functioning well in the community.

B. The Importance of Short-term, Supervised Release Programs

Short-term, supervised release programs allow incarcerated individuals to learn marketable skills and build bonds with possible future employers. This can result in permanent employment that enhances economic and job growth while reducing recidivism and strengthening communities.

DOCCS has a temporary release program for work in which inmates are allowed to leave a facility for up to 14 hours in any day to work at a job in the community or gain on-the-job training. Such work-release programs have been very successful in other pilot programs such as those in Maryland or Minnesota,⁶⁴ where studies showed a significant increase in the odds that the participants will find a job, increase the total hours they work and earn higher total wages.⁶⁵ Another study showed that release programs produced cost avoidance/revenue enhancement benefits of about \$1.26 million overall or \$700 per participant.⁶⁶ These benefits include savings from early releases, income taxes paid from employment and lower recidivism.

However, despite the demonstrated re-entry and cost/benefit enhancements of short-term, temporary supervised release programs, New York's approval percentage for applications for such programs is extremely low. For example, in 2011, DOCCS had 23,467 applications for the release program, of which only 121 were approved. That was about a 0.5% approval rate. In 2012, this approval rate dropped to 0.4% -- with only 96 of 22,936 applications being approved. For alcohol and substance treatment temporary release programs, only 228 of 6,685 applications were approved in 2011, about a 3.4% approval rate.⁶⁷ The approval rate for alcohol and substance treatment temporarily release also declined in 2012, to 2.89%.⁶⁸ The extent any of these programs release the individual near his or her home depends on how long the release may be. The shorter the release, for example for 14 hours, the more likely the individual will be released to employers near the prison, rather than his or her returning neighborhood.

⁶⁴ Grant Duwe, An outcome evaluation of a prison work release program estimating its effects on recidivism, employment, and cost avoidance, *Criminal Justice Policy Review* 1, 19 (2014), <http://cjp.sagepub.com/content/early/2014/03/10/0887403414524590.full.pdf+html>. (Last accessed December 9, 2015)

⁶⁵ Valerie A. Clark, *Predicting Two Types of Recidivism Among Newly Released Prisoners: First Addresses as "Launch Pads" for Recidivism or Reentry Success*, *CRIME & DELINQUENCY*, Nov. 12, 2014, <http://cad.sagepub.com/content/early/2014/11/11/0011128714555760.abstract>.

⁶⁶ Grant Duwe, *supra* note 64.

⁶⁷ *Temporary Release Program 2011 Annual Report*, Department of Corrections and Community Supervision, (2011), <http://www.doccs.ny.gov/Research/Reports/2012/TempReleaseProgram2011.pdf>.

⁶⁸ *Id.*

C. When Release Time Approaches: Integrated Plan for Re-entry Into Community, Including Temporary Activities in the Community

Effective planning for releases that are expected to occur fairly soon involves a collaborative effort between prison management officials and parole officers, along with community resources and other key stakeholders. This process should begin in earnest at a minimum of 180 days prior to projected release and involves a shift in primary focus to individual community preparedness.⁶⁹ Attention to an incarcerated individual's transition from incarceration to the community is crucial in ensuring that the individual has the support of information and contacts to access necessary community resources – which should include experienced in-the-field contacts.⁷⁰

These efforts can be enhanced by mentoring from released individuals who have successfully maneuvered through re-entry's many challenges. Such individuals can be contact persons for those in the prison system, particularly those soon to be released. Contacts made before the individual is released can enhance the soon-to-be-released inmate's planning for and structuring of re-entry.

Effecting planning in the period when release is approaching draws upon the assessments, resources and relationships developed during the individual's incarceration. It is particularly enhanced when it fills a potential gap in responsibility that may result from prison management viewing themselves as not being responsible for an incarcerated individual's well-being once the individual is no longer in custody and post-release supervision agencies viewing themselves as not being responsible until an incarcerated individual arrives in a field office after release.

The key components of an effective plan for an approaching release typically include (i) meeting basic needs including housing, transportation, clothing and food, financial resources, and identification/important documents, (ii) employment and education, (iii) health and mental health care (as appropriate) and (iv) support systems.⁷¹ The actual planning for approaching releases in correctional facilities across the country varies from mere checklists to detailed, thoughtful programs.

Finally, every plan for an approaching release should have a post-release component that encompasses various types of actions designed to ensure optimization of the plan's effectiveness.

⁶⁹ *Pre-Release Planning and Reentry Process*, <http://www.ok.gov/doc/documents/op060901.pdf>. (Last accessed December 9, 2015)

⁷⁰ *Id.*

⁷¹ Nancy La Vigne, Elizabeth Davies & Tobi Palmer, *Release Planning for Successful Reentry: A Guide for Corrections, Service Providers, and Community Groups*, Urban Institute (2008), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411767-Release-Planning-for-Successful-Reentry.PDF>. (Last accessed December 9, 2015)

D. Timing of Benefits Applications

1. Safety Net Assistance

Individuals released from incarceration may be eligible for Safety Net Assistance (SNA), a New York State public assistance program for adults who do not live with children. Someone who applies for SNA cannot receive benefits for 45 days after applying. This waiting period can prove problematic for soon-to-be-released individuals because an application made while incarcerated can be denied because the person's needs are at that time being met in prison or jail. This can lead to people waiting until being released to apply for SNA, and consequently enduring the 45-day waiting period without these necessary financial resources.

In response to this issue, the Office of Temporary and Disability Assistance (OTDA) issued an Informational Letter stating that public assistance applications from those imprisoned should be accepted 45 days before their release date so that benefits can begin on the date of release.⁷² However, the OTDA says that its Information Letter merely presents a non-binding option to local Social Services Districts. While some counties have adopted the Informational Letter recommendation, other counties either refuse to allow currently incarcerated individuals to apply for benefits or deny their applications due to their not currently facing financial need.

2. Supplemental Security Income

Supplemental Security Income (SSI) is a joint federal and state government program that pays for basic necessities including food, clothing and shelter for elderly and disabled individuals based on financial need. Because SSI does not utilize Social Security funds, SSI does not have the same work-credit requirements as Social Security benefits. This makes SSI a particularly important resource for soon-to-be-released individuals who have not met Social Security work-credit requirements while incarcerated.

The application process for SSI is quite long and can take between 12 and 18 months to complete. Incarcerated individuals may begin applying for SSI benefits 90 days before their release dates. It is critical that steps be taken to assure that possibly eligible individuals submit SSI applications as close to 90 days before release as possible.⁷³ This is particularly significant in view of the large and growing elderly prison population.

For example, Wisconsin has a program that funds civil legal programs to establish SSI or Social Security disability benefits for individuals who are going to be released from state prison. This permits the newly released individual to get access to income supports and medical

⁷² Susan C. Antos & McGregor Smyth, *Public Benefits: Statutory Application Delays & Medicaid*, Greater Upstate Law Project, Inc., (Mar. 31, 2005), <https://www.nycourts.gov/ip/partnersinjustice/medicaid.pdf> (Last accessed December 9, 2015)

⁷³ *Benefits Available to Paroling and Discharging Inmates*, Prison Law Office, (Revised Aug. 2011), <http://www.prisonlaw.com/pdfs/BenefitsLetter,Aug2011.pdf> (Last accessed December 9, 2015)

coverage. The project is called the Disabled Offenders Economic Security Project ("DOES").⁷⁴ The Wisconsin Department of Corrections contracts with Legal Action of Wisconsin to administer the DOES Project, which serves inmates with serious mental health issues and/or developmental disabilities in 14 state prisons. Wisconsin Department of Corrections social workers, medical staff, and corrections staff screen and refer these particular inmates to Legal Action lawyers some six to nine months before the inmates are scheduled for release. LAW attorneys then schedule a visit at the prison, and if an inmate agrees to be represented, LAW attorneys act as their authorized representatives and submit SSD and/or SSI applications (as well as retirement applications, if applicable) to SSA.⁷⁵ Other parts of the DOES Project assists inmates in applying for and obtaining health insurance, Food Share (*i.e.*, food stamp benefits), housing assistance, and employment and training programs. The vast majority of the SSI and SSD applications submitted by DOES attorneys are initially approved by SSA. Approval rates are far higher than the national average. Of the 660 applications approved between 2010 and 2014, some 600 SSD and SSI were approved or reinstated upon initial application. Another 47 were approved upon reconsideration, and only 13 cases were approved after a hearing before an ALJ.⁷⁶ "The DOES Projects demonstrates a rapid approval of benefits with 76.4% of participants approved at initial consideration, including reinstatements, and retirements, receiving notice of approval within four weeks of release."⁷⁷ Applying a similar program to the State of New York would improve the re-entry process by providing soon-to-be-released individuals with a chance to gain healthcare and income for food and shelter, and such financial security and access to health care would reduce the likelihood of reoffending.

E. How Law or Graduate Social Work Students Can Help in Re-entry

If properly supervised in a structured program, both law and graduate social work students can help incarcerated individuals to prepare for their release, such as by acting as liaisons between incarcerated persons and available community services. The success of various New York law school clinics demonstrates the viability of using professional school clinics in aiding. Columbia Law School's Prisoners and Families Clinic's students, supervised by legal professionals and instructors, inform incarcerated people about their parental rights and responsibilities and how to advocate effectively for themselves.⁷⁸ Law students in New York University School of Law's Criminal Defense and Re-entry Clinic collaborate, *inter alia*, with community groups and use interdisciplinary approaches to consider how defender offices can aid in re-entry processes.⁷⁹ Through Brooklyn Law School's Youth Re-entry and Legal Services Clinic, law students advise youth clients with criminal or juvenile offense records on, among other things, how to deal with threatened collateral consequences of such records.

⁷⁴ Becky Young Community Corrections Recidivism, *Reentry: A Bridge to Success!*, October 2014 <http://doc.wi.gov/Documents/WEB/ABOUT/OVERVIEW/Reentry%20Unit/Becky%20Young%20Report%202014-Final.pdf>. (Last accessed December 9, 2015)

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Columbia Law School, Incarceration and the Family Clinic, <http://web.law.columbia.edu/clinics/prisoners-and-families-clinic>. (Last accessed December 17, 2015)

⁷⁹ Criminal Defense and Reentry Clinic, NYU Law, <http://www.law.nyu.edu/academics/clinics/year/criminaldefense>. (December 9, 2015)

Applying a similarly supervised clinic structure to social work students could enhance re-entry prospects, particularly by connecting an incarcerated individual with the community in which (s)he is most likely to live after release. Students may, through such clinics, gain experience that may ultimately improve future programs affecting re-entry. For these things to occur, the clinical programs should be led by appropriately credentialed professionals and professors who use suitable prerequisite, supervision and accountability structures. For example, good standing in particularly relevant prerequisite courses should be required. And students should be closely supervised and guided, in an effort to prevent case mismanagement.

F. The Parole Process' Need to Accommodate People with Mental Illness in Preparing Proposed Release Plans and in Assessing Properly their Post-Release Prospects

The Supreme Court's decision in *Olmstead v. L.C.* requires states, *inter alia*, to ensure that an individual with a disability receives services in the most integrated setting appropriate to the individual's needs. In 2012, Governor Cuomo created the "Olmstead Cabinet" in order to propose ways to implement *Olmstead*.⁸⁰ Consistent with its mission, the Olmstead Cabinet released a report discussing the need to improve greatly the ability of people with disabilities to gain access upon release to needed community-based services.

However, the Olmstead Cabinet did not address needed reforms relating to the potential parole of a person with mental illness. Neither DOCCS nor OMH has procedures to accommodate a person with mental illness who is unable to prepare and present a release plan for parole board consideration.

Moreover, parole staff underutilizes OMH in assessing mentally ill persons and in helping to create discharge plans – despite DOCCS' interactions with OMH with regard to people with mental illness.⁸¹ This results in disproportionately denial of parole to people with mental illness.⁸² Parole staff unaided by OMH are apt to base their recommendations on inappropriate stigma relating to mental illness and misperceptions of future dangerousness and

⁸⁰ Executive Order Number 84.

⁸¹ DOCCS has coordinated with OMH to execute robust statewide policies that screen people in prisons for mental illness, provide mental health services in prisons and could facilitate successful re-entry. Through these policies, OMH can offer accessible services by employing pre-release coordinators to connect mentally ill re-entrants with the appropriate community-based services and assist in these re-entrants in applying for SSI, SNA and other benefits where appropriate.

⁸² Jason Matejkowski, Joel M. Caplan & Sara Wiesel Cullen, *The Impact of Severe Mental Illness on Parole Decisions: Social Integration Within a Prison Setting*, CRIMINAL JUSTICE AND BEHAVIOR, (July 2010), http://www.researchgate.net/profile/Jason_Matejkowski/publication/247744903_The_Impact_of_Severe_Mental_Illness_On_Parole_DecisionsSocial_Integration_Within_a_Prison_Setting/links/0f31753b712f7ed64d000000.pdf. (Last accessed December 9, 2015)

instability⁸³ that ignore, for example, research showing that mentally ill individuals are less likely to commit a violent crime if taking appropriate medication.⁸⁴

Parole staff use the COMPAS Re-entry Risk Assessment ("COMPAS") to assess risk of release when making parole recommendations. Yet, COMPAS has not been tested for whether its use is valid as to people with mental illness. Parole staff may be making recommendations with regard to people with mental illness based on inadequate and inaccurate assessment criteria.

G. Recommendations

- Individualized consideration of re-entry should begin prior to actual incarceration if possible, and programs consistent with that consideration should begin as soon as possible after incarceration begins
- There must be a seamless link with community resources while an individual is incarcerated.
- There should be an expansion of supervised day releases during which an incarcerated person works with an employer – preferably one located within feasible travel distance of where the person is most likely to find housing upon release. This recommendation would enhance the likelihood of successful employment after release.
- Supervised day releases that enable an incarcerated person to receive substance abuse or mental health treatment at a center should be expanded – preferably, where the center is relatively close to where the person is most likely to find housing upon release. This would provide, upon release, an existing contact and continuity of treatment at a substance abuse or mental health treatment center.
- The process and criteria for approving employment and substance abuse treatment-related day release should be re-evaluated. The approval rates for both types of day releases are extremely low.
- As release approaches, planning should deal with (i) basic needs including housing, transportation, clothing and food, financial resources and identification/important documents, (ii) employment and education, (iii) health and mental health care (as appropriate), (iv) support systems, and (iv) an inbuilt post-release component that encompasses various types of actions designed to ensure that the plan's effectiveness is optimized.

⁸³ *Id.*; Darrell Steinberg & David Mills, *When Did Prisons Become Acceptable Mental Healthcare Facilities?*, (2013), https://www.law.stanford.edu/sites/default/files/child-page/632655/doc/slspublic/Report_v12.pdf. (Last accessed December 9, 2015)

⁸⁴ *See, e.g.*, Matejkowski, Caplan & Wiesel Cullen, *supra* note 82.

- School clinics should be used as a means by which social work students can help soon-to-be-released individuals to form critical ties in the communities in which they are most likely to live after release. There should be effective prerequisite, supervision and accountability structures for the students.
- New York State should adopt a uniform standard under which a person scheduled for release may apply for Safety Net Assistance at least 45 days before release without facing the possibility that the application will be denied because at the time of the application a prison or jail is dealing with the person's needs.
- DOCCS should ensure that soon-to-be-released people file applications for Supplemental Security Income benefits approximately 90 days before release.
- New York State's DOCCS, OMH and Parole Board should ensure that people with mental illness are given assistance enabling them to prepare and present parole applications, and should assess their applications using criteria that take into account the ways in which people with mental illness can successfully be released on parole.

IV. JOB TRAINING AND EMPLOYMENT

Lack of employment for re-entrants is a serious problem not only for the re-entrants and their families, but also for the broader community. The quality of those returning to mainstream society is diminished, and "[n]o healthy economy can sustain such a large and growing population of unemployable workers, especially in those communities already hit hard by joblessness."⁸⁵ Further, when employment is a significant factor in recidivism, the community suffers from the crimes committed and the criminal justice system bears the costs of prosecuting such crimes.⁸⁶ For example, the total annual cost of incarceration to the state and federal governments is now more than \$50 billion.⁸⁷ Therefore, correcting this cyclical effect is beneficial to both re-entering individuals and society as a whole by alleviating the very profound barriers to employment present for those returning to their communities.⁸⁸

⁸⁵ MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, NAT'L EMPT LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3 (2011), http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf?nocdn=1. (Last accessed December 9, 2015)

⁸⁶ See THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 2 (2010), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/CollateralCosts1pdf.pdf. (Last accessed December 9, 2015)

⁸⁷ *Id.*

⁸⁸ Deborah Archer & Kele Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 532 (2005).

A. Barriers to Employment

Employment is a vital factor for reintegration but the reality of gaining employment for a recently released person is often very bleak. Aside from the easy access to criminal records, the inaccuracy of some such records and the stigma of re-entrant status, other factors frequently include: (i) low levels of education and previous work experience; (ii) substance abuse or other mental health issues; (iii) residence in lower income urban neighborhoods (which have disproportionately high unemployment and underemployment rates); and (iv) distrust of traditional work.⁸⁹ Throughout the United States, up to 70 percent of prison inmates operate at the low end of the literacy range, making it difficult to fill out a job application or even negotiate a train or bus schedule.⁹⁰ Further, there are more than 100 occupations in New York State that require some type of license or certification, ranging from medicine to cosmetology.⁹¹ Many of the licensing statutes require "good moral character" or some standard that allows the licensing board to disqualify an individual based on criminal conviction.⁹² More than two-thirds of the states allow licensing decisions to be made on an arrest alone.⁹³ Anyone convicted of a felony also cannot enlist in the armed forces.⁹⁴ Additionally, the very few job-training opportunities while in prison prevent those who want to better themselves from getting good skill training before their release.

A recent helpful development is that on September 21, 2015, Governor Andrew M. Cuomo announced that pursuant to a recommendation by the Council on Community Re-Entry and Reintegration, he had issued an executive order requiring that uniform guidelines be used to evaluate qualified applicants for state occupational licenses in contrast to the pre-existing uneven approach to reviewing applicants for occupational licenses.⁹⁵

⁸⁹ N.Y. STATE BAR ASS'N, "REENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY" – REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS 204 (2006), <http://csgjusticecenter.org/wp-content/uploads/2007/09/2006-NYSBA-report.pdf>. (Last accessed December 9, 2015)

⁹⁰ CHRISTY VISHER ET AL., URBAN INST., EMPLOYMENT AFTER PRISON: A LONGITUDINAL STUDY OF RELEASEES IN THREE STATES 3-7 (2008), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releasees-in-Three-States.PDF>. (Last accessed December 9, 2015)

⁹¹ *Occupations Licensed or Certified By New York State*, NEW YORK STATE DEPARTMENT OF LABOR, <https://labor.ny.gov/stats/lstrain.shtm> (last visited December 9, 2015).

⁹² N.Y. GEN. BUS. LAW § 434(b) (McKinney 2013); N.Y. EXEC. LAW § 435(2)(c)(1) (McKinney 2013).

⁹³ Alfred Blumstein & Kiminori Nakamura, Op-Ed., *Paying a Price, Long After the Crime*, N.Y. TIMES, Jan. 9, 2012, <http://www.nytimes.com/2012/01/10/opinion/paying-a-price-long-after-the-crime.html>. (Last accessed December 9, 2015)

⁹⁴ 10 U.S.C. § 504(a).

⁹⁵ Press Release, N.Y. State, *Governor Cuomo Announces Executive Actions to Reduce Barriers for New Yorkers with Criminal Convictions* (September 21, 2015) <https://www.governor.ny.gov/news/governor-cuomo-announces-executive-actions-reduce-barriers-new-yorkers-criminal-convictions>. New guidelines will apply to applications for licenses, including those for barbers, paramedics and real estate brokers, among others, with a presumption towards granting a license, unless an individualized consideration of an applicant's criminal record under New York's anti-discrimination statute governing licensing and employment weighs against it. Before the Governor's executive actions, there was an uneven approach to reviewing applications for occupational licenses for several different occupational licenses

Today, more than 13,000 statutes or regulations affect a person leaving custody in seeking employment.⁹⁶ Moreover, 84 percent of institutionalized collateral consequences relate to employment.⁹⁷ Although some of the restrictions can be justified due to public policy to protect vulnerable populations (*e.g.*, children) or because the crime committed aligns with the heightened risk of the particular job, most of the restrictions are purely punitive.⁹⁸ These restrictions are not premised on any relationship between the specific crime committed and the specific job to be performed.⁹⁹

In response, immediate past United States Attorney General Eric Holder began a review of the relationship between the federal collateral consequences of incarceration and public safety.¹⁰⁰ As part of this review, every state attorney general was asked to consider state collateral consequences' relationship to public safety. The Holder-initiated review sought to identify burdens that do not increase public safety – so they could be eliminated.¹⁰¹

Beyond the formal barriers described above, it is apparent that many employers engage in employment discrimination.¹⁰² Employers are often reluctant to hire someone who has been incarcerated. For example, in a study conducted by Devah Pager, two fictitious resumes showing the same level of education and experience were created, with one resume indicating a criminal record.¹⁰³ The likelihood of callback was reduced by half for white applicants with a criminal record, whereas only one-third of African American applicants with a criminal record received callbacks.¹⁰⁴ Similarly, a recent survey of employers revealed that only eight percent indicated they were "often willing" to consider an individual recently released for employment.¹⁰⁵

The first few months after release, which are the most important in reducing recidivism, are the time frame with the highest unemployment rates.¹⁰⁶ Reportedly, up to 60 percent of those recently released from prison or jail in the United States are unemployed one year after their release.¹⁰⁷

⁹⁶ *National Inventory of the Collateral Consequences of Conviction*, AM. BAR ASSOC., <http://www.abacollateralconsequences.org> (last visited December 9, 2015)

⁹⁷ *See id.*; *Written Testimony of Stephen Saltzburg*, *George Washington University Professor*, U.S. Equal Employment Opportunity Commission (July 26, 2011).

⁹⁸ Archer & Williams, *supra* note 88, at 583; Marliana Freisthler & Mark Godsey, *Going Home to Stay: A Review of Collateral Consequences of Conviction, Post-Incarceration, Employment, and Recidivism in Ohio*, 36 U. TOL. L. REV. 525, 543 (2005).

⁹⁹ Archer & Williams, *supra* note 88, at 583.

¹⁰⁰ Memorandum from Eric. H. Holder, Att'y Gen., DOJ, to Heads of Dep't of Justice Components and U.S. Att'ys 2 (Aug. 12, 2013), <http://csgjusticecenter.org/wp-content/uploads/2013/09/DOJ-Collateral-Consequences-memo-8-12-13.pdf>. (Last accessed December 9, 2015)

¹⁰¹ *Id.*

¹⁰² Archer & Williams, *supra* note 88, at 535, 537.

¹⁰³ DEVAH PAGER, *MARKED: RACE, CRIME AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 38 (Univ. Chi. Press ed., 2007).

¹⁰⁴ *Id.*

¹⁰⁵ Stacy A. Hickox & Mark V. Roehling, *Negative Credentials: Fair and Effective Consideration of Criminal Records*, 50 AM. BUS. L.J. 201, 226 (2013).

¹⁰⁶ Archer & Williams, *supra* note 88, at 535.

¹⁰⁷ *Id.*

Studies show that incarceration reduces an individual's post-incarceration wages, time of employment, and salary -- amounting to a loss of \$179,000 per person through the age of forty-eight.¹⁰⁸ Such individuals' upward mobility is significantly reduced, and substantial research suggests that reduced economic prospects of parents diminish the economic mobility of their children.¹⁰⁹ It is thus unsurprising that about two-thirds of those released are re-arrested, mostly for new economic crimes, and return to the prison system within three years of release.¹¹⁰ Indeed, 40 percent of former federal prisoners are re-arrested.¹¹¹

Thus, the inability to find employment at least catalyzes economic crimes and, hence, recidivism.¹¹² Many have concluded that barriers to employment negatively affect released persons' rehabilitation and reintegration.¹¹³

Several studies show an inverse relationship between employment and involvement in crime.¹¹⁴ About two-thirds of re-offenses occur within the first three years,¹¹⁵ and about 30 percent of such re-arrests occur in just the first six months.¹¹⁶

Prisons have become the "warehouses for outcasts; they put problem people at a distance from those who may help reintegrate them."¹¹⁷ This report makes recommendations aimed at alleviating some of the barriers and negative outcomes from a criminal charge or imprisonment, so as to reduce recidivism and improve employment opportunities.

¹⁰⁸ THE PEW CHARITABLE TRUSTS, *supra* note 86, at 4.

¹⁰⁹ *Id.* at 4 (stating that about 2.7 million children, or about one in every twenty-eight children, have at least one parent in jail or prison).

¹¹⁰ *Recidivism*, NATIONAL INSTITUTE OF JUSTICE: OFFICE OF JUSTICE PROGRAMS (June 17, 2014), <http://www.nij.gov/topics/corrections/recidivism/pages/welcome.aspx>. (Last accessed December 9, 2015)

¹¹¹ *A Comprehensive Anti-Violence Strategy: Reentry, Prevention, and Enforcement*, THE UNITED STATES DEPARTMENT OF JUSTICE (Oct. 11, 2012), <http://www.justice.gov/opa/blog/comprehensive-anti-violence-strategy-reentry-prevention-and-enforcement>. (Last accessed December 9, 2015)

¹¹² See PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEPT OF JUSTICE, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002), <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf>; Denis Gottfredson, David B. Wilson & Stacy Najaka, *The Schools*, in CRIME: PUBLIC POLICIES FOR CRIME CONTROL 149, 154 (J. Q. Wilson & J. Petersilia eds., 2002).

¹¹³ See, e.g., N.Y. STATE BAR ASS'N, *supra* note 89, at 251; *Recidivism*, *supra* note 110.

¹¹⁴ See, e.g., Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715, 719 (2012); Miriam Aukerman, *Criminal Convictions as a Barrier to Employment: How Attorneys Can Help People with Records Get A Second Chance*, 87 MICH. B.J. 32, 33 (2008); Avi Brisman, *Double Whammy: Collateral Consequences of Conviction and Imprisonment for Sustainable Communities and the Environment*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 423, 429 (2004); Bruce E. May, *Real World Reflection: The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N. DAK. L. REV. 187, 188 (1995); Peter T. Kilborn, *Flood of Ex-Convicts Finds Job Market Tight*, N.Y. TIMES, Mar. 15, 2001, at A16.

¹¹⁵ Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 461.

¹¹⁶ JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 141 (Oxford University Press, Inc. 2003).

¹¹⁷ *Id.* at 251.

B. Benefits that Result from Overcoming Employment Barriers

There are several benefits in addressing the employment barriers facing those recently released from prison or jail and those charged with a crime. First, multiple studies show that employment prevents recidivism.¹¹⁸ Employment is the number one factor for successful reintegration.¹¹⁹ Above that, those recently released themselves identify employment as one of the essential elements to remain crime-free.¹²⁰ Thus, re-entrants are less likely to engage in crime if they are employed and earning a living. Not only is giving an individual recently released from prison or jail a fair opportunity for employment arguably a protected right,¹²¹ it is also one of the best ways to prevent recidivism.¹²²

Employment discourages recidivism through the following means: (i) reduction in "association with criminal peers by expanding social networks to include more law-abiding citizens;"¹²³ (ii) disassociation with criminal identity and adoption of a pro-social role;¹²⁴ and (iii) reduction in crime due to an alternate source of financial support.¹²⁵ Employment provides such imprisoned individuals with benefits such as income, personal satisfaction, opportunities for favorable social interaction, and stability.¹²⁶ A sense of well-being is promoted in addition to a connection to the workplace and to the surrounding community.¹²⁷

C. Recommendations

This report's recommendations, begin with pre-charge and extend to post-release. While this section places a strong emphasis on diversion programs, it does not go into great detail, as diversion programs are more thoroughly analyzed in Section II. This section recommends programs during incarceration, during the release period, and, long-term, after release. As discussed above, the best re-entry program begins during incarceration and continues through the release and reintegration.

We recommend: (1) enacting a "ban the box" statute statewide, applicable to both private and public employers, (2) adopting and implementing the notice and relief provisions of the

¹¹⁸ Rose M. Burt, *More Than a Second Chance: An Alternative Employment Approach to Reduce Recidivism Among Criminal Ex-Offenders*, 6 TENN. J.L. & POL'Y 9, 12 (2014). Archer & Williams, *supra* note 88, at 531; Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOC. REV. 529, 529-30 (2000).

¹¹⁹ Archer & Williams, *supra* note 88, at 527.

¹²⁰ *What Works in Reentry Clearinghouse*, THE COUNCIL OF STATE GOVERNMENTS, JUSTICE CENTER, <https://whatworks.csgjusticecenter.org/focus-area/employment-topic>. (Last accessed December 9, 2015)

¹²¹ Ben Geiger, *The Case for Treating Ex-offenders as a Suspect Class*, 94 CAL. L. REV. 1191, 1225 (2006).

¹²² Archer & Williams, *supra* note 88, at 527.

¹²³ JEREMY TRAVIS & CHRISTY VISHER, *PRISONER REENTRY AND CRIME IN AMERICA* 234 (Cambridge University Press 2005).

¹²⁴ SHADD MARUNA, *MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES* (2001).

¹²⁵ Travis & Visser, *supra* note 123.

¹²⁶ FARRALL, S., *RETHINKING WHAT WORKS WITH OFFENDERS: PROBATION, SOCIAL CONTEXT AND DESISTANCE FROM CRIME* (Willam Publishing 2002).

¹²⁷ *Id.*

Uniform Collateral Consequences of Conviction Act ("UCCCA"), drafted by the National Conference of Commissioners of Uniform State Laws to provide a more individualized assessment of the application of collateral consequences to a specific re-entrant, (3) having formal programs that connect about-to-be-released individuals with community services, (4) implementing short-term "day" releases that allow employment training or placement and include pre-release trainings, especially computer training, (5) refining the New York State Department of Corrections and Community Supervision ("DOCCS") Work for Success and Pay for Success programs, and (6) implementing child support payment reform.

As discussed immediately below, the long-term costs when recently released people return to incarceration are much greater than the cost of diversion programs, pre-charge programs, and good transition services and treatments upon release.

1. Implement "Ban the Box" Statute Statewide

At a time when mass incarceration is at an all-time high, qualified workers who carry the stigma of a criminal record face real barriers to employment. Such barriers have real consequences for millions of Americans with past convictions (or even arrests without convictions) as well as for our society's economic and social stability. One such barrier is the "box" on job applications that asks about one's criminal history.¹²⁸ The "box" not only discourages those with convictions or arrests from applying, but also artificially narrows the pool of applicants when employers automatically throw away an application with the "box" checked.¹²⁹ Employers throw out these applications without adequately considering the applicant's qualification or the relevance of the conviction or arrest to the employment.

It is estimated that the reduction of goods and services of people with convictions or arrests costs the United States about \$57 to \$65 billion in losses.¹³⁰ Employment of those with convictions or arrests would allow for increased tax contributions, enhance consumer sales and sales taxes, and save funds that would otherwise be spent on individuals who have returned to the criminal justice system.¹³¹ A 2011 study found that employing just 100 formerly incarcerated people would increase their lifetime earnings by \$55 million, increase their income tax contributions by \$1.9 million, and boost sales tax revenues by \$770,000, while saving \$2 million a year by keeping them out of the criminal justice system.¹³²

¹²⁸ NAT'L EMP'T LAW PROJECT, *Ban the Box Resource Guide*, 8 (2013) (hereinafter *NELP Ban the Box Resource Guide*), http://nelp.3cdn.net/834261d211eee6922f_58m6brp1.pdf

¹²⁹ *Id.*; Jessica S. Henry & James B. Jacobs, *Ban the Box to Promote Ex-Offender Employment*, 6 CRIMINOLOGY & PUB. POL'Y 755 (2007).

¹³⁰ John Schmitt and Chris Warner, *Ex-Offenders and the Labor Markets*, Center for Economic and Policy Research 1 (Nov. 2010), <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf>. (Last accessed December 9, 2015)

¹³¹ NAT'L EMP'T LAW PROJECT, *"Ban the Box" is a Fair Chance for Workers with Records*, 1-2, <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-Fact-Sheet.pdf>. (Last access January 5, 2016) In fact, employment is a significant factor in reducing re-offending.

¹³² PolicyLink, *America's Tomorrow: Equity is the Superior Growth Model, Why "Ban the Box" Matters: Durham's Success Story*, Oct. 9, 2014., <http://policylink.org/focus-areas/equitable-economy/americas-tomorrow-newsletters/ban-the-box-success> (Last accessed December 9, 2015)

To eliminate such costs to society, a total of 18 states representing nearly every region of the country that have adopted "ban the box" policies —California (2013, 2010), Colorado (2012), Connecticut (2010), Delaware (2014), Georgia (2015), Hawaii (1998), Illinois (2014, 2013), Maryland (2013), Massachusetts (2010), Minnesota (2013, 2009), Nebraska (2014), New Jersey (2014), New Mexico (2010), Ohio (2015), Oregon (2015), Rhode Island (2013), Vermont (2015), and Virginia (2015). Seven states, Washington D.C. and 12 cities and counties have removed the conviction history question on job applications for private employers, which advocates embrace as the next step in the evolution of these policies.¹³³ In addition, major corporations such as Wal-Mart and Target have voluntarily removed the "box" from their initial job applications.¹³⁴

Hawaii's 1998 "ban the box" law proved to be extremely successful in reducing repeat felony offending. A study found that The current study investigates a criminal defendant prosecuted in Honolulu County for a felony crime was 57 % less likely to have a prior criminal conviction after the implementation of Hawaii's ban the box law.¹³⁵ "Ban the box" laws have resulted in similar success Durham, North Carolina, "where government hiring of people with records has increased dramatically since the city and county removed questions about prior convictions from job applications."¹³⁶ Since the policy came into effect in 2012, the number of new hires with records has increased by 13.5 percent.¹³⁷ The change in policy has shown no compromise to public safety, which was the biggest concern with banning the box. There has been no increase in workplace crime in either the city or the county government, and no employee has been fired because of illegal activity.¹³⁸

Currently, New York prohibits "unfair discrimination against persons previously convicted of one or more criminal offenses" in both public and private employment and licensing, unless the conviction is directly related to the employment or license sought, or there is an unreasonable risk to property or to the public.¹³⁹ This fairness statute, however, does not remove the question on job applications about an individual's conviction or arrest history or delay the background check inquiring until later in the hiring process.

Yet, there are currently six cities in New York that have implemented such initiatives. In Buffalo, Rochester and New York City the "box" is banned for both public and private

¹³³ NAT'L EMP'T LAW PROJECT, *Ban the Box Resource Guide*, 1 (2015), <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>. (Last accessed December 9, 2015)

¹³⁴ NAT'L EMP'T LAW PROJECT, *Ban the Box Resource Guide*, 14 (2015), <http://www.nelp.org/content/uploads/2015/01/Report-Federal-Fair-Chance-Hiring-Agenda.pdf>; "NAT'L EMP'T LAW PROJECT, Ban the Box" Voices in Support, 2, http://nelp.3cdn.net/0e4548d1901d375c45_2tm6b3qa4.pdf.

¹³⁵ Stewart J. D'Alessio et al., *The Effect of Hawaii's Ban The Box Law on Repeat Offending*, 40 Am J Crim Just 336, 347 (1992).

¹³⁶ PolicyLink, America's Tomorrow: Equity is the Superior Growth Model, *Why "Ban the Box" Matters: Durham's Success Story*, Oct. 9, 2014, <http://policylink.org/focus-areas/equitable-economy/americas-tomorrow-newsletters/ban-the-box-success>. (Last accessed December 10, 2015)

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ NY CORRECT. LAW §§ 752-753 (McKinney 2014).

employers as well as for vendors who do business within the city.¹⁴⁰ In June, 2015, the New York City Council passed the Fair Chance Act. This legislation is one of the strongest ban-the-box policies nationwide, requiring private and public sector employers to delay any inquiry about criminal record history until after a conditional job offer.¹⁴¹ Additionally, in Syracuse, Ulster County and Yonkers, the box is removed for government employment.¹⁴²

In September 2015, Governor Cuomo issued an executive order under which applicants applying for positions with New York State agencies will not be required to discuss or disclose information about prior convictions until and unless the agency has interviewed the candidate.¹⁴³

Recommendation: We recommend that New York State adopt a statewide "ban the box" policy by removing the question from both private and public employers' applications and delay the background check to a later part of the hiring process. This will allow consistency and uniformity of the law within the state, as well as give a fair opportunity to stigmatized individuals. It allows employers to judge applicants on qualifications first and to make individualized assessments considering the age of the offense and relevancy to the employment.

2. Limit Employment Collateral Consequences

Collateral consequences have traditionally been "one size fits all." This undermines any public safety rationale for many collateral consequences.¹⁴⁴ For example, while the reason given for barring a sex offender from working in child-care facilities may be sound, the same line of reasoning fails when a minor drug offender is barred from educational loans and grants.¹⁴⁵ Similarly, a one-time felon convicted of the lowest felony can be denied access to barbershop licensing.¹⁴⁶ Surely, the severity of collateral consequences should be proportional to the crime committed.

¹⁴⁰ NAT'L EMPT LAW PROJECT, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies to Reduce Unfair Barriers to Employment of People with Criminal Records*, 42, 49, <http://www.aicpa.org/Advocacy/State/DownloadableDocuments/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf> (Last accessed December 10, 2015)

¹⁴¹ *Victory! New York City Council Passes Fair Chance Act!* (June 10, 2015), <http://www.vocal-ny.org/blog/victory-new-york-city-council-passes-fair-chance-act>. (Last accessed December 10, 2015)

¹⁴² NAT'L EMPT LAW PROJECT, *Ban the Box Resource Guide*, 69 (2015), <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>. (Last accessed December 10, 2015)

¹⁴³ Press Release, N.Y. State, *Governor Cuomo Announces Executive Actions to Reduce Barriers for New Yorkers with Criminal Convictions* (September 21, 2015) <https://www.governor.ny.gov/news/governor-cuomo-announces-executive-actions-reduce-barriers-new-yorkers-criminal-convictions>. (Last accessed December 10, 2015)

¹⁴⁴ See Archer & Williams, *supra* note 88, at 583.

¹⁴⁵ *Id.* This report does not address the additional complex issues facing certain re-entrants who are classified as sex offenders. These issues are deserving of a full separate study and report

¹⁴⁶ Clyde Haberman, *Ex-Inmate's Legacy: Victory Over Bias and Catch-22 Bureaucracy*, N.Y. TIMES, Aug. 28, 2008, <http://www.nytimes.com/2008/08/29/nyregion/29nyc.html>. (Last accessed December 10, 2015)

For such reasons and more, Governor Cuomo in September 2015 announced an executive order under which there are to be uniform guidelines for evaluating qualified applicants for state occupational licenses.¹⁴⁷

The UCCCA is an effort to make collateral consequences somewhat proportional to the underlying crime. Originally issued by the Uniform Law Commission in 2009, and amended in 2010, it has two procedural sections: notice and relief. Under the notice section, the UCCCA sets forth a process through which criminal defendants would be notified of the "indirect penalties" that may attach upon conviction.¹⁴⁸ Under the relief section, defendants would be able to have some relief from such penalties when appropriate. Thus, the UCCCA provides for "individualized assessment" to grant or deny a right based on the individual and the "particular facts and circumstances" involved in the offense.¹⁴⁹ It would require a "substantial relationship" between the offense and the collateral consequence. And it would create an Order for Limited Relief, which provides, at the sentencing phase, an opportunity for the court or agency to remove certain automatic collateral restrictions.¹⁵⁰ It also would permit relief for individuals who have abided by the law for a certain amount of time: the Certificate of Restoration of Rights. This would give any potential employer, landlord or licensing agency an objective set of facts about the re-entrant's progress and a degree of assurance. Also, UCCCA's Section 10 would permit an individual recently released to receive relief from several collateral consequences if (s)he can prove the relief would "materially assist" in gaining employment, education, housing, or public benefits, and that the individual has a "substantial need" to live a "law-abiding" life.¹⁵¹

Recommendation: New York State should adopt the UCCCA's notice and relief provisions to provide a more individualized assessment of the application of collateral consequences to a specific re-entrant. Further, New York State should require thorough analysis of current collateral consequences, especially employment barriers, that hamper an individual's re-entry so that New York State may develop some sort of relation between the convicted crime and the rights denied.

Moving in this direction, in one of his September 2015 executive orders, Governor Cuomo ordered that there be new and more accessible processes to obtain Certificates of Relief from Disabilities and Certificates of Good Conduct. Such documents are similar to the Certificates in UCCCA.¹⁵²

¹⁴⁷ Press Release, N.Y. State, *Governor Cuomo Announces Executive Actions to Reduce Barriers for New Yorkers with Criminal Convictions*, *supra* note 143.

¹⁴⁸ UNIFORM LAW COMM'N, *Why States Should Adopt UCCCA*, <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UCCCA> (Last accessed December 10, 2015).

¹⁴⁹ NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, *Uniform Collateral Consequences of Conviction Act*, at 20-27 (2010), *supra* note 243.

¹⁵⁰ *Id.* at 27.

¹⁵¹ NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, *supra* note 149, at 20-21; Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 *How. L.J.* 753, 785-86 (2011).

¹⁵² Press Release, N.Y. State, *Governor Cuomo Announces Executive Actions to Reduce Barriers for New Yorkers with Criminal Convictions*, *supra* note 143.

3. Use Re-entry Community Resources

Community, including faith-based, resources play an important role in integrating those recently released from prison or jail into communities. This report argues for a holistic re-entry programming that provides employment, housing, education, counseling, vocational training, health care and social opportunities designed to combat the currently extreme collateral consequences. The community programs, whether or not faith-based, should specifically work and assist those re-entering individuals with job training and placement.

Upon their release, re-entrants return to predominantly low-income neighborhoods where the number of employment opportunities are limited. They are often forced to take jobs in developed business areas that are quite a distance from their housing; this burden is worsened when the individuals recently released are unable to secure a driver's license. Finding housing and employment are crucial to a re-entrant's successful reintegration into society. However, after serving their time, many find that they cannot get a job without a home address and cannot find a place to live without the money to pay rent.¹⁵³ In Tarrant County, Texas, a 2011 homeless survey showed that more than 76 percent of the 410 people surveyed said their criminal records were the main reason they were unemployed.¹⁵⁴

Faith-based community resources have become a big part of the re-entry programs available for those recently released from prison or jail. There are many faith-based prison ministries and programs.¹⁵⁵ For example, the Ulster County, New York, Probation Department has a strong relationship with the New Progressive Baptist Church's Save Them Now program, which provides individuals recently released with re-entry services.¹⁵⁶ These faith-based resources should be made available to incarcerated individuals while in prison and immediately upon their release to help them find employment. For instance, in Texas, the Innerchange Freedom Initiative targets re-entrants within 18 to 30 months of their release and emphasizes the importance of personal responsibility through the use of biblical teachings.¹⁵⁷ Corrections-related faith-based programs, staffed by committed volunteers, can potentially reduce the cost of providing services.¹⁵⁸ Faith-based groups draw upon and reflect community values and culture. Also, their position within the community offers ties that are essential in giving offenders a better

¹⁵³ Mitch Mitchell, *Ex-offenders says housing, jobs are tough to find*, The Fort-Worth Star Telegram, (May 29, 2012), <http://www.mcclatchydc.com/news/nation-world/national/economy/article24730114.html#storylink=cpy>. (Last accessed December 10, 2015)

¹⁵⁴ *Id.*

¹⁵⁵ BUREAU OF JUSTICE ASSISTANCE, *A Guide for States Faith-Based and Community Organizations*, 11 (2008), <http://www.justice.gov/archive/fbci/docs/reentry-partnership.pdf>. (Last accessed January 5, 2016)

¹⁵⁶ *Id.* at 12.

¹⁵⁷ Jason Clark, *Incarceration, Recidivism & Rehabilitation: Reducing Risk and Recidivism: The Texas Department of Criminal Justice Rehabilitation Programs*, 75 TEX. B.J. 612, 614 (2012) http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/Clark_ReducingRiskandRecidivism.authcheckdam.pdf ; BUREAU OF JUSTICE ASSISTANCE, *A Guide for States Faith-Based and Community Organizations*, 2 (2008), <http://www.justice.gov/archive/fbci/docs/reentry-partnership.pdf>.

¹⁵⁸ BAYLOR UNIVERSITY, *Faith-Based Re-Entry Program for Prisoners Saves Money, Reduces Recidivism*, NEWSWISE (Aug. 8, 2013, 4:00 PM), <http://www.newswise.com/articles/faith-based-re-entry-program-for-prisoners-saves-money-reduces-recidivism-baylor-study-finds>. (Last accessed December 10, 2015)

chance for success and employment when they return home.¹⁵⁹ Note that all religions should be included as faith-based resources.

Beyond faith-based programs, social services and re-entry services should also serve an important role. Prior to re-entry, the service providers must begin contact with their incoming clients. A discharge plan before release and meaningful contact with a community resource are vital to re-entry success and lowering recidivism.¹⁶⁰ For example, in Delaware, Sojourner's Place provides clients with the skills and opportunities to find employment, with half of their participants working after re-entry.¹⁶¹ In New York, America Works, Inc. and Brooklyn Workforce Innovations are current community service programs that provide assistance in finding permanent employment.¹⁶² STRIVE, a program beyond mere job placement, is a three to four week program that focuses on the re-entrants' attitude, communication skills, and very basic computer abilities. STRIVE then assists with placing the individual in full-time employment.¹⁶³ However, such programs are consistently in need of funding and resources to better help their clients. Without assistance from the public and the government, it is not possible for these organizations and community service providers to truly accomplish their goals in helping re-entrants with successful re-entry.

A unique approach to re-entry community services includes involving the various social work graduate programs within New York State. Social work students, who participate in clinics (*i.e.*, programs within the school that allow students to represent clients during the students' education), will serve as the primary coordinators for an individual's re-entry. Each student will communicate with offenders during the incarceration period and determine each individual's needs and goals. The student will essentially act as a liaison between the offender and available community services. As demonstrated by similar successful clinics run by New York University Law School and Brooklyn Law School in which law students provide legal aid to re-entrants as they reintegrate into society,¹⁶⁴ this alternative may be a more cost-effective way to connect an re-entrants with the community, while clinical students simultaneously gain experience and learn from their representations.

Recommendation: A formal program should be put into place to connect individuals about to be released, and also those individuals recently released, with community service programs, whether or not faith-based. Such community programs must have formal connection

¹⁵⁹ *Id.*

¹⁶⁰ Nancy G. La Vigne, et. al., *Release Planning for Successful Reentry: A Guide Corrections, Service Providers, and Community Groups*, Urban Institute Justice Policy Center, 5 (2008), http://www.urban.org/research/publication/release-planning-successful-reentry/view/full_report. (Last accessed December 10, 2015)

¹⁶¹ Joanna Champney, *The Difficult Journey Home: Returning to the Community from Prison*, DEL. LAWYER, Summer 2014, at 20, 21.

¹⁶² AMERICA WORKS, <http://www.americaworks.com> (last accessed December 10, 2015); BROOKLYN WORKFORCE INNOVATIONS, <http://www.bwiny.org/> (last visited Apr. 1, 2015).

¹⁶³ STRIVE INT'L, <http://striveinternational.org> (last visited Apr. 1, 2015).

¹⁶⁴ Criminal Defense and Reentry Clinic, NYU Law, <http://www.law.nyu.edu/academics/clinics/year/criminaldefense>; Clinic - Youth Reentry and Legal Services, Brooklyn Law School, <https://www.brooklaw.edu/academics/curriculum/coursedescriptions/course?id=318>.

with to-be-released offenders to better assist the individuals in obtaining temporary and permanent employment. Second, to incentivize more community service programs and to promote the continuation of current programs, there must be improved New York State funding and private donations. Finally, clinics should be funded that will connect social work students, preferably those studying for their graduate degree, with offenders so the clinicians can act as liaisons and provide resources to an individual upon re-entry.

4. Implement Temporary Release Programs and Pre-Release Training

Temporary release programs and training while incarcerated not only encourage economic and job growth, but also reduce recidivism and strengthen communities.¹⁶⁵ Today, such programs are given little funding and have become mere afterthoughts. However, preparing incarcerated individuals and then connecting them to jobs not only saves taxpayers' money, but also helps local economies.¹⁶⁶ Reducing joblessness and poverty also alleviates recidivism.¹⁶⁷ There are several forms of rehabilitation programs to implement while the individual is in prison, but the most common include: (i) education; (ii) needs assessment; (iii) vocational training; (iv) employment; (v) behavioral, mental health, and substance abuse treatment; and (vi) resettlement in the community through assistance in finding employment and housing.¹⁶⁸ Many may argue that this would be too costly; however, a study by the Washington State Institute for Public Policy showed that the ratio of benefits per dollar of costs is actually positive for every correctional treatment, with work release programs receiving the highest ratio.¹⁶⁹

(a) Short-Term Work Releases

Transitional jobs during incarceration are extraordinarily helpful in providing temporary, paid work for individuals who otherwise have difficulty getting employment after imprisonment. Many of these individuals are very eager to work. This temporary work prepares them to subsequently find jobs in the regular labor market.¹⁷⁰ In fact, the Reentry Policy Council recommends that correctional facilities provide actual opportunities so that inmates can gain work experience to better ease their transition into society.¹⁷¹ Work release programs allow the inmate to learn marketable skills and build bonds with possible future employers.¹⁷² From an employer's perspective, the correctional facility will bear the risk, pay for transportation, and

¹⁶⁵ Burt, *supra* note 118, at 9, 15; Pinard, *supra* note 115, at 459; Archer & Williams, *supra* note 88, at 529; et. al., Brett Garland, Value Conflict and Public Opinion Toward Prisoner Reentry Initiatives, 24 Crim. Justice Pol'y Rev. 27, 61 (2013).

¹⁶⁶ Brett Garland, *supra* note 165, at 27, 33.

¹⁶⁷ *Id.*

¹⁶⁸ See Archer & Williams, *supra* note 88, at 529.

¹⁶⁹ JOAN PETERSILIA, *supra* note 116, at 178-79.

¹⁷⁰ CORRECTIONS CORP. OF AM. RESEARCH INST., *CCA on Pre-Release and Reentry Services*, <https://www.cca.com/Media/Default/documents/CCA-Resource-Center/09-0910-ResearchInstitute-WhitePaper.pdf> (Last accessed December 10, 2015)

¹⁷¹ RE-ENTRY POLICY COUNCIL, COUNCIL OF STATE GOV'TS, *Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community* (2005), <http://csgjusticecenter.org/wp-content/uploads/2012/09/1691.pdf>. (Last accessed December 10, 2015)

¹⁷² *Id.*

guarantee employment for employers who may have a labor shortage.¹⁷³ Such measures will also allow for public acceptance.¹⁷⁴

The number of inmates being accepted and participating in the temporary release program has drastically decreased in the past decade. In 1997, there were 15,034 temporary release participants,¹⁷⁵ whereas by 2013 that number had decreased to 796 total participants in all temporary release programs.¹⁷⁶ In the work release program specifically, 21,095 inmates applied in 2013, however only 700 were accepted and participated.¹⁷⁷

Examples of successful pre-release programs include those from other states as well as foreign countries. For example, in Sweden, the philosophy is that "every person deprived of freedom must spend the time in a useful way" and thus education or work must be available.¹⁷⁸ Prisoners are also under obligation to work or participate in vocational training or education, some outside of prison.¹⁷⁹ Similarly, in Germany, the prison system has work-day releases to attend training or employment.¹⁸⁰ In fact, more than 70 percent of those recently released continue to work with that particular employer after release and others are able to secure positions through experience gained while in prison.¹⁸¹ Similarly, in Maryland, an inmate is allowed pre-release leave for employment interviews or to participate in education programs.¹⁸² A recent study of Minnesota prison work release programs showed significant increase in the odds that the participants found a job, in the total hours they work and in the total wages they earn.¹⁸³ Further, the study showed that the work release program produced cost avoidance benefits of about \$1.26 million overall, or \$700 per participant.¹⁸⁴ Temporary release has proven

¹⁷³ Gerald P. López, *How Mainstream Reformers Design Ambitious Reentry Programs Doomed to Fail and Destined to Reinforce Targeted Mass Incarceration and Social Control*, 11 HASTINGS RACE & POVERTY L. J. 1, 52 (2014).

¹⁷⁴ Garland, *supra* note 165.

¹⁷⁵ See DOCCS, *Temporary Release Program, 2009 Annual Report*, Table V, <http://www.doccs.ny.gov/Research/Reports/2010/TempReleaseProgram2009.pdf>

¹⁷⁶ See DOCCS, *Temporary Release Program, 2013 Annual Report*, Table V, <http://www.doccs.ny.gov/Research/Reports/2014/TempReleaseProgram2013.pdf>

¹⁷⁷ *Id.*

¹⁷⁸ The German and Swedish Rehabilitation Systems, United Kingdom House of Commons Report, <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmhaff/193/19326.htm>. (Last accessed December 10, 2015)

¹⁷⁹ *Id.*

¹⁸⁰ Axel Boetticher & Johannes Feest, *German Criminal and Prison Policy, Prison Policy and Prisoner's Rights*, 365-66, 380 (2008), http://www.internationalpenalandpenitentiaryfoundation.org/Site/documents/Stavern/19_Stavern_Report%20Germany.pdf. (Last accessed December 10, 2015)

¹⁸¹ Rouzhna Nayeri, *The Forever Scarlet Letter: The Need to Reform the Collateral Consequences of Criminal Conviction*, 5 WIDENER JOURNAL OF LAW, ECON. & RACE 109, 123-24 (2014).

¹⁸² 18 MD. LAW. ENCYC., Prisons and Prisoners § 33.

¹⁸³ Valerie A. Clark, *Predicting Two Types of Recidivism Among Newly Released Prisoners: First Addresses as "Launch Pads" for Recidivism or Reentry Success*, CRIME & DELINQUENCY, Nov. 12, 2014, <http://cad.sagepub.com/content/early/2014/11/11/0011128714555760.abstract>. (Last accessed December 10, 2015)

¹⁸⁴ Grant Duwe, An outcome evaluation of a prison work release program estimating its effects on recidivism, employment, and cost avoidance, Criminal Justice Policy Review 1, 19 (2014), <http://cjp.sagepub.com/content/early/2014/03/10/0887403414524590.full.pdf+html>.

to be a successful re-entry program, and likewise results in an enormous cost savings. These examples should inform future efforts to improve the current New York DOCCS short-term work release programs in place.

Recommendation: New York State should strengthen its current short-term work release program in a fashion that allows imprisoned individuals to "sample" particular work with an external employer or to attend education and training courses, with prison administration discretion. Correctional facilities must begin to attempt a relationship with local businesses to identify training needs and allow inmates to better position themselves for employment. In addition, this report recommends a formal pre-release apprenticeship program while the inmate is incarcerated. This prerelease apprenticeship program can give the re-entrants a career path, which allows for "normalization" and the ability to continue working with the particular employer after release or at least become more likely to secure positions through experience gained while in prison.

(b) Pre-Release Training

Pre-release vocational training is vital to an individual's reintegration. This report recommends a holistic approach to in-prison training, which examines the inmate's background, knowledge, and capabilities to build training and workplace programs. For example, for young offenders, educational programs are more beneficial, while for older offenders, job placement services are more effective.¹⁸⁵ Further, this report argues that recidivism would be tremendously reduced if inmates are offered pre-release training.¹⁸⁶ This section will analyze employment training programs that are effective while the individual is in prison.

First, computer training is the most necessary skill to teach current inmates. Funding and personnel are the two key obstacles to computer training pre-release. However, these obstacles should not dissuade the effort to teach imprisoned individuals computer skills while they are still incarcerated - especially for inmates who have been incarcerated long enough to have never even held a cellphone. Computer skills are a basic prerequisite for many jobs in the community. Even the most basic communications with a government agency, commercial entity, or other individuals, require access to and the ability to use computers – including the ability to type. The New York State DOCCS does offer vocational programs for Computer Technology & Support and Computer Operation, but these programs have been hampered by lack of funding.¹⁸⁷ Nevertheless, computer training is critically important in helping recently released individuals to find employment and may even supplement highly beneficial computer-based training in other vocational programs.¹⁸⁸

¹⁸⁵ *Id.*

¹⁸⁶ Congressman John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL'Y REV. 377, 384 (2013).

¹⁸⁷ DEPT OF CORRECTIONS & CMTY. SUPERVISION, <http://www.doccs.ny.gov/ProgramServices/vocational.html> (Last accessed December 10, 2015)

¹⁸⁸ Education and Vocational Training in Prisons Reduces Recidivism, Improves Job Outlook, RAND CORPORATION, (Aug. 22, 2013), <http://www.rand.org/news/press/2013/08/22.html>. (Last accessed December 10, 2015)

Computers must be allowed for inmates' employment readiness and offender workforce development. Some agencies, like the U.S. Bureau of Prisons, now have inmate e-mailing (without actual Internet access) as a means of communication while incarcerated.¹⁸⁹ However, funding is provided entirely from profits made from inmate purchases of commissary products, telephone services, and the fees inmates pay for using such services.¹⁹⁰ In the U.S., current rules permit all federal inmates and most state prisoners to send and receive emails through special, monitored systems. Since the U.S. Bureau of Prisons began its pilot program eight years ago, there have been no documented cases of inmates running criminal operations involving email.¹⁹¹ Government funding is necessary to ensure that learning how to use a computer and how to use the Internet are parts of individualized re-entry plans. The access would also allow the inmate to find job postings online and facilitate successful re-entry.

Within three years after their release, over two thirds of prisoners will find themselves back in prison.¹⁹² The lack of technology in prisons denies inmates basic life skills, creating yet another barrier to exiting the system by encouraging recidivism. One of the chief causes of this recidivism is a lack of job training and employable skills amongst the re-entrants population.¹⁹³ Allowing the use of computers and Internet in prisons yields significant benefits to the rehabilitation of inmates, such as boosting training, helping maintain family ties and facilitating re-entry into the community. In the United Kingdom, the virtual campus prison intranet system gives imprisoned individuals access to help with resettlement, skills and employment.¹⁹⁴ The Ministry of Justice suggests providing such access will allow inmates to "learn skills that will help in their rehabilitation and reduce their risk of reoffending."¹⁹⁵

To help bridge the digital divide and create awareness of resources available at public libraries, the Maryland Correctional Education Libraries produced a CD-Rom entitled "Discovering the Internet@ Your Library" which provides offline instruction about how to use the Internet.¹⁹⁶ The CD-Rom highlights Internet sites for housing, online high school equivalency degree practice test, job and career sites, community resources, rental and other housing information, and web addresses of local public officials.¹⁹⁷ Colorado Correctional Libraries have

¹⁸⁹ FED. BUREAU OF PRISONS, <http://www.bop.gov/inmates/communications.jsp>. (Last accessed December 10, 2015)

¹⁹⁰ FED. BUREAU OF PRISONS, <http://www.bop.gov/inmates/trulincs.jsp> (last accessed December 10, 2015)

¹⁹¹ Eli Lehrer, *Internet Access for Prisoners?*, The Weekly Standard (July 22, 2013), http://mail.theweeklystandard.com/articles/internet-access-prisoners_739266.html. (Last accessed December 10, 2015)

¹⁹² Ben Branstetter, *The Case for Internet Access in Prisons*, The Washington Post, (February 9, 2015), <http://www.washingtonpost.com/news/the-intersect/wp/2015/02/09/the-case-for-internet-access-in-prisons>. (Last accessed December 10, 2015)

¹⁹³ *Id.*

¹⁹⁴ BBC News, *Prison Reform Trust: Let prisoners use the internet*, (Oct. 28, 2013), <http://www.bbc.com/news/uk-politics-24706851>. (Last accessed December 10, 2015)

¹⁹⁵ *Id.*

¹⁹⁶ Glennor Shirley, *Prison Libraries and the Internet*, (June 2, 2004), <http://olos.ala.org/columns/?p=117>. (Last accessed December 10, 2015)

¹⁹⁷ *Id.*

similarly produced the first in a series of DVDs about modern services provided in public libraries in order to assist inmates with re-integration in the community.¹⁹⁸

Educational programs would also benefit from the expanded use of Internet in prison. Federal and state laws require prisons to offer high school equivalency degree courses, but options for inmates who want to go further and complete college-level work or learn a trade not available in their prison have decreased as correspondence schools have moved to the Internet.¹⁹⁹ Internet-based courses would be better suited to serving the broad range of educational levels, provide a better quality of instruction and lessen the cost taxpayers bear for high school equivalency degree and vocational programs.

The second most important training required is occupational education. Such trainings, especially if combined with short-release programs, will allow inmates to acquire marketable skills in trades relevant to the current market.²⁰⁰ Further, in-prison vocational education can be effective in increasing an inmate's likelihood of post-release employment.²⁰¹ Vocational training instructors contracted from community colleges and technical schools can provide such trainings so that inmates can earn the applicable certificates to help them gain employment when they enter society. Currently, DOCCS provides some vocational programs such as barbering, welding, plumbing, and heating.²⁰² However, these programs are not provided by all correctional facilities and have very little funding and resources to provide meaningful results. Adequate vocational training is crucial for an inmate to secure employment post-release. The enactment of "ban the box" laws prohibiting employers from asking about criminal history early in the application process would be rendered irrelevant if inmates do not hold the necessary vocational skills for employment. In addition, licensing authorities can deny a license in the specific trade due to "moral character" requirements, creating an additional barrier to employment.²⁰³

Recommendation: First, the New York State legislature should increase funding for inmate computer training. Even a minimal amount of computer training (*e.g.*, Word, Excel, PowerPoint, Internet interaction) could make re-entrants more attractive to future employers. In addition, it would allow an inmate to begin job searches while incarcerated through job postings online and could supplement additional computer-based vocational training. Second, we

¹⁹⁸ Correctional Education Association, *Internet Access for Prisoners*, 2008 International Conference, (2008)

¹⁹⁹ Eli Lehrer, *Internet Access for Prisoners?*, The Weekly Standard (July 22, 2013), http://mail.theweeklystandard.com/articles/internet-access-prisoners_739266.html (Last accessed December 10, 2015)

²⁰⁰ FED. BUREAU OF PRISONS, *A Directory of Bureau of Prisons' Nat'l Programs*, 6 (2014), http://www.bop.gov/inmates/custody_and_care/docs/BOPNationalProgramCatalog.pdf. Trainings may also include entrepreneurship and self-employment programs that teach soon-to-be-released prisoners and ex-offenders the necessary skills to establish small businesses and positively impact their communities. Matthew C. Stronfield, *Entrepreneurship and Prisoner Re-Entry: The Development of a Concept*, 35 Small Business Institute Research Review (2008), <http://www.sbij.org/index.php/SBIJ/article/view/58/31>.

²⁰¹ *Id.*

²⁰² DEPT OF CORRECTIONS & CMTY. SUPERVISION, *supra* note 187

²⁰³ A bill was passed by the Legislature and signed by Governor David A Paterson in 2008. This forbids New York State from denying a license to a would-be barber or cosmetologist merely because of an applicant's criminal record. However, critics were not sure it would have much of a positive practical effect. *See* Haberman, *supra* note 146 .

recommend that the current vocational training programs increase funding, increase alignment with the current market's demands, and increase the resources available for meaningful learning. Further, there must be more scrutiny in the alignment of license denial with the underlying crime charged.²⁰⁴

5. Assess and Consider Refining DOCCS Initiatives: Pay for Success and Work for Success

DOCCS is overseeing implementation in the prison system of the "Pay for Success" and "Work for Success" initiatives.²⁰⁵ These seek to provide targeted employment services for individuals recently released from prison or jail.

The more recent of these is Pay for Success, which was announced in 2013.²⁰⁶ It connects soon-to-be-released offenders with employment training as well as job placement.²⁰⁷ It is unique in that funding is provided in part by private investors.²⁰⁸ This is the first state-led project of its kind in the United States.²⁰⁹ It currently serves 2,000 formerly incarcerated individuals in New York City and Rochester.²¹⁰

The program seeks to increase employment in the fourth quarter following release, reduce recidivism, and maximize participant engagement in transitional jobs. The program was envisioned to operate in two phases over five and a half years.²¹¹ Pay for Success raised \$13.5 million from about 40 individuals or foundations, through its intermediary, the Social Finance and Bank of America Merrill Lynch.²¹² Investors included the Rockefeller Foundation, which invested \$1.3 million and the Robin Hood Foundation, which invested \$300,000.²¹³ Pay for Success was initiated with the hope of including 500 high risk offenders per year.

²⁰⁴ This last recommendation aligns with Governor Cuomo's September 2015 executive order seeking to implement the Council on Community Re-Entry and Reintegration's recommendation that there be uniform guidelines to evaluate qualified applicants for state occupational licenses.

²⁰⁵ Press Release, Dep't of Corrections & Cmty. Supervision, Governor Cuomo Announces \$12 Million Federal Grant For 'Pay For Success' (Sept. 23, 2013), http://www.doccs.ny.gov/PressRel/2013/Pay_For_Success.html; Press Release, N.Y. Exec. Comm., Governor Cuomo Announces More Than 9,400 Hired Through Work for Success Program (Feb. 13, 2015), http://www.doccs.ny.gov/NewsRoom/external_news/Work_for_success_AMC_PR.pdf. (Last accessed December 10, 2015)

²⁰⁶ Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces New York the First State in the Nation to Launch Pay for Success Project in Initiative to Reduce Recidivism (Dec. 30, 2013), <http://www.governor.ny.gov/news/governor-cuomo-announces-new-york-first-state-nation-launch-pay-success-project-initiative>. (Last accessed December 10, 2015)

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ N.Y. STATE DIV. OF THE BUDGET, Investing In What Works: Pay for Success in New York State, (March 2014), https://www.budget.ny.gov/contract/ICPFS/PFSFactSheet_0314.pdf. (Last accessed December 10, 2015)

²¹² *Id.*

²¹³ Pay for Success Learning Hub: New York State, PAY FOR SUCCESS, <http://payforsuccess.org/new-york-state>. (Last accessed December 10, 2015)

A Pay for Success Project involves a contract between the government and a third party organization.²¹⁴ The objectives are set by New York State. The third party is responsible for raising funds from private or philanthropic investors. In return, New York State pays investors based only on whether they increase employment and reduce recidivism. Indeed, investors are to be repaid only if the project reduces recidivism by at minimum 8 percent and/or increases employment by at least 5 percent.²¹⁵ So, the contract is performance-based, with taxpayer resources being spent only if results are achieved. A Social Impact Bond ("SIB") is used to finance these contracts.²¹⁶ In the SIB model, private investors fund the upfront working capital to create the social services to achieve the desired outcomes. Then, if pre-defined minimum outcomes are achieved, the government makes performance-based payments, thus repaying the investors.²¹⁷ If initial Pay for Success projects do not, in one or more instances, reach their objectives, consideration should be given to refining the program.²¹⁸

The second program is Work for Success. Work for Success is for low risk offenders and was first implemented in Brooklyn and the Bronx.²¹⁹ Work for Success identifies job openings across key regions and works with about 1,300 companies.²²⁰ Since its implementation in February 2012, more than 9,400 formerly incarcerated individuals have been placed in jobs,²²¹ including jobs in green technology, health services, food services, and the construction industry.²²² The DOCCS is working collaboratively with the Department of Labor on the Work for Success initiative.²²³ Work for Success has developed and implemented a tool to assess an re-entrants' risks and needs to match with suitable vocational training or employment.²²⁴ It also

²¹⁴ Pay for Success Fact Sheet 2014, CORP. FOR NATIONAL AND COMMUNITY SERVICE, http://www.nationalservice.gov/sites/default/files/documents/PFS_Fact_Sheet.pdf. (Last accessed December 10, 2015)

²¹⁵ PAY FOR SUCCESS, *supra* note 213.

²¹⁶ N.Y. STATE DIV. OF THE BUDGET, *supra* note 211.

²¹⁷ Press Release Pay for Success, Governor Andrew M. Cuomo, *supra* note 206.

²¹⁸ *See Pay for What Works: An innovative approach looks to improve social services while saving taxpayers money*, US News (July 14, 2015) <http://www.usnews.com/opinion/knowledge-bank/2015/07/14/pay-for-success-programs-can-save-taxpayers-money-on-services>; *Living Cities and Third Sector Capital Partners Introduce Pay for Success Construction Loan*, PR Newswire (October 29, 2015) <http://www.prnewswire.com/news-releases/living-cities-and-third-sector-capital-partners-introduce-pay-for-success-construction-loan-300168879.html>. (Last accessed December 10, 2015)

²¹⁹ Press Release Work for Success, Governor Andrew M. Cuomo, *Governor Cuomo Announces that "Work for Success" Initiative is Providing More Employment Opportunities for the Formerly Incarcerated* (Feb. 12, 2014), <http://www.governor.ny.gov/news/governor-cuomo-announces-work-success-initiative-providing-more-employment-opportunities>. (Last accessed December 10, 2015)

²²⁰ *Id.*; *Here's What It's Like For People Trying to Find a Job After They're Released From Prison*, BUSINESS INSIDER, (Oct. 10, 2014), <http://www.businessinsider.com/getting-a-job-after-prison-2014-10>. (Last accessed December 10, 2015)

²²¹ Press Release, N.Y. Exec. Comm., *Governor Cuomo Announces More Than 9,400 Hired Through Work for Success Program* (Feb. 13, 2015), http://www.doccs.ny.gov/NewsRoom/external_news/Work_for_success_AMC_PR.pdf.

²²² *Here's What It's Like For People Trying to Find a Job After They're Released From Prison*, BUSINESS INSIDER, (Oct. 10, 2014), <http://www.businessinsider.com/getting-a-job-after-prison-2014-10>. (Last Accessed December 10, 2015)

²²³ Press Release Work for Success, Governor Andrew M. Cuomo, *supra* note 219.

²²⁴ *Id.*

allows incarcerated individuals to identify specific employment goals so that they can work toward those goals while incarcerated.²²⁵ Work for Success also releases such information to parole officers to help them make appropriate employment referrals.²²⁶ In return for hiring re-entrants, businesses gain tax credits and access to federal bonding.²²⁷ The Work for Success programs include, (a) developing and implementing client matching, (b) launching an offender employment specialist program, (c) creating a partnership to identify key job openings, (d) launching inter-agency vocational training, (e) creating resume templates for all applicants, (f) improving the ability to obtain vital identification documents, (g) launching a state-wide public education and outreach program, and (h) increasing accessibility of services through marketing.²²⁸ In addition, all of New York State's 101 Career Centers have Offender Employment Specialists.²²⁹ Individuals leaving state prisons who are identified as having a lower risk of recidivism go to a Career Center, where they see an employment counselor.²³⁰ Formerly incarcerated individuals who are identified as being at a high risk of recidivism are provided with more intensive services through one of Work for Success' nonprofit partners that serve this population full time.²³¹

The State of New York is piloting a program that will require low risk individuals being released from state facilities to work with a career counselor prior to their release to develop a training and job placement plan. This plan can be implemented immediately with the Department of Labor upon their return home. The pilot has been implemented in the Fishkill and Queensboro correctional facilities for inmates who are returning to the Bronx or Brooklyn, and scheduled to expand to re-entrants returning to Peekskill, Albany, Syracuse, Buffalo and Nassau County in 2015.²³²

The Offender Reentry Task Force Program supplements these initiatives. Many counties in New York State have a County Re-entry Task Force ("CRTF") which provides services to individuals being released from incarceration in state prisons.²³³ With respect to employment, the CRTFs provide assistance in writing resumes, developing interview skills, obtaining job counseling and finding a part-time or full-time job.²³⁴ For example, DOCCS has been very active in training offenders in the food service industry while still incarcerated.²³⁵ After completing training, the offenders receive an official certificate for "Safe Handling of Food,"

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ See Press Release, *supra* note 219.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ County Reentry Task Force Program, New York State Division of Criminal Justice Services, (2014), <http://www.criminaljustice.ny.gov/crimnet/ojsa/initiatives/reentry-docs/reentry-brochure-april-2014.pdf>. (Last accessed December 10, 2015)

²³⁴ *Id.*

²³⁵ DEP'T OF CORRECTIONS & CMTY. SUPERVISION, *supra* note 205.

which helps them find future employment.²³⁶ With extensive marketing, there has been a 50 percent increase in the number of individuals seeking career placement and training services.²³⁷

Recommendation: DOCCS should continue to expand the Work for Success program and should refine the Pay for Success program. The New York State legislature should provide additional funding to see that these programs remain in place and are refined throughout the New York State Prison System. In addition to state funding, we recommend applications for national grants for improvement of the facilities.

6. Implement Child Support Payment Reform

Re-entering individuals often face life in the outside world with crushing child support arrears that have accumulated while they were in prison.²³⁸ They are likely to have limited resources and multiple barriers to employment.²³⁹ If they are able to find work, their wages will be garnished to pay their child support arrears almost immediately, often in amounts as high as 65 percent.²⁴⁰ This leaves those recently released from prison or jail with insufficient income to make a fresh start, thereby driving them into the underground economy.²⁴¹ They would likely face the loss of their driver's licenses as a penalty for having arrears,²⁴² which would further impede their ability to work or look for work.²⁴³ Excessive arrears drive low-income non-custodial parents away from formal employment, discourage voluntary payment of child support, lead to uncollectible debt, and have a negative impact on parent-child relationships.²⁴⁴

²³⁶ *Id.*

²³⁷ Press Release Work for Success, Governor Andrew M. Cuomo, *supra* note 223.

²³⁸ Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, 43 JUDGES' JOURNAL 5, 8 (Winter 2004), <http://csgjusticecenter.org/wp-content/uploads/2007/09/Building-Debt-While-Doing-Time-Child-Support-and-Incarceration.pdf> (hereinafter PEARSON, BUILDING DEBT WHILE DOING TIME). (Last accessed December 10, 2015)

²³⁹ *Id.*

²⁴⁰ CPLR §§ 5241(g)(1), 5242(f)(ii).

²⁴¹ CARMEN SOLOMON-FREARS, GENE FALK & ADRIENNE L. FERNANDES-ALCANTARA, CONG. RESEARCH SERV., RL41431, *CHILD WELL-BEING AND NONCUSTODIAL FATHERS* 59 n.161 (2013), <http://www.ncsea.org/documents/CRS-Child-Well-Being-Noncustodial-Fathers-2.12.13.pdf> (hereinafter SOLOMON-FREARS, CHILD WELL-BEING AND NONCUSTODIAL FATHERS); CAROLYN J. HEINRICH, BRETT C. BURKHARDT & HILARY M. SHAGER, INST. FOR RESEARCH ON POVERTY, *REDUCING CHILD SUPPORT DEBT AND ITS CONSEQUENCES: CAN FORGIVENESS BENEFIT ALL?* 6 (Mar. 2010), http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/2007-09/FamiliesForward_3_19_10.pdf (hereinafter HEINRICH, REDUCING CHILD SUPPORT DEBT); PEARSON, BUILDING DEBT WHILE DOING TIME, *supra* note 238, at 5,8.

²⁴² SOCIAL SERVICES LAW § 111-b(12); 18 NYCRR 346.12.

²⁴³ HEINRICH, REDUCING CHILD SUPPORT DEBT, *supra* note 241, at 6; PEARSON, BUILDING DEBT WHILE DOING TIME, *supra* note 238, at 8.

²⁴⁴ SOLOMON-FEARS, CHILD WELL-BEING AND NONCUSTODIAL FATHERS, *supra* note 241, at 26; HEINRICH, REDUCING CHILD SUPPORT DEBT, *supra* note 24, at 3-6; MARIA CANCIAN, CAROLYN HEINRICH, AND YIYUON CHUNG, INST. FOR RESEARCH ON POVERTY, *DOES DEBT DISCOURAGE EMPLOYMENT AND PAYMENT OF CHILD SUPPORT? EVIDENCE FROM A NATURAL EXPERIMENT* 1-3, 28 (July 2009), <http://www.irp.wisc.edu/publications/dps/pdfs/dp136609.pdf> (last visited January 23, 2015) (hereinafter CANCIAN, DOES DEBT DISCOURAGE EMPLOYMENT AND PAYMENT OF CHILD SUPPORT?); PEARSON, BUILDING DEBT WHILE DOING TIME, *supra* note 238, at 8.

Benefits to child support would result from increasing the capacity of work release programs, as mentioned in Section 4a. An inmate would be more capable of contributing to child support payments while in prison when receiving pay through a work release program. Several state prisons and county jails withhold income for child support payments for imprisoned individuals participating in a work release program. For example, the Florida Department of Corrections' work release program requires ten percent of an inmate's net pay to go to family assistance, including child support.²⁴⁵

(a) The Treatment of Incarceration as "Voluntary Unemployment"

New York State courts have generally rejected the argument that incarceration is a valid reason to absolve an individual from his or her obligation to pay child support, on the basis that such a conclusion would be rewarding the wrongful conduct which led to "voluntary unemployment."²⁴⁶ This means that when establishing child support orders against incarcerated individuals, courts in New York are permitted to impute income even when the individual has no actual ability to pay.²⁴⁷ In 2010, the state amended The New York Family Court Act and Domestic Relations Law to allow New York courts to modify child support orders for incarcerated parents if appropriate.²⁴⁸ However, courts cannot consider incarceration as a "substantial change in circumstances" justifying the inability to pay when the underlying order was entered before October, 2010.²⁴⁹

In New York, child support orders are established based on percentage guidelines applied against the parents' income.²⁵⁰ When an individual says that he has little or no income, a court may impute income even when the individual has none.²⁵¹ Generally, courts impute income when they consider an individual to be "voluntarily unemployed," such as when a person quits work to go to school, or changes careers to take a lower paying, but more personally satisfying job. Income is also imputed if there is evidence of a lifestyle (*e.g.*, an expensive car or home) inconsistent with the person's claimed low income. Because the current financial hardship of an incarcerated individual is deemed to be the result of his "wrongful conduct," a court establishing a support order may impute income, even when the individual has no ability to pay.²⁵²

Recommendation: Family Court Act § 413(1)(b)(5) should be amended to add a new subsection (vi) (and renumbering of subsequent sections) or alternately a new subsection (b)(6), which prohibits the imputation of income against incarcerated individuals solely on the basis of

²⁴⁵ *Frequently Asked Questions Regarding Work Release*, FLA. DEP'T OF CORR., <http://www.dc.state.fl.us/oth/inmates/wr.html> (Last accessed December 10, 2015)

²⁴⁶ U.S. DEP'T OF HEALTH & HUMAN SERVS., REALISTIC CHILD SUPPORT ORDERS FOR INCARCERATED PARENTS 2 (June 2012), http://www.acf.hhs.gov/sites/default/files/ocse/realistic_child_support_orders_for_incarcerated_parents.pdf. (Last accessed December 10, 2015)

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ FAM. CT. ACT § 451; DOM. REL. § 236(B)(a)(b)(2)(i).

²⁵⁰ FAM. CT. ACT § 413(1)(c)(2).

²⁵¹ *See* FAM. CT. ACT § 413(1)(b)(5).

²⁵² FAM. CT. ACT § 413.

the "wrongful conduct" that caused the incarceration.²⁵³ Orders of support against incarcerated individuals should be based on actual ability to pay.

(b) Incarceration as a Ground for Modification

Prior to October 13, 2010, the rule in New York was that support orders could not be modified downward while a person was incarcerated because an incarcerated parent's current financial hardship was solely the result of his wrongful conduct.²⁵⁴ The legislature amended the Family Court Act to modify this rule, but the rule only applies prospectively to orders that were entered after the statute's effective date.²⁵⁵ Thus, those whose incarceration is ending but are burdened with arrears arising from orders entered before October 13, 2010, are unable to take advantage of the relief afforded by this amendment.²⁵⁶

Recommendation: Family Court Act § 451(3)(a) should be amended to clarify that the modification provision applies regardless of when the order was entered.

The United States Department of Health and Human Services, which oversees and funds state child support enforcement programs, has proposed federal regulations, which, if adopted, will require states to prohibit the treatment of incarceration as voluntary unemployment for both the establishment and modification of child support orders.²⁵⁷ By amending the Family Court Act now, New York State will be prepared for this likely change. A support order that is commensurate with an individual's ability to pay is one of the strongest indicators of compliance.

(c) Review Support Orders Once an Individual is Incarcerated

Once incarcerated, individuals with children become noncustodial parents (NCPs). It is logistically difficult for incarcerated NCPs to file petitions to modify their support orders downward to avoid the accumulation of arrears while they are incarcerated. Further, many incarcerated NCPs may be unaware that filing for modification is even an option. Thus, very few incarcerated parents do so. As a result, some states have enacted laws that require their state agencies to automatically review support orders upon learning that a NCP has been incarcerated to avoid the problems associated with large arrears.²⁵⁸ The process usually involves an evaluation of the individual's ability to pay support while incarcerated, unless the individual has been incarcerated due to the failure to pay support.²⁵⁹ In some states, computerized match systems notify the state child support collection agency when the individual is incarcerated and again when the individual is released in order to begin the process of review and to petition the

²⁵³ See Appendix A for proposed language.

²⁵⁴ FAM. CT. ACT § 451.

²⁵⁵ *Id.*

²⁵⁶ *See id.*

²⁵⁷ U.S. Department of Health and Human Services, proposed regulations regarding Flexibility, Efficiency and Modernization in the Child Support Enforcement Program, at 79 Fed. Reg. 68548, 68553-55, 68580 (proposed Nov. 17, 2014) (to be codified at 45 C.F.R. § 302.56(b)(5)).

²⁵⁸ U.S. Department of Health and Human Services, *supra* note 257.

²⁵⁹ *Id.*

court if necessary.²⁶⁰ During the first year that the District of Columbia implemented such a procedure, it modified over 300 orders, resulting in an average of \$5,156 in child support debt reduction.²⁶¹

Proposed federal regulations, if adopted, will allow the child support agency to elect in its State plan the option to initiate the review of a child support order and seek to adjust the order, if appropriate, after being notified that a NCP will be incarcerated for more than 90 days.²⁶² New York State should enact legislation and develop policies and procedures that would facilitate the automatic review of support orders upon a NCP's incarceration. This would avoid the problems caused by large arrears, which would help facilitate successful re-entry and increase the likelihood of future compliance with support orders.

Recommendation: Family Court Act § 451(3) should be amended to add a new subsection (c) to allow for the automatic review of a child support order when a child support agency is notified that a NCP has been incarcerated for more than 90 days.

(d) Noteworthy Pilot Programs

When parents are incarcerated, their children are often forced to rely on public assistance as their primary means of support.²⁶³ When a child receives public assistance, any child support to which the child is entitled is assigned to the state and county to reimburse these government entities for public assistance paid to the child while the parent is incarcerated.²⁶⁴ These arrears are often called "state owed arrears."²⁶⁵

To support successful re-entry for individuals and to increase the likelihood that their children actually receive child support, New York State should encourage the creation of programs that develop connections to the workforce and tie employment with affordable payments and forgiveness of state-owed arrears. Some states have already created programs that allow courts flexibility to provide relief from overwhelming arrears.²⁶⁶ Creating such programs has a positive impact on the employment rate of re-entrants and helps reduce recidivism rates. Furthermore, the reduction of large arrears may result in increased future child support payments.²⁶⁷ For example, participants in a pilot program created by the State of Wisconsin

²⁶⁰ *Id.*

²⁶¹ D.C. Code §16-0138 (2011); D.C. Code §16-916.01(r)(5) (West 2012).

²⁶² U.S. Department of Health and Human Services, *supra* note 257 (§ 303.8: Review and Adjustment of Child Support Orders).

²⁶³ Judi Bartfeld, *Forgiveness of State-Owed Child Support Arrears*, INSTITUTE FOR RESEARCH ON POVERTY 7, <http://www.irp.wisc.edu/publications/sr/pdfs/sr84.pdf>. (Last accessed December 10, 2015)

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *State Child Support Agencies with Debt Compromise Policies*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/human-services/state-child-support-debt-compromise-policies.aspx>. (Last accessed December 10, 2015)

²⁶⁷ *See* Bartfeld, *supra* note 263, at 14.

were able to pay more monthly child support on average and make more frequent payments as a result of child support debt reduction.²⁶⁸

New York State has piloted two noteworthy programs which can lay the groundwork for future initiatives. In 2010, New York State ran a pilot arrears forgiveness program called the Arrears Credit Program, which tied debt reduction to supported re-entry into the workforce.²⁶⁹ The program targeted low-income NCPs with state-owed arrears, with a particular focus on incarcerated individuals and individuals under parole or probation supervision.²⁷⁰ While the program did not receive much attention because participation was low, just over \$545,000 in state-owed arrears were eliminated for those who participated.²⁷¹ Most of the successful participants were in programs that included case management.²⁷² This pilot should inform future efforts to improve outreach in order to increase participation.

In 2006, New York State launched the Strengthening Families Through Stronger Fathers Initiative, which sought to increase employment and earnings of unemployed and underemployed NCPs.²⁷³ The goal was to increase the participants' child support payments by providing employment and other support services.²⁷⁴ This pilot program did not specifically target incarcerated parents or individuals.²⁷⁵ Participants received case management services, and after one year in the program, the NCPs paid an average of \$504 more in child support than nonparticipants.²⁷⁶

Evaluations of both programs recognized that one of the most pressing participant needs was legal assistance.²⁷⁷ The most effective pilot programs of the Strengthening Families Initiative included partnerships with local legal services programs to assist with modification of orders, arrears forgiveness, and restoration of licenses.²⁷⁸ It can be difficult for low-income NCPs to handle these legal issues without representation.²⁷⁹ For example, parents who have their

²⁶⁸ HEINRICH, REDUCING CHILD SUPPORT DEBT, *supra* note 241, at 6; PEARSON, BUILDING DEBT WHILE DOING TIME, *supra* note 238, at 8.

²⁶⁹ NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 266.

²⁷⁰ OFFICE OF CHILD SUPPORT ENFORCEMENT, *Annual Report 2013*, CITY OF NEW YORK 24 (2014), http://www1.nyc.gov/assets/hra/downloads/pdf/services/child_support/ocse_annual_report.pdf. (Last accessed December 10, 2015)

²⁷¹ Comments on proposed rule at 79 Fed. Reg. 68548, Flexibility, Efficiency and Modernization in Child Support Enforcement Programs, RIN 0970-AC50, EMPIRE JUSTICE CENTER 6 (Jan. 16, 2015), <http://www.empirejustice.org/assets/pdf/policy-advocacy/comments/empire-justice-comments-on.pdf>. (Last accessed December 10, 2015)

²⁷² *Id.*

²⁷³ KYE LIPPOLD, AUSTIN NICHOLS, & ELAINE SORENSEN, *STRENGTHENING FAMILIES THROUGH STRONGER FATHERS: FINAL IMPACT REPORT FOR THE PILOT EMPLOYMENT PROGRAMS*, URBAN INSTITUTE 4 (Oct. 2012), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412442-Strengthening-Families-Through-Stronger-Fathers-Final-Impact-Report-for-the-Pilot-Employment-Programs.PDF>. (Last accessed December 10, 2015)

²⁷⁴ *Id.* at 5.

²⁷⁵ *See id.*

²⁷⁶ *Id.* at vii.

²⁷⁷ *Id.* at 9.

²⁷⁸ *Id.* at 9.

²⁷⁹ *Id.* at 9.

driver's licenses suspended when they owe child support arrears can have their licenses restored when the license is necessary to work or when they begin making child support payments. However, they generally need the assistance of a lawyer to negotiate the process with the Department of Motor Vehicles and Family Court.

The New York City Office of Child Support Enforcement (NYC OCSE) also has successful programs which are worthy of expansion statewide. NYC OCSE has a "Customer Service Walk-in Center" open from 8AM to 7PM Monday through Friday that assists NCPs with arrears in obtaining financial hardship review and provides referrals to programs that help them meet their child support obligation.²⁸⁰ Several of the innovative programs include the following:

The Modify DSS Order (MDO) program can help NCPs with an income below the State self-support reserve of \$15,755 if they have at least one child on cash assistance.²⁸¹ The program allows NCPs to have their child support order lowered to reflect their actual income without returning to Family Court.²⁸² In 2013, 215 parents had their child support orders reduced through this program by an average of 89%, reducing the average support order from \$254 per month to \$28 per month.²⁸³ Additionally 60% of MDO participants continued to pay child support after enrolling.²⁸⁴

The Arrears Cap Initiative lowered arrears for NCPs who had state-owed arrears which accrued when their income was under the poverty level.²⁸⁵

The Arrears Credit Program allows for credit against state owed arrears when the NCP remains in good standing on current support.²⁸⁶ NCPs can participate for up to three years and receive total credit of up to \$15,000.²⁸⁷ Participants are subject to an asset test and must have no record of domestic violence or crimes against children.²⁸⁸

The Support Through Employment Program (STEP) helps unemployed NCPs find employment to support themselves and their children.²⁸⁹

²⁸⁰ Child Support, CITY OF NEW YORK, <http://www1.nyc.gov/nyc-resources/service/1368/child-support>. (Last accessed December 10, 2015)

²⁸¹ HUMAN RESOURCES ADMINISTRATION, *Manage Your Child Support*, CITY OF NEW YORK (2014), http://www1.nyc.gov/assets/hra/downloads/pdf/services/child_support/manage_your_child_support.pdf (last accessed December 10, 2015)

²⁸² *Id.*

²⁸³ OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 270, at 11.

²⁸⁴ *Id.*

²⁸⁵ HUMAN RESOURCES ADMINISTRATION, *Office of Child Support Enforcement's "Pay It Off" Program Helped Noncustodial Parents Repay nearly \$1 Million in Child Support Debt*, CITY OF NEW YORK (Jan. 22, 2014), http://www1.nyc.gov/assets/hra/downloads/pdf/news/internet_articles/2014/january_2014/OCSE_Pay_It_Off_Rresults.pdf. (Last accessed December 10, 2015)

²⁸⁶ HUMAN RESOURCES ADMINISTRATION, *Manage Your Child Support*, *supra* note 281.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ HUMAN RESOURCES ADMINISTRATION, *Office of Child Support Enforcement's "Pay It Off" Program*, *supra* note 285.

The Pay It Off initiative allows NCPs who paid at a target amount toward their state-owed arrears to receive a \$2 credit for every dollar they paid toward state-owed arrears. HRA also removed nine percent interest charges owed on debt if NCPs paid the principal in full. This pilot had three phases. In 2013, two programs were run with target amounts of \$5000 and \$2500. In 2014, a target amount of \$1000 was established. This program allowed HRA to reach agreements with 180 parents, collecting \$1 million in state owed arrears and reducing the debt of the parent by \$1.9 million.²⁹⁰

Through these programs, New York City has allowed more than 2,200 NCPs to reduce their state-owed arrears by \$24.6 million dollars.²⁹¹ Six hundred participants have paid their debt in full.²⁹² The percentage of participants making current child support payments increased from 43 to 60 percent.²⁹³

Recommendation: The New York State legislature should establish incentives for local social services districts to develop programs across the state which assist low income non-custodial parents, including those released from incarceration with the following services: (a) assistance in modifying orders that are not commensurate with a person's ability to pay; (b) programs allowing reduction of state owed arrears; (c) programs to be developed that assist with finding employment and provide incentives for those who stay employed and pay child support; and (d) civil legal services to assist in arrears modification and license restoration.

In most cases, these efforts can draw down federal funding for their operation in the amount of two-thirds of the expenditures. The balance of the cost is paid by local social services districts. Budget legislation which reimburses social services districts for their local share would go a long way to encouraging the development of these programs.

D. Conclusion

With an overwhelming number of individuals being released into the community, the State should seek to reduce their recidivism by connecting them with employment. Lowered recidivism not only helps each such individual, but also the entire community.

Successful employment is often the key to successful re-entry. Individuals who are employed can manage better in the "real world," have financial resources that reduce the likelihood of committing a petty crime, and have the self-confidence to integrate into society. Moreover, there are major cost savings in the criminal justice system.

As emphasized throughout this report, diversion programs should be at the pre-booking, pretrial, and trial phases. And absent pre-conviction diversion, New York State, by adopting the notice and relief provisions of the UCCCA, would at least align the current statutory or regulatory collateral consequences with the conviction. There should be formal programs before

²⁹⁰ OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 270, at 17.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* at 4.

release and post-release that emphasize training, employment opportunity, and connection to the community. To inhibit the very present discrimination by employers who go well beyond statutory requirements, there should be statewide implementation of the ban the box statute. Finally, various sections of the Family Court Act should be amended to minimize that burden and encourage the establishment of programs that tie employment and payment of child support to forgiveness of state owed arrears. Overall, programs should be implemented that can avert the effects of a criminal record and/or imprisonment so that individuals can better reintegrate into society and gain employment.

V. EDUCATION

In 1987, the New York Court of Appeals found that the objectives of New York State law and public policy include "rehabilitating and reintegrating former inmates in the hope that they will spend their future years productively instead of returning to crime."²⁹⁴ Although there are a number of factors that account for why some former inmates succeed post-release and others do not, one significant factor is that many former inmates lack suitable education or vocational skills. "This is why correctional education programs – whether academically or vocationally focused – are a key service [when] provided in correctional facilities across the nation."²⁹⁵

According to New York Correction Law, the objective of correctional education is to provide to incarcerated individuals, through education, "a desire to conduct themselves as good citizens, [...] with the skill and knowledge which will give them a reasonable chance to maintain themselves and their dependents through honest labor."²⁹⁶

To this end each inmate shall be given a program of education, which, on the basis of available data, seems most likely to further the process of socialization and rehabilitation.²⁹⁷

Despite this objective, educational resources in prisons are sparse and education has continued to be a casualty of state budgets.²⁹⁸ In recent years, education has been emerging as an important component of efforts to promote the successful re-entry and reintegration of people with criminal convictions into free society. As a 2014 RAND study found, quality correctional education reduces post-release recidivism in a cost-effective manner.²⁹⁹ To maximize the impact of correctional education, inmates' educational needs should be addressed throughout, starting at the time of arrest and continuing throughout the incarceration period. Easy access to suitable

²⁹⁴ *Eiseman v. State of New York*, 70 N.Y.2d 175, 191 (1987).

²⁹⁵ Robert Bozick, Lois Davis, Jessica Saunders, et al. *Evaluating the Effectiveness of Correctional Education*. RAND Corporation (2014), at (iii).

²⁹⁶ NY Correction Law § 136.

²⁹⁷ *Id.*

²⁹⁸ Robert Bozick, Lois Davis, Jessica Saunders, et al. *How Effective is Correctional Education and Where Do We Go from Here?* RAND Corporation (2014) at (xix).

²⁹⁹ Robert Bozick, Lois Davis, Jessica Saunders, et al. *Evaluating the Effectiveness of Correctional Education*. RAND Corporation (2014), at (iii).

educational services and post-secondary educational programs should be provided during incarceration in anticipation of an individual's return to his or her community.

Despite the widely accepted view among corrections officials, experts, and researchers in the field about the multiple benefits of higher education in prison -- including reduction of recidivism rates, and enormous taxpayer savings, by 1995 prison higher education programs nationwide and in New York were decimated by restrictive legislation on both the state and federal levels. In New York, higher education in prison is now behind where it was 20 years ago.

In 2006, New York State Penal Law §1.05(6) was amended to add a new goal to the four traditional sentencing goals of deterrence, rehabilitation, retribution, and incapacitation. The law now requires that sentencing decisions take into account "the promotion of their successful and productive re-entry and reintegration into society." Education is a proven and effective intervention that reduces recidivism, improves employment opportunities, and increases public safety.

The overall recommendations include the following: (i) education as an ATI (or diversion) pre-conviction; (ii) education during incarceration – secondary, vocational, and post-secondary; (iii) access to local colleges post-conviction and post-incarceration; (iv) restoration of TAP Eligibility during incarceration; and (v) Ban the Box for College Admissions

A. Overview of Issues

1. Characteristics of the Re-entry Population

The prison population differs from the general population in important ways. On average, people in prison are less educated than their general population counterparts.³⁰⁰ Thus, New York's very sizeable incarcerated population consists of people in critical need of education to improve their post-release opportunities for employment and participation in full citizenship.

The New York Department of Corrections and Community Supervision (DOCCS) reported that, as of January 1, 2014, approximately 28% of the prison population was reading at an 8th grade level or less and that only 59% had achieved either a high school or equivalency diploma.³⁰¹ This stands in contrast to the general population of New York of which 87.6% had graduated from high school or received an equivalency diploma.³⁰² Even more disparate is the percentage of the incarcerated population with college degrees; while 22% of the general

³⁰⁰ Laura D. Gorgol and Bryan A. Sponsler, *Unlocking Potential: Results of a National Survey of Postsecondary Education in State Prisons*, Institute for Higher Education Policy, 2011 at 1.

³⁰¹ DOCCS Under Custody Report: *Profile of Inmate Population Under Custody as of January 1, 2014*, at 24.

³⁰² US Census Bureau, *2013 American Community Survey*.

population has earned some type of college degree, only 2% of people in prison were college graduates.³⁰³

This puts incarcerated individuals at a disadvantage when it comes to finding employment post-release. Approximately 21% of the available jobs in the country in any given year require applicants to hold an associate's degree or a bachelor's degree. Of those jobs that do not require a post-secondary degree, approximately 40% require applicants to hold a high school or high school equivalency diploma.³⁰⁴

DOCCS estimates approximately 80,000 incarcerated individuals may be eligible for academic and/or vocational programs during a fiscal year.³⁰⁵ More than 40% of this population – approximately 32,000 people in prison – do not possess a high school diploma or HSED (formerly GED) certificate.³⁰⁶

2. Incarcerated Persons Age 21 or Older: Educational Rights

In New York, all incarcerated persons who have not earned a high school diploma or HSED certificate have the right to an education. The source and extent of this right vary based on whether the individual is under or over twenty-one years of age.³⁰⁷

With respect to adult incarcerated persons, New York law provides that DOCCS shall "establish programs and classification procedures designed to assure the complete study of the background and condition of each inmate in the care or custody of the department and the assignment of such inmate to a program that is most likely to be useful in assisting him to refrain from future violations of the law."³⁰⁸ Despite this broad discretion, DOCCS policy dictates that all offenders "who enter the system without a verified high school diploma or equivalency are required to attend an academic program."³⁰⁹ To this end, DOCCS provides three levels of academic instruction: Adult Basic Education (ABE) for people at or below a fifth grade reading level; pre-HSED for people between a sixth and eighth grade reading level; and HSED for people between a ninth and twelfth grade reading level.³¹⁰ Many DOCCS facilities also have

³⁰³ Wendy Erisman and Jeanne Bayer Contardo, *Learning to Reduce Recidivism: A 50-state Analysis of Postsecondary Correctional Education Policy*, Institute of Higher Education Policy (2005) at 4.

³⁰⁴ Elka Torpey and Audrey Watson. *Education Level and Jobs: Opportunities by State*. US Bureau of Labor Statistics, 2014, at 1.

³⁰⁵ Testimony of Brian Fischer, DOCCS Director, Assembly Standing Committee on Corrections Educational and Vocational Programs in Prison, November 29, 2012 (hereinafter "Fischer") at 1.

³⁰⁶ *Id.*

³⁰⁷ See section IX below for a discussion of persons under 21.

³⁰⁸ N.Y. Corp. Law § 137 (McKinney).

³⁰⁹ Fischer, *supra* note 305, at 1.

³¹⁰ Testimony of Jack Beck, Prison Visiting Project Director, Assembly Corrections and Mental Health Committees, November 29, 2012 (hereinafter "Beck") at 5.

English as a Second Language (ESL) or bilingual courses, and some facilities offer multi-level or special education classes.³¹¹

3. Vocational Learning

Due to their relatively lower educational experience and economic advantage, many people in prison may find greater opportunities pursuing vocational training than in attaining expensive post-secondary education. DOCCS offers vocational training in 27 trades with 307 vocational instructors.³¹² These trades include carpentry, plumbing, electrical, and masonry. Some of DOCCS' vocation training programs permit inmates to participate in Facility Maintenance Programs in which civilians train inmates on-the-job in a specific trade.³¹³ Many of the trades in which such training is offered can lead to better-paying jobs if re-entry barriers to employment are removed.

4. Decreasing Rates of Education and Academic Achievements

In 2011, 61% of New York State's newly incarcerated individuals and 43% of New York State's total incarcerated population did not possess a high school (or high school equivalency) diploma.³¹⁴ The following year, only 2,228 people in prison earned an HSED, representing less than 3% of the total DOCCS population.³¹⁵ While DOCCS policy requires that all people without a HSED participate in academic programming,³¹⁶ 59% of such persons are unable to enroll in such training.³¹⁷

A significant portion of the DOCCS population with identified academic needs does not receive any academic instruction during the entire period of incarceration. Although the average time served in DOCCS custody was nearly five years, only 64% had completed or participated in an academic class by the time of their release in 2009.³¹⁸ Anecdotal evidence indicates that there are not enough classes open to meet the released individuals' needs.

³¹¹ *Id.* at 5.

³¹² *Id.* at 2.

³¹³ *Id.* at 2. The current listing of vocational program on the DOCCS website is as follows: Air Conditioning, Refrigeration and Heating; Appliance Repair; Auto Mechanics; Barbering; Braille Transcription & Large Print; Building Maintenance; Cabinetmaking; Carpentry; Closed System Educational Television; Commercial Arts; Computer Operator; Computer Repair; Cosmetology; Custodial Maintenance; Drafting; Electrical Trades; Floor Covering; Food Service; General Business; Horse Handling and Care; Horticulture; Introduction to Technology; Machine Shop; Masonry; Painting; Plumbing and Heating; Printing; Puppies Behind Bars; Radio and Television Repair; Sheltered Workshop; Small Engine Repair; Upholstery; Vocational Assessment; Welding. <http://www.doccs.ny.gov/ProgramServices/vocational.html>. (Last accessed December 10, 2015)

³¹⁴ Fischer, *supra* note 305, at 1. http://www.doccs.ny.gov/Commissioner/Testimony/Educational_Vocational_Programs.pdf. (Last accessed December 10, 2015)

³¹⁵ *Id.* at 7.

³¹⁶ *See id.* at 1.

³¹⁷ Beck, *supra* note 310, at 14.

³¹⁸ NYS DOCCS, *Under Custody Report: Profile of Inmate Population Under Custody, Jan. 1, 2011*.

Despite the mandates of Section VII of DOCCS Directive 3503R, only 41% of incarcerated individuals without a HSED were enrolled in any academic class, and only 18.56% of the total population was enrolled in any non-college academic class in 2012.³¹⁹

5. Barriers to Education Post-Arrest

New York's criminal justice system has yet to fully appreciate the magnitude of re-entry, as it has not yet internalized the re-entry process as being the culmination of the criminal justice continuum.³²⁰ The failure to see successful re-entry as a key goal from the moment of arrest precludes the optimal use of education.

In recent years two developments have caused a re-focus on education's potential benefits. First, there has been a move towards "evidence-based" sentencing with a focus on reducing recidivism.³²¹ Second is the emergence of the re-integrative sentencing model.³²² So, the stage is now set for the use of education in creative ways to reduce recidivism.

6. Academic and Vocational Education During Incarceration

In testimony before the Assembly Corrections and Mental Health Committees, Jack Beck, Director of the Prison Visiting Project of the Correctional Association of New York, concluded that the limitations on the enrollment in academic and vocational courses were the result of two primary causes: (1) limited staffing and (2) insufficient financial resources.³²³ Beck discussed DOCCS's failure to authorize enough teacher positions to meet the academic needs of the incarcerated population.³²⁴ From 2008 to 2012, authorized program staff, which includes academic, vocational, substance abuse treatment, and other treatment service staff was reduced by 20.5%, while the prison population declined by only 10.9%.³²⁵ This decline created a student-to-authorized teacher ratio of approximately 140:1. In vocational programs, the student-to-teacher ratio is approximately 40:1.³²⁶ For incarcerated individuals without a HSED, the student-to-authorized-teacher ratio was approximately 60:1.³²⁷

The increased appreciation of the importance of education appears to correlate inversely with funding of correctional education. DOCCS requires funding to pay for supplies, teachers, and other personnel. As noted by Beck, the current student-to-teacher ratio behind bars is

³¹⁹ *Id.* at 14.

³²⁰ Michael Pinard, *A Reentry-Centered Vision of Criminal Justice*, 20 Federal Sentencing Reporter 103, 104-105(2007).

³²¹ Judge Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 NYU Law Rev. 1389 (2008).

³²² Alan Rosenthal & Elaine Wolf, *Unlocking The Potential of Reentry and Reintegration*, Center for Community Alternatives (2004).

³²³ Beck, *supra* note 310, at 7.

³²⁴ *Id.* at 12.

³²⁵ *Id.* at 7.

³²⁶ Fischer, *supra* note 305, at 2.

³²⁷ *Id.* at 12.

unmanageable. These are not ideal conditions in which incarcerated individuals can learn and be expected to acquire the necessary skills to enable them to successfully transition to society upon release.

7. How In-Person Instruction Can Be Enhanced

The benefits to hiring more instructors (and other teaching staff) are apparent from the fact that in-person instruction is a proven-effective way to provide an education to those in prison.³²⁸ According to a 2015 Stanford Law School study, "in-person, classroom-based courses foster interaction and analytical discussion among teachers and students and help improve outcomes for underprepared and educationally disadvantaged students, and therefore, they should be provided whenever possible".³²⁹ Three principal benefits to classroom-based courses are: (1) students can interact with their teachers, ask questions, and receive feedback immediately, (2) teachers can easily monitor students' comprehension of the material being presented as well as students' educational progression overall, and (3) the interactive nature of classroom-based courses enables teachers to provide direct individualized attention to students if they begin to struggle with the course materials. In-person instruction is particularly important to those inmates enrolled in vocational programs because most of these programs take place in shops, which operate under the supervision of skilled professionals who serve as instructors. "Inmates [work] under the direct supervision of skilled civilians in infrastructure maintenance shops. They work as carpenters, plumbers, electricians, masons, welders, and general mechanics to name a few."³³⁰

For most skilled jobs, there is no distance learning option. The primary drawback is cost. The cost of hiring teachers depends on the number of inmates enrolled in the correctional education programs.

8. Ways to Expand Distance Education

In the absence of in-person instruction, distance education can help provide inmates with access to education. Exemplifying technology's ability to facilitate this are MOOCs – Massive Open Online Courses.³³¹ Accessed via the web, MOOCs are a great advancement in distance learning that provide unlimited participation to remote learners in a cost effective manner. While MOOCs are a great way for incarcerated individuals to continue with their education, the use of MOOCs is not without drawbacks.

³²⁸ Stanford Criminal Justice Center. *Degrees of Freedom: Expanding College Opportunities for Currently and Formerly Incarcerated Californians*. Stanford Law School (2015) at 58.

³²⁹ *Id.* at 58

³³⁰ Fischer, *supra* note 305, at 4.

³³¹ Fiona Hollands and Devayani Tirthali. *MOOCs: Expectations and Reality*. Teachers College, Columbia University (2014) at 7.

An important factor is Internet access.³³² Within prisons, there are barriers to the use of this technology. Prison administrators often resist the use of MOOCs, citing security.³³³ Their desire to restrict inmates' access to the Internet or the ability to communicate with the outside world is understandable. A second factor is computer illiteracy.³³⁴ To take advantage of the education offered through MOOCs, inmates must have at least a baseline level of computer literacy, which is not true of much of the prison population. A third factor is educational support.³³⁵ Distance education puts the onus of learning solely on the inmates, many of whom have already had issues with learning in traditional academic settings.

[Distance] courses suffer greatly from a number of limitations including a limited ability to help struggling students on complex tasks that have a variety of acceptable responses, challenges in developing students' practical skills (social or psychomotor), and an inability to provide adequate feedback in these areas.³³⁶

Although these factors are significant, steps can be taken to address them. A pilot program in California has attempted to address the issues of educational support and Internet access by creating a "closed" online course that allows students to communicate with the instructor while still restricting inmates' Internet usage.³³⁷

Another successful pilot program is being implemented in the New Jersey Department of Corrections. Their program, Prison to Community (P2C), allows inmates to take courses online through the use of streaming technology. One of the benefits to this sort of computer-based system is that inmates can continue their education, without significant interruption, even when they are transferred from one prison to another. Also, P2C allows those who have been released to continue their participation with the program through the use of online continuing education courses. Moreover, the greatest success of P2C thus far has been the drop in recidivism rates among participants in the program. P2C participants are 78% less likely to recidivate than non-participants, regardless of duration, location, or courses completed.³³⁸

So, distance education should be viewed as a viable alternative to in-person education as a way to defray costs while providing an education to incarcerated individuals.

³³² Robert Bozick, Lois Davis, Jessica Saunders, et al. *How Effective is Correctional Education and Where Do We Go from Here?* RAND Corporation (2014) at 1.

³³³ *Unlocking Potential: Results of a National Survey of Postsecondary Education in State Prisons*, *supra* note 300, at 12.

³³⁴ National Center of Education Statistics. *Literacy Behind Bars*. U.S. Department of Education, at 64.

³³⁵ Robert Bozick, Lois Davis, Jessica Saunders, et al., *supra* note 332, at 3.

³³⁶ Stanford Criminal Justice Center. *Degrees of Freedom: Expanding College Opportunities for Currently and Formerly Incarcerated Californians*. Stanford Law School (2015) at 48.

³³⁷ *Id.* at 49.

³³⁸ Deborah Ward et al. *How Does Prison to Community (P2C) Affect Recidivism*. Rutgers University (2009) at 2.

9. Lack of Funding for Higher Education

Although there are a number of problems with higher education in prison, the greatest is the lack of funding.

Traditionally, Pell Grants were the primary source of funding of post-secondary education for people in prison.³³⁹ New York provided similar tuition assistance in the form of TAP Grants commencing in 1974. By 1995, both means of funding higher education in prison had been eliminated.

In 1994, there were college programs in 70 New York prisons; but by 2004, that number had been reduced to just 4.³⁴⁰ As of 2012, after an increase, 21 prisons hosted college programs.³⁴¹ In 2012, the number of people in New York prisons taking college courses had moved back up to 2321, or about 4% of all imprisoned individuals.³⁴²

The number of college degrees conferred to people while in prison plunged from 1078 in 1991³⁴³ to only 141 in 2011.³⁴⁴

10. Criminal Conviction Screening Required for College Admission

One of the least recognized of the collateral consequences of a criminal conviction is barriers to college admission. Over the past decade, colleges and universities across the United States have increasingly included criminal history screening in their admissions process.³⁴⁵ In 2010 the Center for Community Alternatives (CCA) partnered with the American Association of Collegiate Registrars and Admissions Officers (AACRAO) to conduct a national survey and groundbreaking report revealing that 66% of the responding colleges and universities collect criminal history background information in the admissions process.³⁴⁶ In New York, all SUNY campuses engage in criminal history screening, as do many of New York's private colleges and universities. CUNY has refrained from this practice. The effects of criminal history screening elsewhere are discussed below.

³³⁹ Charles B.A. Ubah and Robert L. Robinson, Jr., *A Grounded Look at the Debate Over Prison-Based Education: Optimistic Theory Versus Pessimistic Worldview*, 83 *The Prison Journal* 115, 122,123 (2003).

³⁴⁰ *Reentry and Reintegration: The Road to Public Safety*, *supra* note 89, at 116.

³⁴¹ Brian Fischer, Testimony before the Assembly Standing committee on Corrections (November 29, 2012) at 5, http://www.doccs.ny.gov/Commissioner/Testimony/Educational_Vocational_Programs.html. (Last accessed December 10, 2015)

³⁴² *Id.* at 5.

³⁴³ *Reentry and Reintegration: The Road to Public Safety*, *supra* note 89, at 116

³⁴⁴ Brian Fisher Testimony, *supra* note 341, at 5.

³⁴⁵ Marsha Weissman, Alan Rosenthal, Patricia Warth, Elaine Wolf and Michael Messina-Yauchzy, *The Use of Criminal History Records in College Admissions Reconsidered*, Center for Community Alternatives (2010), <http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf>. (Last accessed December 10, 2015)

³⁴⁶ *Id.* at 8.

Policies requiring screening for criminal history records are being implemented despite there being virtually no evidence that such screening has any value in predicting who will offend on campus or will make college campuses safer.³⁴⁷ Yet, such policies have very significant and dangerous consequences that run contrary to efforts at promoting successful re-entry and reintegration. Research has consistently shown that education, and particularly higher education, reduces recidivism, is a significant factor in supporting desistance from crime, and as a result enhances public safety. Ironically, in the name of campus safety, college admissions officers are adopting policies that threaten to make the community at large less safe.

Two factors greatly reduce the number of well-qualified applicants with criminal records who are admitted to college. First, a significant number of potential applicants never begin to fill out the application because of the "chilling effect" caused by the presence of the criminal history question on the application.³⁴⁸ The "box" containing the criminal history question sends a message of exclusion, leads to self-doubt, kills morale and motivation to seek higher learning, and promotes avoidance of rejection.³⁴⁹ Second is what some have referred to as "exclusion by application attrition."³⁵⁰ Preliminary findings from a study of admission practices by the Center for Community Alternatives³⁵¹ considered the requirement by all SUNY campuses that applicants check a box on the application indicating whether or not they have been convicted of a felony offense.³⁵² Those who check the "yes" box are sent a supplemental directive requiring detailed information about the conviction and an array of additional documents.³⁵³ The scope and nature of a supplemental directive vary widely among the SUNY campuses, but typically obligate applicants to gather and disclose several different documents, some of which are difficult to obtain while others simply do not exist.³⁵⁴ For many applicants, the cost to fulfill the requirements of the supplemental directive far exceeds the fee associated with the application itself.³⁵⁵ Many applicants drop out of the application process, assuming that the procedures are intended to exclude them, while others are just not able to provide the requested documents.³⁵⁶

As with ban the box statutes relating to employment, banning the box with regard to college admissions would not preclude statutorily mandated consideration of criminal histories *after* consideration of applications and supporting materials and the initial admission-decision making process.

³⁴⁷ *Id.* at 3 and 4.

³⁴⁸ Alexis Halovic and Michelle Fine et al, *Higher Education and Reentry: The Gifts They Bring*, Science Project at the CUNY Graduate Center (2013) at 23, 24.

³⁴⁹ Education from the Inside Out Coalition, *Unnecessary and Counterproductive: SUNY's Criminal History Screening Policy* (2014) at 3.

³⁵⁰ *Id.* at 2 and 3.

³⁵¹ *Id.*

³⁵² Center for Community Alternatives, *Boxed Out: Criminal History Screening and College Application Attrition* (2015). This report and study is available online at www.communityalternatives.org. (Last accessed December 10, 2015)

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*

Screening for criminal history falls most heavily on college applicants of color. Like everything else that flows from our racially disparate criminal processing system, this invariably has racially distinct impacts. The unfettered use of criminal records to screen out qualified prospective students would apparently undermine the gains made over the last 60 years dating back to *Brown v. Board of Education*.³⁵⁷

Moreover, a recent study by Ford and Schroeder shows higher education having a crime reducing effect.³⁵⁸ Their study used data from the National Youth Survey to examine the impact of higher education on criminal offending. This included college both in and out of prison. Their findings indicate that college attendance and investment in higher education decreases criminal offending in adulthood. Reasons why this appears true are that school is a major agent of socialization; strong bonding to school promotes socially conforming behavior; education has a positive impact on the perception of risk; more schooling enhances employability, increases social capital; improves self-esteem, and encourages personal growth.³⁵⁹ Ford and Schroeder's study also provides some evidence that the simple decision to attend college has the potential to change the offending trajectories of some individuals, especially those who were high-rate juvenile offenders.³⁶⁰

B. Recommendations and Model Programs

1. Offer Education as a Component in Diversion

We recommend that education and vocational training be used in judicial and other diversion as an alternative to incarceration. This model has been successfully pioneered in Buffalo City Court over the past two decades. "With no extra funds, in 1995 the court began to identify defendants' social problems and link them to needed services. Today, Buffalo's innovative Court Outreach Unit: Referral and Treatment Services (COURTS) program links together more than 130 community-based providers and makes more than 6,000 referrals a year. The program links individuals coming through the justice system with a full range of social services, including drug treatment, mental health treatment, medical care, anger management, family counseling, youth counseling, domestic violence and battering programming, vocational/educational services, and housing."³⁶¹

2. Ban the Box for College Admissions

We recommend enactment of The Fair Access to Education Act, which would amend the Correction Law and the Executive Law to make it an unlawful discriminatory practice for any college to ask about or consider applicants' past arrests or convictions during the application and admission decision-making process. Adding new provisions that explicitly prohibit colleges

³⁵⁷ *Brown v. Board of Education*, 347 U.S. 483 (1954).

³⁵⁸ Jason A. Ford and Ryan D. Schroeder, *Sociological Spectrum, Higher Education and Criminal Offending Over the Life Course* (2010).

³⁵⁹ *Id.* at 33-34.

³⁶⁰ *Id.* at 46.

³⁶¹ Center for Court Innovation. Buffalo's COURTS (2015), at 1. <http://bit.ly/1SHAbPx>.

from asking about or considering applicants' past arrests and/or convictions during the application and admission decision-making process would amend the Correction Law. In addition, a new subdivision would be added to section 296 of the Executive (Human Rights) Law to make it an unlawful discriminatory practice for colleges to ask about or consider prior criminal justice involvement during application and admission decision-making process.

This recommendation builds upon the recommendation of the 2006 NYSBA Report and Recommendations of the Special Committee on Collateral Consequences of Criminal Proceedings, which proposed that the anti-discrimination provisions of the Human Rights Law and the Correction Law be extended to prohibit discrimination with respect to prior convictions by post-secondary educational institutions.³⁶²

3. Expand Educational Opportunities for People While Incarcerated

Studies show that 95% of incarcerated persons will, at some point, re-enter society, however upon re-entry, only 60% of people in state prisons nationally will have a high school diploma or HSED, and only 2% will hold a degree.³⁶³ Meanwhile, a Georgetown study predicts that nearly two-thirds of the 46.8 million job vacancies created before 2018 will require some post-secondary education.³⁶⁴ The study cites two principal reasons for this. First, the fastest-growing industries — such as computer and data processing services — require workers with disproportionately higher education levels.³⁶⁵ Second, occupations as a whole are steadily requiring more education.

Absent successful vocational training or job matching that enables re-entering people to secure other jobs, New York should consider a front-end investment in secondary education for a significant number of the 30,900 eligible incarcerated individuals who are without it. New York should also ensure that every person in prison has the opportunity to receive academic instruction consistent with an academic assessment of the person's abilities, and, if the length of sentence permits, the opportunity to pursue a HSED, vocational training, or post-secondary education.

³⁶² *Reentry and Reintegration: The Road to Public Safety*, *supra* note 89, at 406.

³⁶³ *Unlocking Potential: Results Of A National Survey Of Postsecondary Education In State Prisons*, *supra* note 300, at 2; *Learning to Reduce Recidivism: A 50 State Analysis of Postsecondary Correctional Education Policy*, *supra* note 303, at 4.

³⁶⁴ Anthony P. Carnevale, *et al.*, Georgetown Univ. Ctr. on Educ. & the Workforce, *Help Wanted: Projections of Jobs and Education Requirements Through 2018*, 5 (2010), <https://cew.georgetown.edu/wp-content/uploads/2014/12/fullreport.pdf>. (Last accessed December 11, 2015). Note that, moving in a similar director, Governor Cuomo has proposed a higher-education initiative in New York prisons to provide college courses for inmates. The Governor plans to use \$7.5 million in criminal forfeiture funds from the Manhattan district attorney and an additional \$7.5 million will come from private matching funds. Only inmates who have a high school degree and are within two to five years of completing their sentences would be eligible. Jesse McKinley and James C. McKinley, *Cuomo Proposes Higher-Education Initiative in New York Prisons*, New York Times (January 10, 2016) http://www.nytimes.com/2016/01/11/nyregion/cuomo-proposes-higher-education-initiative-in-new-york-prisons.html?_r=0.

³⁶⁵ *Id.* at 5.

Many other creative solutions may be employed to expand educational opportunities and defray costs. For example, technology may permit people in prison to have greater access to HSED, vocational and post-secondary education online at a great savings in cost. As noted above, MOOCS can accomplish this. Security concerns can be overcome by using technology to limit online access to the web to the MOOC only, while blocking out other undesired access that threatens security. DOCCS should re-evaluate how access to the web can be controlled, supervised, and thus limit security breaches.

4. Restoration of Tuition Assistance Program (TAP) Eligibility During Incarceration

We recommend that the Legislature enact legislation that overturns the 1995 ban on incarcerated persons receiving student financial aid awards to help pay for college courses while incarcerated, by repealing paragraph d of subdivision 6 of section 661 of the education law. This recommendation is the same as a recommendation of the 2006 NYSBA Report and Recommendations of the Special Committee on Collateral Consequences of Criminal Proceedings: "[t]he State should restore funding for the Tuition Assistance Program for imprisoned individuals for post-secondary education."³⁶⁶

On February 16, 2014, Governor Cuomo announced a new statewide initiative to support college courses in state prisons with public funds.³⁶⁷ His proposal received support from criminal justice organizations and editorial writers.³⁶⁸ But only six weeks later, acknowledging that his proposal was politically controversial, Governor Cuomo dropped the plan. We believe it is preferable to fund prison-based education through a need-based program such as TAP rather than to use public funds without a needs requirement. TAP funding should be considered a collective investment by society. It is an investment we cannot afford to pass up.

5. Promising Models

Buffalo: The Buffalo model exemplifies collaboration between academic, judicial, and workforce development partners. The critical role that a community college can play in such an intervention is exemplified by the partnership between Erie Community College and the Buffalo City Court. Through this partnership, criminal defendants who would otherwise have little hope of successful re-entry and reintegration because of low educational attainment and limited employment prospects are given an opportunity to become productive members of society.

For defendants willing to opt into this program, support services come in the form of case management, mentoring, educational opportunity, educational and career counseling and employment referrals. Although the Buffalo model for education was developed as a component of treatment and an individual's recovery, education has great potential either as a component of

³⁶⁶ NYSBA, *"Re-Entry and Reintegration: The Road to Public Safety,"* *supra* note 89, at 407.

³⁶⁷ Press release, *"Governor Cuomo Launches Initiative to Provide College Classes in New York Prison"* (February 16, 2014), <http://www.governor.ny.gov/news/governor-cuomo-launches-initiative-provide-college-classes-new-york-prison>. (Last accessed December 14, 2015)

³⁶⁸ *"Gov. Cuomo's Bold Step on Prison Education,"* New York Times Editorial (Feb. 18, 2014).

a broader diversion effort or as a stand-alone diversion. Motivational recruitment can be conducted over an extended period of time spanning weeks or even months. The Buffalo recruitment process is selective and self-selective. The decision to participate and take on the hard work and challenge of an educational program is neither presented nor accepted as the easy way out.

New Orleans: Another successful education diversion model has been developed in New Orleans, at the Tulane Towers Learning Center, a partnership between the city's Criminal District Court, Delgado Community College and the Youth Empowerment Project.³⁶⁹ This program has helped to divert thousands of individuals from the criminal justice system, in a city suffering from high incarceration rates and low high school graduation rates.

Moreover, education as a diversion tool may make incarceration unnecessary. If, as Judge Michael A. Wolff hypothesizes, "prison is criminogenic," then early intervention with educational opportunity also avoids "punishment" that may make the problem worse.³⁷⁰ Indeed, educational diversion programs can help address the crisis of extreme high school dropout and pushout rates, low rates of employment, and high rates of incarceration, followed by high recidivism rates. It can, as some in New Orleans believe, "staunch the flow of bodies out of school and into the courts."³⁷¹

New Mexico: New Mexico provides programming to all its prisons using a WebCT engine, a closed circuit Internet connection.³⁷² People in New Mexico prisons enroll in the Internet-based courses, but can access only their courses, not external websites or e-mail.³⁷³ New Mexico's use of the Internet is cost-efficient and can serve as a model for New York.

6. Promising Studies

Rand Corporation: Studies over the last thirty years have repeatedly concluded that educational programming at all levels reduces recidivism rates. The RAND CORPORATION undertook the most recent and most comprehensive meta-analysis in this regard. The findings were released in 2013, with respect to programs that provide education to incarcerated adults. Entitled *Evaluating the Effectiveness of Correctional Education*, the analysis, begun in 2010, was sponsored by a grant from the Bureau of Justice Assistance. Describing the results, Denise E. O'Donnell, Director of the Bureau of Justice Assistance and Brenda Dann-Messier, Assistant Secretary of Vocational and Adult Education for the U.S. Department of Education issued a joint statement, saying:

³⁶⁹ Zoe Sullivan, *Turning the Tide: Challenging the School-to-Prison Pipeline in New Orleans*, *The Crisis* (Spring, 2013) at 24.

³⁷⁰ *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, *supra* note 321, at 1394.

³⁷¹ *Turning the Tide: Challenging the School-to-Prison Pipeline in New Orleans*, *supra* note 369, at 24.

³⁷² Dianna M. Spycher, Gina M. Shkodriani and John B. Lee, *The Other Pipeline: From Prison to Diploma*, College Board Advocacy & Policy Center (2012) at 12.

³⁷³ *Id.*

RAND researchers show that correctional education reduces post-release recidivism and does so cost-effectively. ... The results provided here give us confidence that correctional education programs are a sound investment in helping released prisoners get back on their feet – and stay on their feet – when they return to communities nationwide.³⁷⁴

RAND examined 50 studies of correctional education programs spanning 32 years of research. It found that the odds of recidivating for people who participated in educational programs were 43% lower than the odds of recidivating among comparison group members who did not.³⁷⁵ This translates into a reduction in the risk of recidivating of thirteen percentage points for those who participate in correctional education programs versus those who do not.³⁷⁶ The analysis did not differentiate between the effects of a HSED, vocational, or postsecondary education. An additional finding in the RAND study was that the odds of obtaining employment post-release among people receiving correctional education are 13% higher than the odds of obtaining employment post-release among people not receiving correctional education.³⁷⁷ This was a national study, but findings in New York have been equally probative.

NY DOCCS: New York DOCCS conducted a study of 16,302 people released for the first time in 2005 and followed them for three years.³⁷⁸ The study measured the return rate to DOCCS custody within 36 months of release, comparing people who earned a HSED while incarcerated with people who did not. The return rate of those who earned a HSED while incarcerated was 31% while the rate of those who did not earn a HSED while incarcerated was 38%. The positive effects of participating in a HSED program were even greater for women and for people under age 25 at the time of release. The New York State Commission on Sentencing Reform recognized that there was a more profound reduction in recidivism to be realized from postsecondary educational programs, recommending that DOCCS should provide more educational opportunities for those who enter with a HSED or high school diploma. It reasoned that while obtaining a HSED will realize modest reductions in recidivism, postsecondary educational programs have been shown to reduce recidivism by approximately 40%.³⁷⁹

In addition, the financial gains of decreasing recidivism significantly outmatch the costs of inmate education.³⁸⁰ Consistent with earlier studies in Utah and Florida, the Washington State

³⁷⁴ RAND Corporation, *Evaluating the Effectiveness of Correctional Education* (2013) at iii-iv.

³⁷⁵ *Id.* at 57.

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 58.

³⁷⁸ New York State DOCS, *Follow-Up Study of Offenders Who Earned High School Equivalency Diplomas (HSEDs) While Incarcerated in DOCS* (2010).

³⁷⁹ New York State Commission on Sentencing Reform, *The Future of Sentencing in New York State: Recommendations for Reform*, (2009) 155.

³⁸⁰ Michele Fine, et al, *Changing Minds: The Impact of College in a Maximum-Security Prison*, The Graduate Center of the City of New York and the Women in Prison at Bedford Hills Correctional Facility September 2001 (finding that the "direct costs of reincarceration were far greater than the direct costs" of inmate education).

Institute for Public Policy reported in 2006 that for every dollar spent on correctional education, the State of Washington saved \$12 in reduced criminal justice, incarceration and victim costs.³⁸¹

NY Correctional Association: The New York Correctional Association recently reported that "the cost differences in education versus incarceration in New York, plus the short- and long-term benefits of a better educated population, makes investment in higher education for incarcerated individuals and people in the community smart fiscal policy."³⁸² As noted above, as of April 2012, more than 58% of the prison population – roughly 32,000 people – have attained a high school diploma or HSED certificate, and are therefore eligible for post-secondary education.³⁸³ Nonetheless, only 2% of the entire DOCCS population, or just over 1,100 people, were enrolled in any post-secondary program, leaving out roughly 30,900 eligible people.³⁸⁴

Assuming that 1,000 additional people in prison are educated over four years at a cost of \$2,500 per year, the total cost would be 10 million dollars. Assuming a very modest return on saving of 3.5 dollars for every dollar invested, we can expect a return of 30.5 million dollars. And that savings would be realized just for the first 1,000 people in prison provided expanded educational opportunities.

By increasing the budget to authorize more teachers, DOCCS programs could offer more classes and promote more effective teaching practices. By increasing the budget to authorize more hiring personnel, DOCCS facilities could ensure that vacancies were filled in a reasonable period of time, with proficient – and possibly even longer-lasting – teachers. Moreover, increased salaries would incentivize teachers to remain in their positions longer, alleviating costs associated with staff turnover and decreasing the costs of hiring personnel. Finally, by increasing the non-personal services budget, classes may have a more meaningful impact on people in prison. Better teaching supplies could increase the number of people receiving HSEDs, which dropped by 28.1% between 2000 and 2009. These tools afford people in prison opportunities to exercise their newly learned skills, an essential component of the educational experience. Likewise, increased resources could also increase teacher retention through greater success and satisfaction. Again, this benefit could help alleviate costs associated with staff turnover.

In light of all the benefits derived from support of education for people with criminal history records, and most particularly in light of the cost savings, expenditures on education are an investment.

³⁸¹ Steve Aos, Marna Miller and Elizabeth Drake, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates (2006)* at 9, <http://www.wsipp.wa.gov/ReportFile/952>. (Last accessed December 14, 2015)

³⁸² The Correctional Association of New York, *Education From The Inside, Out: The Multiple Benefits Of College Programs In Prison* (2009), http://www.correctionalassociation.org/wp-content/uploads/2012/05/Higher_Education_Full_Report_2009.pdf. (Last accessed December 14, 2015)

³⁸³ Fischer, *supra* note 305, at 1.

³⁸⁴ Beck, *supra* note at 28. The cost of expanding post-secondary to each of these eligible inmates at \$1,600 each year would be about \$49.44 million.

C. Conclusion

As Brian Fischer, Former Commissioner of the New York State Department of Corrections and Community once said:

Education in the prison setting provides far more than a degree and lower recidivism rates...Through its transformational powers, it provides for a socialization and self-actualization process that no other treatment program can offer. It allows offenders to better understand their self-worth and potential, and most often has offenders reaching out to their own children to encourage them to continue their education.

Once a person makes the decision to move forward with his or her education, that person should be considered a part of the solution.³⁸⁵ Many people will take advantage of the opportunity and take a pathway to successful reintegration if given the chance. It is our responsibility as a society to provide a means for these individuals to do so, for if we do nothing the cost will be heavy. The road to public safety frequently runs through the classroom, and our failure to chart that course will mean that thousands of our fellow citizens will remain jobless, dependent, incarcerated, and poor, and all of our economic and social well-being will be jeopardized.³⁸⁶

VI. HOUSING

Securing and retaining stable housing are critical components of reintegration into society after leaving prison or jail.³⁸⁷ Re-entrants who do not have stable housing have higher rates of recidivism and parole violations, leading to re-arrest and further contact with the criminal justice system.³⁸⁸ Furthermore, if a person released from custody is to have a reasonable chance of securing suitable employment at even a minimum wage, he or she must be able to find an affordable place to live. It is imperative that the re-entrant secures housing from which travel to a job is possible, within a reasonable amount of time, by public transportation or other affordable means.

Yet, housing stability can be one of the most difficult things for re-entrants to achieve because of various obstacles: (1) Government subsidies are less available to re-entering people than in the past. Furthermore, public housing is less available as an option because of

³⁸⁵ *Higher Education and Criminal Offending Over the Life Course*, *supra* note 358, at 46.

³⁸⁶ Diana Brazzell et al., *From the Classroom to the Community: Exploring the Role of Education During Incarceration and Reentry*, The Urban Institute (2009) at 17.

³⁸⁷ See, e.g., The Council of State Governments, *Integrated Reentry and Employment Strategies: Reducing Recidivism and Promoting Job Readiness* (Sept. 2013); Corporation for Supportive Housing, *Public Housing Authorities and Re-Entry Populations: Eligibility of Persons with Criminal Histories and/or Drug Involvement for Public Housing and Section 81 Housing Choice Voucher Programs* (Aug. 2007).

³⁸⁸ Caterina Gouvis Roman & Jeremy Travis, *Taking Stock Housing, Homelessness, and Prisoner Reentry* (2004), http://www.urban.org/research/publication/taking-stock/view/full_report. (Last accessed December 14, 2015). Note that in New York City, a re-entrant who is unable to secure housing has a right to shelter, but New York City's shelter system offers limited options for moving its clients into permanency.

government policies that bar re-entrants from establishing or returning to public housing units, even when eligible, because of the extremely long waitlists. (2) Re-entrants are less likely to have sufficient financial resources to afford unsubsidized private housing or to have relatives, friends or other support in the community to give or lend them the necessary money or provide them a free place in which to live. (3) Their financial burdens may be greater because many re-entering individuals owe money for child support or restitution to crime victims – neither of which they are able to earn enough to pay while incarcerated, with the amounts owed growing substantially over time due to interest and penalties.³⁸⁹ (4) 81% of re-entrants in New York City are unable to secure employment,³⁹⁰ and when they do find employment, it is often insufficient to cover the cost of housing.

These challenges are magnified by a variety of factors discussed in this report that further increase the likelihood of recidivism. First, the cost of private housing has greatly increased, while availability of private and public housing have greatly decreased. Second, people with criminal records (even those only with arrests and no convictions) usually confront many barriers to securing and keeping stable housing following incarceration. As discussed below, the law places harsh restrictions on the provision of and financial support for re-entrants' housing that often precludes or ends otherwise viable living arrangements. This increases the likelihood of recidivism. Third, there is increased private discrimination in housing against people with arrest or conviction records due to both inaccurate and accurate information on the Internet, and indifference to making corrections or declining to discriminate where there is no conviction. It is vital for re-entrants that post-release housing is an important component in discharge plans before release.

The recommendations below are designed to ease the transition for individuals from incarceration to normal and productive social life in terms of housing. They are meant to increase the ability of re-entrants to find stable and safe housing on their own. These recommendations would increase the likelihood that re-entering individuals will avoid recidivism and homelessness. If adopted, the recommendations will, over time, reduce the cost to communities by lessening the use of shelters, homelessness prevention programs, jail, prosecution and prison as well as reduce the cost of housing for re-entrants. An individual who has "served the time" should be given a genuine opportunity to be reintegrated into the community and to participate as an active, tax-paying citizen.

This report describes the challenges presented by the policies of public housing administrations, private housing policies, Three Quarter Houses, and Safety Net Assistance application procedures, and offers several recommendations for reform. New York should expand the availability of and eligibility requirements for public housing. New York should also pass legislation prohibiting landlords of private housing units from making blanket prohibitions against individuals with criminal records. In addition, there should be greater implementation of promising pilot programs that aim to provide housing subsidies and supportive housing to re-entrants. Lastly, the legislature should reform the law to allow incarcerated individuals to begin

³⁸⁹ Steven Yoder, "Prisoner's Dilemma," *The American Prospect*, (Mar. 14, 2011), <http://prospect.org/article/prisoners-dilemma-0>. (Last accessed December 14, 2015)

³⁹⁰ County Re-entry Task Force, *Program Activity Report: January 2012 – June 2012*, at 12.

to apply for Safety Net Assistance before being released. This report does not address the additional complex issues facing certain re-entrants who are classified as sex offenders. These issues are deserving of a full separate study and report

A. Public Housing Concerns and Recommendations

New York State faces an affordable housing crisis³⁹¹ and has the fifth highest housing costs in the nation.³⁹² The affordable housing crisis is affected by price as well as supply (which in turn affects price). Affordable housing for low-income people is especially scarce in New York City.³⁹³ 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.³⁹⁴ Furthermore, the public housing shortage is especially felt by re-entrants who face many restrictions on entering the little public housing available.

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. Pursuant to the U.S. Department of Housing and Urban Development's "One Strike and You're Out" policy,³⁹⁵ public housing tenants can be evicted if any other members or guests are involved in drugs or other criminal activity on or off the premises, even without the tenant's knowledge.³⁹⁶ The United States Supreme Court upheld the constitutionality of such evictions in *Rucker*.³⁹⁷ In light of this decision, those who might otherwise be able to offer housing to re-entering individuals in existing public housing may be averse to offering assistance to an individual with a criminal record.³⁹⁸ Further, the Housing Opportunity Program Extension Act of 1996 strengthened PHAs' ability to screen out and evict drug offenders and other criminals. For example, prior eviction from public housing for drug related activity serves as grounds for immediate declination of an application.³⁹⁹ The Act also

³⁹¹ State of N.Y. Comptroller, *Housing Affordability in N.Y. State* 16-17 (March 2014), http://www.osc.state.ny.us/reports/housing/affordable_housing_ny_2014.pdf. (Last accessed December 14, 2015)

³⁹² National Low Income Housing Coalition, *Out of Reach 2014*, at 13 (2014).

³⁹³ Community Service Society, *What New Yorkers Want from the New Mayor: An Affordable Place to Live* 13 (2014).

³⁹⁴ *Housing New York: A Five Borough Plan* at 5 (2014).

³⁹⁵ Pub. L. No. 104-120, § 9, 110 Stat. 836-38.

³⁹⁶ In *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 128 (2002), the U.S. Supreme Court held that federal law "unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity."

³⁹⁷ *Id.*

³⁹⁸ David J. Harding et al., *Home is Hard to Find: Neighborhoods, Institutions, and the Residential Trajectories of Returning Prisoners*, 647 *Annals Am. Acad. Pol. & Soc. Sci.* 214, 218 (2013). Today, the reach of *Rucker* has been extended to other public housing programs and has also provided PHAs with discretion to evict tenants for offenses less serious than drug crimes (M. Zmora, *Between Rucker and a Hard Place: The Due Process Void for Section 8 Voucher Holders in No-Fault Evictions*, 103 *NW U. L. Rev.* 1961, 1972 (Fall 2009)).

³⁹⁹ Pub. L. No. 104-120, 110 Stat. 834 § 9(b) (1996).

added a metric to the Public Housing Assessment System to monitor the efficacy of PHAs in screening out and evicting tenants for drug-related criminal activity regardless of whether it was committed on or off or near PHA property.⁴⁰⁰

Federal statutes permit excluding someone from public housing – due to purported criminal activity even in the absence of a conviction.⁴⁰¹ For example, 42 U.S.C. § 13661(c), gives a Public Housing Authority ("PHA") the discretion to reject an applicant if it determines that an applicant or any member of the applicant's household is or was, during a reasonable time preceding the date when the applicant household would otherwise be selected for admission, engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety or right to peaceful enjoyment of the premises. Moreover, federal law bars from admission to federally assisted housing a former PHA tenant previously been evicted from federally assisted housing for three years after the eviction, absent successful completion of an approved rehabilitation program.⁴⁰² Federal law also forbids individuals who have been found guilty of producing methamphetamine from being provided public housing.⁴⁰³

Most PHAs reject re-entrants' applications, without any sort of individualized assessment.⁴⁰⁴ 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.⁴⁰⁵ 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.

The situation described above effectively bars most re-entering individuals from entering an existing public housing household, thereby making it difficult to benefit from the familial support other citizens take for granted.⁴⁰⁶ Thus, for example, absent an exercise of discretion by the PHA, a seventeen year old who is sentenced to three years in prison will not be able to return home to her or his parents, if they are public housing tenants.⁴⁰⁷ This is a pressing problem given that a larger percentage of public housing tenants have family members or partners with a recent

⁴⁰⁰ Zmora, *supra* note 398, at 1971.

⁴⁰¹ Paul Stinson, *Restoring Justice: How Congress Can Amend the One-Strike Laws in Federally-Subsidized Public Housing to Ensure Due Process, Avoid Inequity and Combat Crime*, 11 Geo. J. on Poverty L. & Pol'y 435, 446 (2004).

⁴⁰² 42 U.S.C § 13661(a).

⁴⁰³ 42 USC §§ 1437n, 13661-13663; 24 C.F.R. 960.204(a).

⁴⁰⁴ 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).

⁴⁰⁵ Nat'l Housing Law Project, *An Affordable Home on Re-entry: Federally Assisted Housing and Previously Incarcerated Individuals* at 7-23 (2008); HUD Notice PIH 96-16 (HA) (April 29, 1996) ("[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.").

⁴⁰⁶ See Council of State Governments, *Reentry Housing Option: The Policymaker's Guide* at viii.

⁴⁰⁷ 42 U.S.C. §13661(a).

criminal history as compared to the general population and is felt with particularly acuity by re-entering youth.⁴⁰⁸

To deal with the discrimination for New York-financed housing, Governor Cuomo issued an executive order in September 2015 designed to require anti-discrimination guidance with regard to New York-financed housing.⁴⁰⁹ The new guidance is intended to forbid discrimination based on the fact of a conviction. It requires the operators to make an individualized assessments of an applicants with attention to the seriousness of the offense, the time passed since the offense, the age of the individual at the time of the crime, and any evidence of rehabilitation.⁴¹⁰ It will be the Division of Homes and Community Renewal's responsibility to ensure that local agencies fully comply with regard to state-funded public housing, federal Section 8 rental assistance administered by state agencies, and affordable housing financed by the Housing Finance Agency.⁴¹¹ Similarly, Governor Cuomo issued an executive order in September 2015 designed to ensure that homeless individuals leaving incarceration be one of the targeted populations that can be served by supportive housing projects funded by New York State.⁴¹²

Recommendations: Public housing authorities (PHAs) in New York State should amend their restrictive admission policies to provide them with the discretion to enable individuals with criminal records to return to their families. The discretion that PHAs have available under federal law presents New York State with an opportunity to expand the housing for re-entering individuals as part of a broader approach to ameliorating the re-entry problem. PHAs should be required to provide an individualized assessment of a public housing applicant's criminal record before deciding whether to admit a re-entrant. This assessment should include consideration of mitigating factors such as: evidence of rehabilitation; the relationship between the conviction and the applicant's ability to be a good tenant; the interests of the applicant's children, and the applicant's prospects for securing non-public housing.

There have been some moves in this direction. A New York City Housing Authority ("NYCHA") pilot project enables individuals re-entering the community after incarceration to reunite with their families.⁴¹³ Starting in December 2013, the pilot program placed 150 recent re-entrants in public housing.⁴¹⁴ In exchange for placement, the re-entrants must agree to work with case managers to find employment, undergo drug treatment, and/or attend addiction support groups.⁴¹⁵ The pilot is still ongoing and the outcomes are unquantified at this point. The New

⁴⁰⁸ *Id.* at 155, citing Catrina Gouvis Roman, Urban Institute, *Taking Stock: Housing, Homelessness, and Prison Reentry* at 24 (2004).

⁴⁰⁹ Press Release, N.Y. State, *Governor Cuomo Announces Executive Actions to Reduce Barriers for New Yorkers with Criminal Convictions* (September 21, 2015) <https://www.governor.ny.gov/news/governor-cuomo-announces-executive-actions-reduce-barriers-new-yorkers-criminal-convictions>.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ See Mireya Navarro, *Ban on Former Inmate in Public Housing is Eased*, N.Y. TIMES (Nov. 14, 2013), [http://www.nytimes.com/2013/11/15/nyregion/ban-on-former-inmates-in-public-housing-is-eased.html?_r=2&N.Y. City Housing Authority, Family Re-entry Pilot Program, http://www1.nyc.gov/site/nycha/residents/family-services.page](http://www.nytimes.com/2013/11/15/nyregion/ban-on-former-inmates-in-public-housing-is-eased.html?_r=2&N.Y.%20City%20Housing%20Authority,%20Family%20Re-entry%20Pilot%20Program,%20http://www1.nyc.gov/site/nycha/residents/family-services.page).

⁴¹⁴ *See id.*

⁴¹⁵ *See id.*

York State legislature should enact laws designed to ensure that re-entrants have realistic access to public housing. Further, New York state should continue to expand, adopt and implement the new anti-discrimination guidance for New York-financed housing provided by the Council on Community Re-Entry and Reintegration and adopted by Governor Cuomo.

B. Private Housing Concerns and Recommendations

1. Discrimination Against Re-Entrants, Reduced Availability of SROs, and Restriction of Occupancy by Unrelated Parties

Private housing's limited options also pose great problems for re-entering individuals. Already facing New York State's severe shortage of affordable housing for low-income people (see Part A above), re-entrants – absent any discrimination – often find it impossible to afford private housing, particularly when they lack employment, monetary sources of their own, resources from family or others in the community, and sufficient government subsidies. Unfortunately, the housing choice voucher programs ("Section 8")⁴¹⁶ is not presently a viable option for most re-entrants because all applicants to and residents of housing assistance programs are subject to federal alcohol, drug, and criminal activity restrictions.⁴¹⁷ But even a re-entrant who obtains a subsidy faces severe discrimination in the private rental marketplace. Private landlords have even wider discretion than public housing authorities to discriminate against re-entrants.

New York City has been hemorrhaging single room occupancy ("SRO") units since the construction of private SRO units was banned in 1955, and in the ensuing decades the City adopted policies further discouraging SRO occupancy and incentivizing SRO conversions. In addition, for decades part of the New York City's Housing Maintenance Code contained a provision banning more than three unrelated people from living in an apartment or a house. While the law has gone unenforced for years, the Department of Housing Preservation and Development (HPD) has recently began to issue citations.⁴¹⁸

Additionally, private landlords' screening policies and practices very often result in the exclusion or eviction of formerly incarcerated individuals. Private landlords are increasingly utilizing their improved access to "criminal record" data in their screening procedures.⁴¹⁹ A 2008

⁴¹⁶ The Section 8 voucher program subsidizes low-income families who find a qualifying unit in the private rental market.

⁴¹⁷ Marah A. Curtis, Sarah Garlington & Lisa S. Schottenfeld, *Alcohol, Drug, and Criminal History Restrictions in Public Housing*, 15 Cityscape: A Journal of Policy Development and Research 3 (2013), <http://www.huduser.org/portal/periodicals/cityscape/vol15num3/ch2.pdf>. (Last accessed December 14, 2015). Although New York City has implemented a housing subsidy called SEPS that is available to re-entrants who have no other housing options, the program has not had available to it sufficient funding to maximize its utilization.

⁴¹⁸ Cara Buckley, *"In New York, Breaking a Law on Roommates,"* The New York Times, http://www.nytimes.com/2010/03/29/nyregion/29roommates.html?_r=0 (Last accessed December 14, 2015)

⁴¹⁹ Rebecca Oyama, Note, *Do Not (Re)enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 Mich. J. Race & L. 181, 191 (2009).

study estimated that 80% of companies owning residential rental properties screen incoming potential tenants for criminal histories.⁴²⁰

Recommendations: Legislation prohibiting unfair discrimination against individuals with criminal records. The proposed statute would not preclude consideration of prior criminal convictions entirely in housing-related decisions, but would 1) limit decisions based on a history of convictions to those that are substantially and legitimately related to public safety concerns, and 2) limit evictions for individual convictions to the same considerations. The legislation would be enforceable through the Human Rights Commission or through a private civil action and would be based on NY Corrections Law §§ 750-755, NY Executive Law § 296 and the federal Fair Housing Act 42 U.S.C. § 3613, which limit the use of criminal records in employment. In addition, the legislation should forbid the denial of housing to individuals based on a criminal case with a favorable disposition or based solely on an accusation in a pending criminal case. This law would be modeled on NY Executive Law § 296(16), which prohibits the same in denying individuals employment, and the enactment of a law that protects a landlord's decision to rent to an individual with a criminal record from being used against the landlord in a civil action. Altering the absolute ban on constructing private SRO units should be considered. Further, the Housing Maintenance Code's restriction on more than three unrelated individuals sharing an apartment should also be considered so as to enable greater availability of shared living arrangements.⁴²¹

2. Further Problems Arising from Proliferation of "Three Quarter Houses"⁴²²

As a result of the affordable housing crisis, "Three Quarter Houses" have proliferated in New York City.⁴²³ Three Quarter Houses are unlicensed boarding houses that rent shared rooms and falsely claim to provide supportive services.⁴²⁴ Unlike safe, affordable housing, these are highly problematic parts of an underground housing market. Yet, in New York City, these residences now play a large role in housing re-entrants, including those under parole supervision.⁴²⁵ Parole boards often require an "approved address" as a prerequisite to conditional

⁴²⁰ David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 Law & Soc. Inquiry 5, 20 (2008).

⁴²¹ N.Y.C. ADMIN. CODE §§ 27-2004 (4); (7).

⁴²² The Special Committee on Re-entry thanks Tanya Kessler, Staff Attorney at MFY Legal Services and former Skadden Fellow, whose work on Three Quarter Houses has been recognized statewide, for authoring the initial draft of this portion of the report.

⁴²³ Prisoner Reentry Institute, John Jay College of Criminal Justice, *Three Quarter Houses: The View from the Inside* (hereinafter "PRI Report") 5-6 (October 2013), <http://johnjayresearch.org/pri/files/2013/10/PRI-TQH-Report.pdf>. For background on policies that fed the growth of three quarter houses, see Coalition for the Homeless, *Warehousing the Homeless: The Rising Use of Illegal Boarding Houses to Shelter Homeless New Yorkers* (hereinafter "Warehousing the Homeless") 5-7 (January 2008), http://coalhome.3cdn.net/ddc8dd543ded03ff12_lpm6bh1cr.pdf. (Last accessed December 15, 2015)

⁴²⁴ *Id.*

⁴²⁵ Coalition for Women Prisoners, *A Place to Call My Own: Women and the Search for Housing after Incarceration, Introduction* (2013), <http://www.correctionalassociation.org/wp-content/uploads/2013/10/CA-AP2CMO-FINAL-print-ready-August-8-2013.pdf>; Lisa Riordan Seville and Graham Kates, *A Home of Their Own, The Crime Report* (hereinafter "A Home of Their Own"), <http://www.thecrimereport.org/news/inside-criminal-justice/2013-07-a-home-of-their-own> (noting that New York State Department of Corrections and

(cont'd)

release.⁴²⁶ Ironically, the address of a Three Quarter House frequently is the only approved address in which a re-entrant can afford to live.

Three Quarter Houses, also known as "transitional houses or "sober homes," 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.⁴²⁷ 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.⁴²⁸ Although courts have held that these waivers are unenforceable contracts of adhesion,⁴²⁹ the waiver provisions often convince residents and law enforcement that residents can be evicted at any moment for any reason.⁴³⁰

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.⁴³¹ Lacking qualified staff to provide supportive services, many residents find that three quarter houses fail to maintain safe, healthy environments.⁴³²

Community Supervision (DOCCS) records showed that 425 parolees were being housed in sober houses operated by one particular entity); Patrick Arden, *Deep Concerns About 'Three-Quarter' Housing*, City Limits, March 7, 2012 (hereinafter "Deep Concerns"), <http://bkbureau.org/2012/03/07/deep-concerns-about-three-quarter-housing/> (quoting a DOCCS spokesperson's statement that the agency approves three quarter house placements before release).

⁴²⁶ See N.Y. Corr. Law § 803(1)(d). The Parole Board has the authority to require that an applicant obtain a "suitable residence" prior to conditional release. See *Billups v. N.Y. State Div. of Parole*, 18 A.D.3d 1085, 795 N.Y.S.2d 408, 409 (3d Dep't 2005); *Monroe v. Travis*, 280 A.D.2d 675, 676, 721 N.Y.S.2d 377, 378 (2d Dep't 2001) ("it is within the discretion of the Division to impose the special condition of securing approved housing, even though the condition must be satisfied before his request of conditional release can be granted."); *People ex rel. Beam v. Hodges*, 286 A.D.2d 936, 937, 731 N.Y.S.2d 416 (2001) ("Petitioner was not released because he failed to comply with the special condition that he secure housing approved by the Division of Parole (Division) prior to his conditional release."). The Parole Board has broad discretion to enforce a condition on an applicant to obtain housing prior to release even if the applicant's failure to do so results in incarceration beyond the conditional release date. *People ex rel. Wilson v. Keane*, 267 A.D.2d 686, 700 N.Y.S.2d 408 (3d Dep't 1999). The Board of Parole may refuse to release a person eligible for conditional release to a homeless shelter when the person is unable to secure housing that meets the Division's standards. See *Monroe*, 280 A.D.2d at 675-76, 721 N.Y.S.2d at 378.

⁴²⁷ PRI Report, *supra* note 423, at 5; *Warehousing the Homeless*, *supra* note 423, at 5-6.

⁴²⁸ *A Home of Their Own*, *supra* note 425.

⁴²⁹ See, e.g., *Wright v. Lewis*, 2008 NY Slip Op 52106(U), 2008 WL 4681929 (Sup. Ct. Kings Cty 2008); *Davidson v. House of Hope*, 19600/12, NYLJ 1202579307267 (Kings Cty. Civ. Ct., Nov. 15, 2012); *McCormick v. Resurrection Homes*, 38 Misc.3d 847, 956 N.Y.S.2d 844 (Civ. Ct. N.Y. Cty. 2012).

⁴³⁰ Because evicting without court process is a misdemeanor, police officers have the duty to assist a tenant facing such an unlawful eviction. See N.Y. Police Dep't Patrol Guide 214-12, *Unlawful Evictions* (instructing officers to issue a summons or make an arrest where the officer has probable cause to believe that an unlawful eviction has been committed).

⁴³¹ PRI Report *supra* note 423, at 6-7, citing analysis by Furman Center for Real Estate and Urban Policy.

⁴³² *A Place to Call My Own*, *supra* note 425, at 54; PRI Report *supra* note 423, at 32.

Three Quarter Houses frequently engage in other unlawful practices that may hinder residents' efforts to rebuild their lives. To continue getting money for residents' outpatient treatment, landlords may, through eviction threats, lead recovering addicts to relapse – and then join new treatment programs. Residents have reported that some Three Quarter Houses receive kickbacks from outpatient programs that bill Medicaid, and a recent investigative report detailed complaints of kickbacks to government agencies.⁴³³ Such practices clearly violate New York State laws, which protect patients' right to choice in treatment.⁴³⁴

Furthermore, House-mandated program attendance can interfere with successful re-entry. Individuals already thriving in programs may be forced to switch to programs chosen by Three Quarter Houses. The latter programs may require a long commute or have attendance requirements that interfere with job training or work schedules.⁴³⁵ Re-entrants often put up with the difficult conditions because they have little other choice. New York State provides a meager allowance of \$215 per month for rent for single people receiving public assistance – the same amount has been provided since 1988. Yet, rents have soared – with the median monthly rent in New York City having risen to \$1100.⁴³⁶

New York City Mayor Bill de Blasio recently announced an emergency task force to investigate Three Quarter Houses after The New York Times articles detailing their often illegal but largely unregulated administration and conditions.⁴³⁷ There are no requirements, no regular inspections, and no registry for these Houses or their managers. The Office of Alcoholism and Substance Abuse Services regulates supportive housing for people in treatment in the State of

⁴³³ Jake Bernstein, *Inside a New York Drug Clinic, Allegations of Kickbacks and Shoddy Care*, ProPublica (September 9, 2013) (detailing complaints by former staff at an outpatient program of payments to a three quarter house operator). One of the largest groups of Three Quarter Houses, Narco Freedom, was indicted and charged with receiving kickbacks from outpatient programs that bill Medicaid. Lisa Seville and Graham Kates, *Drug Treatment Moguls Lived in Luxury on Medicaid Cash, Say Prosecutors*, NBC News (January 5, 2015), <http://www.nbcnews.com/news/investigations/drug-treatment-moguls-lived-luxury-medicaid-cash-say-prosecutors-n276386>.

⁴³⁴ N.Y. MENTAL HYGIENE LAW § 22.07. See also Cindy Rodriguez, *Drug Rehab for Housing: Alleged Scheme Targets City's Most Vulnerable*, WNYC (December 15, 2010) (hereinafter *Drug Rehab for Housing*), <http://www.wnyc.org/story/104149-jerome-david/> (quoting a violation report issued by the New York State Office of Alcoholism and Substance Abuse Services citing an outpatient provider for mandating treatment for admission into a three quarter house, "a violation of patient rights.")

⁴³⁵ Maura Ewing, *The Dangerous Zone Between a Halfway House and Freedom*, ALJAZEERA AMERICA (February 23, 2014) (describing a resident's choice between unnecessary house-mandated treatment and paid employment and classes), <http://america.aljazeera.com/articles/2014/2/23/the-dangerous-zone-between-a-halfway-house-and-freedom.html>; PRI Report *supra* note 423, at 23-24.

⁴³⁶ The Growing Gap: New York City's Housing Affordability Challenge, April 2014, http://comptroller.nyc.gov/wp-content/uploads/documents/Growing_Gap.pdf. (Last accessed December 15, 2015)

⁴³⁷ A Choice for Recovering Addicts Relapse or Homelessness, May 30, 2015, Kim Baker, http://www.nytimes.com/2015/05/31/nyregion/three-quarter-housing-a-choice-for-recovering-addicts-or-homelessness.html?hp&action=click&pgtype=Homepage&module=second-column-region®ion=top-news&WT.nav=top-news&_r=1. (Last accessed December 15, 2015). However, New York City's task force is continuing to face struggles shutting down the Three Quarter Houses as shutting them down would risk adding to the homeless population. Kim Barker, *New York Faces Struggle in Curbing Flophouse Schemes that Victimize Addicts*, New York Times (December 28, 2015), http://www.nytimes.com/2015/12/28/nyregion/new-york-faces-struggle-in-curbing-flophouse-schemes-that-victimize-addicts.html?emc=eta1&_r=0.

New York, but does not approve Three Quarter Houses because they provide no services. In some cases, the Department of Buildings has fined the landlords, often for overcrowding, but subsequently has done little to enforce the punishment.

Many Three Quarter Houses evict tenants without notice or due process after they complete mandated outpatient programs or allegedly violate house rules.⁴³⁸ These self-help evictions are illegal.⁴³⁹ Homelessness throws a formerly incarcerated person into immediate crisis, including potentially violating parole for failing to be inside at one's approved address by curfew.⁴⁴⁰

Recommendations: To protect re-entrants from unsafe conditions and predatory practices in the underground housing market, New York must first expand safe, affordable housing options for very low-income people and for formerly incarcerated individuals specifically. Three Quarter Housing, where it can be shown to be compliant with fire and other safety codes, should be regulated; otherwise, Three Quarter Housing should be eliminated.

3. FUSE Program

On the opposite end of the spectrum from Three Quarter Houses is the Frequent Users Service Enhancement (FUSE) program. In 2009, New York City implemented this as a limited program, designed and managed by the Corporation for Supportive Housing (CSH), which states that FUSE is data driven and targeted to the problem of housing upon re-entry⁴⁴¹ The two hundred initial FUSE participants were selected from a pool of re-entering individuals at a high risk of homelessness who had in the six months prior to program entry transitioned in and of various housing, including incarceration, several times.⁴⁴² Participants received job training, mental health and drug rehabilitation treatment, and other services tailored to their needs.⁴⁴³ A Columbia University Mailman School of Public Health study issued in 2013⁴⁴⁴ followed the participants closely during their time in the program and for the two years after they left it.⁴⁴⁵ Researchers also gathered available data about participants' housing in the five years leading up to FUSE participation.⁴⁴⁶

The study found that at the end of the program, 91% of FUSE participants were stably housed compared to 28% of the general re-entering population. After two years, 86% of FUSE participants were stably housed compared to 42% of the general re-entering population. In that

⁴³⁸ A Home of Their Own, *supra* note 425; PRI Report *supra* note 423, at 22-23; Drug Rehab for Housing *supra* note 434.

⁴³⁹ N.Y.C. ADMIN. CODE § 26-521 et seq.; REAL PROP. & PROC. LAW § 711.

⁴⁴⁰ PRI Report *supra* note 423, at 34.

⁴⁴¹ NYC Independent Budget Office, *City Spending Rises on Programs to Help Inmates Leaving Jail*, at 4 (June 2009).

⁴⁴² Angela A. Aidala, William McAllister, Maiko Yomogida, Virginia Shubert, *Frequent Users Service Enhancement 'FUSE' Initiative: New York City FUSE II Evaluation*, at i (Columbia University Mailman School of Mental Health, 2013).

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

same time, FUSE participants spent 146.7 fewer days in shelter and 19.2 fewer days incarcerated than non-participants.⁴⁴⁷ Substantial reductions in ambulance rides, hospitalization, rehabilitation, and other services (typically paid for out of state and municipal coffers) were also found.⁴⁴⁸

New York City is implementing a permanent FUSE-based supportive housing program through the Department of Homeless Services.⁴⁴⁹ And CSH has implemented FUSE programs in several municipalities across the country, including Detroit, Los Angeles, and Chicago.⁴⁵⁰

If scaled appropriately on a statewide level, the FUSE-like supportive housing would go a long way to facilitate successful re-entry. While there would certainly be difficulties in applying the FUSE model to issues confronted by re-entering individuals in rural areas, the FUSE approach is a promising one and worth investing in.

Recommendations: FUSE should be further implemented and funded and a statewide re-entry supportive housing program should be established. Moreover, supportive housing units should be designated for individuals living in Three Quarter Houses and other formerly incarcerated people, statewide. State, county, and municipal authorities should closely examine FUSE and similar supportive housing programs and seriously consider implementing similar programs across the state. State and local governments should also consider a pilot project to pay an enhanced shelter allowance to Three Quarter House operators that meet minimum standards and respect residents' rights.

C. The 45 Day Wait for Safety Net Assistance Applications

Re-entrants with no other means of support must generally rely on public assistance. Because individuals released from incarceration are at high risk for homelessness and shelter use immediately following release, and a history of shelter use substantially increases the risk of subsequent incarceration,⁴⁵¹ having the funds to obtain housing is of critical importance to a successful re-entry. However, applicants for public assistance in New York State who do not reside with their children must wait 45 days after applying for benefits to receive any payments.⁴⁵² For these individuals, the wait time between their submission of the benefits application and when the benefits become available can have a significant effect on their ability to re-enter successfully.

⁴⁴⁷ *Id.*, at iv-v.

⁴⁴⁸ *Id.*

⁴⁴⁹ City of New York, Mayor's Task Force on Behavioral Health and the Criminal Justice System Action Plan 2014, <http://www1.nyc.gov/assets/criminaljustice/downloads/pdf/annual-report-complete.pdf>. (Last accessed December 15, 2015)

⁴⁵⁰ Corporation for Supportive Housing, <http://www.csh.org/fuse> (Last accessed December 15, 2015)

⁴⁵¹ S. Metraux and D. Culhane, *Homeless Shelter Use and Reincarceration Following Prison Release: Assessing the Risk*, University of Pennsylvania School of Social Work, http://www.antoniocasella.eu/nume/Metraux_homeless_2002.pdf (Last accessed December 15, 2015)

⁴⁵² N.Y. Soc. 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").

Recipients of public assistance benefits in New York State fall into one of two categories, depending on whether they reside with their children and if they have received assistance for five years. If they reside with their children and have received assistance for fewer than five years, they are eligible for Family Assistance, a federally funded program. Family Assistance applications must be processed within 30 days, and benefits are issued retroactively to the date that eligibility is established. Individuals who have no children and those who have children but have received assistance for more than five years must apply for Safety Net Assistance (SNA) benefits. SNA is funded with local dollars and a small state match (approximately 29%). Applicants for SNA must wait forty-five days after applying for benefits to receive any SNA payments (although, in the interim, the State must meet all of the applicant's emergency needs).

In 1993, the New York State Department of Social Services ("NYSDSS"), now the New York State Office of Temporary and Disability Assistance ("OTDA"), recognized that the 45-day waiting period could be problematic for those recently released from incarceration. Accordingly, the then-NYSDSS issued an "Informational Letter" stating that local Social Services districts should accept public assistance applications from a person 45 days before his or her release date so that benefits may begin on the date of release. Later, however, OTDA took the position that the directive contained in the Informational Letter was not mandatory. As a result, some social services districts refuse to accept public assistance applications from incarcerated individuals, even if they have a defined release date. Other counties accept but then deny applications on the ground that an applicant is not "needy" because his needs are being met in prison.

When a local Social Services district refuses to accept an application from a person in prison who has identified housing in a particular community, this often has adverse consequences. If the person cannot find family or friends to take him in as an alternative, he may turn to a homeless shelter, which costs New York taxpayers much more than Safety Net Assistance benefits. Otherwise, where a person lacks family or friends to take him in, his inability to identify where he would live upon release will often force him to stay in prison past his conditional-release date. For others, lack of funds for rent, transportation, or even clean clothes will thwart a successful transition into the world of work.

Recommendations: To assure that individuals have money available to house and support themselves upon their release, individuals who are scheduled to be released from incarceration should be allowed to apply for Safety Net Assistance 45 days before release and local officials should be required to accept the applications.

More specifically, the New York State Legislature should add a new section 13 to Social Services Law § 159 to provide:

"(13) Social services districts shall accept applications for safety net assistance from incarcerated individuals beginning forty-five days before their release dates. In such cases, the interim period between application and release shall count toward the forty-five day waiting period for Safety Net Assistance."

In the alternative, a new subdivision (d) should be added to the New York Social Services regulations at 18 NYCRR 350.3, stating:

"(d) Any person shall have the right to make an application for public assistance while incarcerated, so long as the applicant expects to be released within forty-five days of the date of said application. In such cases, the interim period between application and release shall count toward the forty-five day waiting period for Safety Net Assistance."

VII. MEDICAL HEALTH

The nation spends more than \$6.5 billion annually on health care services that purport to benefit incarcerated people.⁴⁵³ For example, the Patient Protection and Affordable Care Act (ACA), in addition to insuring millions of previously uninsured people, creates specific new opportunities to ensure continuity of medical coverage and care when prisoners are released.⁴⁵⁴ Those who are incarcerated do require somewhat disproportionate care, since they have higher incidences of mental illness, chronic and infectious diseases than the populace as a whole.⁴⁵⁵ Mental illness is addressed in section VIII.

Unsurprisingly, the standard of correctional and post-correctional health care significantly affect the rehabilitation or recidivism rates during and after re-entry.⁴⁵⁶ Jeremy Travis's seminal re-entry work "But They All Come Back," and recent works by governmental, academic, and advocacy group authors all highlight effective correctional health care as one of the most effective ways to fight recidivism and poverty.⁴⁵⁷

This Association addressed correctional health care in an appendix to the predecessor report.⁴⁵⁸ As was true then, the courts typically preclude relief unless a prisoner proves that the

⁴⁵³ The PEW Charitable Trusts, "Managing Prison Health Care Spending" (Updated May 2014) at 2, available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2014/PCTCorrectionsHealthcareBrief050814pdf.pdf. (Last accessed December 15, 2015)

⁴⁵⁴ Amy Smith, *Health and Incarceration: A Workshop Summary*, National Research Council and Institute of Medicine (2013), at ix (hereinafter "NAS Report"). See also, NAS Report at 31 to 36 (discussing new funding streams and changes that the ACA may produce that will serve to improve access to care and to continuity of care for individuals who are criminal justice involved); Josiah D. Rich et al., "How Health Care Reform Can Transform The Health of Criminal Justice-Involved Individuals," *Health Affairs*, 33, no. 3 (2014) 462-467; Barbara DiPietro and Lisa Klingenstein, "Achieving Public Health Goals Through Medicaid Expansion: Opportunities in Criminal Justice, Homelessness, and Behavioral Health with the Patient Protection and Affordable Care Act," *American Journal of Public Health* 103, no. S2 (2013): e25-e29; and S. Phillips, "The Affordable Care Act: Implications for Public Safety and Corrections Populations" (Washington, DC: The Sentencing Project, 2012).

⁴⁵⁵ *Id.* at 8.

⁴⁵⁶ Nicholas Freudenberg, et al., *Coming Home From Jail: The Social and Health Consequences of Community Reentry for Women, Male Adolescents, and Their Families and Communities*, *Am. J. Public Health*, 2005; 95(10): 1725-36 (finding evidence that having health insurance after release is associated with lower rates of rearrest and drug use).

⁴⁵⁷ See e.g., Woods et al. *Am J. Public Health*, "The Role of Prevention in Promoting Continuity of Health Care in Prisoner Reentry Initiatives" at e2 (March 2003) ("addressing prison reentry is an essential strategy to address health disparities and increase health equity.").

⁴⁵⁸ "Re-entry and Reintegration: the Road to Public Safety" at Appendix 1 (May 2006), NYSBA, Report and Recommendations of the Special Committee of Collateral Consequences of Criminal Proceedings.

medical "care" amounted to "deliberate indifference." But state and local governments are free to, and should, provide more than the constitutional minimum.

We recommend that New York convene a group of medical providers, attorneys, academics, formerly incarcerated individuals and correctional experts to discuss the state of health care delivery for those in New York state prisons and local jails. This discussion should focus on ensuring continuity of care, re-entry planning services that begin long before release, and enhanced medical care upon release.

Also instructive is the ongoing work of the New York City Mayor's Task Force on Behavioral Health and the Criminal Justice System ("Task Force"), which includes efforts to reduce incarceration rates through changes to bail practices and increased availability of diversion programs that keep individuals with behavioral health needs out of the criminal justice system and, if they do enter the system, treat them outside of the jail system when possible.⁴⁵⁹ In addition, the Task Force is committed to improving mental health and drug treatment inside the jails and to connect individuals with treatment in the community upon release.⁴⁶⁰ Included in the Task Force efforts to improve care inside the jails is a commitment to a therapeutic rather than punitive approach to treatment that anticipates a dramatic reduction in the use of punitive segregation (solitary confinement) in the City jails.⁴⁶¹ As part of the Task Force efforts, the City's Department of Homeless Services will focus on individuals with behavioral health needs who have a history of homelessness and of cycling in and out of the criminal justice system.⁴⁶² The aim is to create 267 permanent housing slots with supportive services including mental health and substance abuse services.⁴⁶³

We focus directly below on a few of the most pressing concerns regarding medical care in and after custody and its impact on re-entry and life outcomes for individuals who return to the communities from whence they came. Litigation has led to major institutional reform covering many issues related to access to and quality of care.⁴⁶⁴ In discussing the current situation, we makes recommendations that highlight where change is most urgently needed.

⁴⁵⁹ *Id.* at 9-10.

⁴⁶⁰ *Id.* at 12.

⁴⁶¹ *Id.* at 7.

⁴⁶² *Id.* at 14.

⁴⁶³ *Id.*

⁴⁶⁴ They include *Hilton v. Wright*, 9:05-CV-1038 (N.D.N.Y. Feb. 26, 2006) (statewide challenge to hepatitis C policies); *Disability Advocates, Inc. v. New York State Office of Mental Health*, 02-CV-4002 (S.D.N.Y. filed May 2002) (statewide challenge to inadequate mental health services); *Inmates with HIV v. Goord*, 90-CV-0252 (N.D.N.Y. filed 1990) (statewide challenge to medical treatment of HIV-infected prisoners); *Benjamin v. Schembri*, 75-CV-3073, Stipulation and Order (S.D.N.Y. June 29, 1994) (agreed order limiting medical care budget cuts); *Todaro v. Ward*, 565 F.2d 48 (2d Cir. 1977) (affirming injunction concerning medical care at women's maximum security state prison); *Milburn v. Coughlin*, Stipulation of Terms of Modified Judgment by Consent (S.D.N.Y. Sept. 27, 1991) (consent decree governing medical care at men's maximum security state prison, still in effect); *Dean v. Coughlin*, 623 F. Supp. 392 (S.D.N.Y. 1985) (decision finding dental care at maximum security women's prison constitutionally inadequate); *Reynolds v. Ward*, 81 Civ. 107, Stipulation and Order of Settlement (S.D.N.Y. Aug. 1, 1990) (consent decree governing medical and mental health care, including conditions of living and restraint practices, in New York City hospital prison wards and for

(cont'd)

A. Current Medical Care Concerns

1. Lack of Access to Quality Health Care During Incarceration is a Barrier to Successful Re-entry

Prisoners perceive the general quality of health care in New York correctional facilities as poor, and patient-provider relationships are often strained. The Correctional Association ("CA") found that "only 11% of all general population ... persons [it surveyed] in DOCCS [NYS Department of Corrections and Community Supervision] rated their prison's healthcare system as good, 40% said it was fair, and about half assessed it as poor."⁴⁶⁵ Additionally, "medical care is the most grieved issue in the prison system, and many CA-surveyed persons raised concerns about access to care and/or the quality of services provided for both sick-call encounters and clinic call-outs."⁴⁶⁶ The quality of care appears to be related to individual provider competence and attitude, and the management of individual medical units.⁴⁶⁷

An Urban Institute empirical study found that those with significant health problems when they left custody "faced distinct challenges with regard to finding housing and employment, reconnecting with family members, abstaining from substance use and crime, and avoiding a return to prison."⁴⁶⁸ Similarly, a paper published by the American Journal on Public Health concluded that "acute and chronic physical and mental illnesses as well as substance abuse can impede individuals' ability to surmount other barriers to re-entry, thereby increasing their risk of relapse and recidivism."⁴⁶⁹

Even if untreated inside jail or prison, inmates eventually leave, usually returning to the communities in which they were sentenced.⁴⁷⁰ The opportunities and services available in jail or prison are correctly included in re-entry analysis because the conditions under which people are held directly affect the skills, problems, and needs they will have when released. If health programs and services are unavailable, ineffective, or unpleasant in custodial settings, individuals will be less likely to seek and participate in necessary treatment after release.

"outposted" patients in civilian wards); Vega v. Ward, 82-Civ-6475, Stipulation and Order (S.D.N.Y. Oct. 12, 1990) (consent decree governing medical care and living conditions for patients held in Rikers Island Infirmary); Vega v. Mitchell, 82 Civ. 6475, Order Relating to Medical Placement and Isolation of Patients with Contagious Diseases (S.D.N.Y. May 16, 1992) (order requiring the construction of Contagious Disease Units on Rikers Island).

⁴⁶⁵ Correctional Association of New York, 2013 Comments DOH Oversight of HIV/HCV Care in NYS Prisons (CA Report), September 10, 2013 at 5. The report is available at: <http://www.correctionalassociation.org/wp-content/uploads/2015/01/CA-Memo-2013-Comments-DOH-Oversight-Law-Final2.pdf> (Last accessed December 15, 2015)

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* ("significant differences exist among prisons concerning both access and quality of care issues").

⁴⁶⁸ Kane & Visser, "Health and Prisoner Reentry: How Physical, Mental, and Substance Abuse Conditions Shape the Process of Reintegration," Urban Institute Justice Policy Center Report (2008) at 1, available at http://www.urban.org/research/publication/health-and-prisoner-reentry/view/full_report. (Last accessed December 15, 2015)

⁴⁶⁹ Woods et al. Am J. Public Health, "The Role of Prevention in Promoting Continuity of Health Care in Prisoner Reentry Initiatives" at 831 (May 2013).

⁴⁷⁰ *Id.* at 830.

A serious impediment to effective health care delivery in the state prisons is inadequate staffing, which seriously strains every aspect of medical care delivery.⁴⁷¹ The DOCCS budget for medical staff and non-personal services was reduced by 16% and 17%, respectively, from fiscal year 2011-12 to fiscal year 2013-14.⁴⁷² Moreover, there remain a significant number of unfilled medical staff positions.⁴⁷³ The corrections environment would be difficult for medical professionals staffing even with proper staffing. Inadequate staffing negatively affects medical judgments and the quality of patient encounters and care.⁴⁷⁴ It is particularly important that staff have the time and willingness to educate patients about their conditions and treatments – and about preventive measures.

Preventive care and continuity of care are crucial to positive long-term health care outcomes, especially for the chronically ill or patients with acute or complex care needs. "A strengths-based prevention framework that helps men maintain their health, monitor health risks, and seek treatment of acute conditions is necessary...."⁴⁷⁵ Yet, DOCCS' inadequate staffing often prevents making appropriate judgments as to specialty care and diagnostic testing, and precludes essential patient education. "A prevention science framework for [health care] education, planning, and service delivery" should be used⁴⁷⁶ Without one, poor preventive care and patient education become a community health concern after the patients are released from custody.

Recommendation: New York should convene a group of medical providers, attorneys, academics, formerly incarcerated individuals and correctional experts to assess the state of health care delivery for those in state prisons and local jails and the obstacles to providing care.

2. Prison and Jail Medical Staff are Often Isolated from the Mainstream Medical Community, Compromising Care

The correctional environment presents serious challenges for medical professionals trying to deliver effective treatment inside prisons and jails – an environment that may itself undermine health. Psychologist, Dr. Craig Haney, an expert on prisons and social psychology, stated: "prisons are not just hospitals with electrified fences around them."⁴⁷⁷ Dr. Haney has reported that many pressures in the correctional setting undermine medical professionalism and patient trust in medical providers.⁴⁷⁸ In the correctional setting "healthcare providers have less authority, unlike in any other setting in which they are accustomed to practicing."⁴⁷⁹ Dr. Haney

⁴⁷¹ See CA Report at 5 ("Limitations on staffing resources are correlated with delays in care and can result in degradation in the quality of the care provided by overtaxed staff.")

⁴⁷² CA Report at 4. See also DOCCS inmate population statistics showing that the population remained between 56,000 and 54,000 during the relevant time frame (a drop of less than 4%). Statistics available at: <http://www.scoc.ny.gov/pop.htm>. (Last accessed December 15, 2015)

⁴⁷³ *Id.* at 4-5.

⁴⁷⁴ *Id.* at 5.

⁴⁷⁵ Woods et al. *supra* note 469, at 831 (May 2013).

⁴⁷⁶ *Id.* at 836.

⁴⁷⁷ NAS Report, *supra* note 454, at 12.

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

concluded that the correctional environment induces "even the best trained and most well-intentioned care providers to a change in attitude [negatively] about the patient."⁴⁸⁰ Similar observations were reported by a former DOCCS Medical Director, Dr. Robert Greifinger. Dr. Greifinger identified several factors which contribute to the difficulty of providing health care effectively in correctional facilities. One is the lack of leadership, as "the commissioners, secretaries, and wardens often are not providing the leadership to allow the modern innovative value-driven physicians and other healthcare practitioners to do their jobs."⁴⁸¹ Another is "the pronounced isolation of healthcare providers in prison and jail settings, as they are often separated from their peers practicing in the general public."⁴⁸² Dr. Greifinger said, "99 percent of the time the reasons there was unconstitutional care was because there was mistrust and cynicism of what the patient was saying."⁴⁸³ These factors relate directly to correctional medical staff morale and professionalism, which in turn directly affects quality of care.

The adverse effect of the culture within correctional settings is compounded by medical professionals' need to play dual roles: to treat, and also to assess for fitness for various punishment and/or security measures. This dual loyalty is evident in requirements that medical staff approve individuals for placement in solitary confinement, and participate in classification, and in pressures on clinical staff from security staff (*e.g.*, to change assessments of patient injuries based on security staff reports, to conform prescribing practices based on security concerns, or to share confidential health information with security staff for non-treatment related reasons).⁴⁸⁴

A recent New York City study reflects an attempt to raise awareness about dual loyalty and mitigate any adverse effect on quality of health care. In the study, clinical staff reported that their ethics were compromised in the correctional work setting, and patients reported their perception that health services were not independent from security staff.⁴⁸⁵

This study's results suggest that it would be helpful to adopt a human rights approach and successfully remove clinical staff from the process of approving patients for placement into solitary confinement settings.⁴⁸⁶ However, this approach raises concerns that clinical staff will hesitate to speak up at critical times during a patient's incarceration when intervention may be needed. A balance must be struck between dual loyalties that enables a therapeutic alliance with patients while allowing clinical staff to intervene when necessary for quality treatment.

The isolation of many corrections settings from the outside medical community may also affect assessments of the quality of the care provided by medical providers because "if practicing outside of health plans or Medicaid, they may also be missed by metrics used to measure and

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.* at 13.

⁴⁸² *Id.* at 13.

⁴⁸³ *Id.*

⁴⁸⁴ See Glow-Kollisch, et al. "*Data-Driven Human rights: Using Dual Loyalty Trainings to Promote the Care of Vulnerable Patients in Jail*," Health & Human Rights (2015).

⁴⁸⁵ *Id.* at pp. 3-4.

⁴⁸⁶ *Id.* at 7.

evaluate performance."⁴⁸⁷ Health care providers inside correctional settings must be held to the community standard of care, including the community standard for quality of care assessments.⁴⁸⁸

Prison and jail medical staff must be included in, and participate in, the wider medical community. Ongoing training and direct communication between forensic medical staff and other health care providers and medical academics in the community must be encouraged. Empowerment of correctional medical staff to rely upon medical professionals and medical ethics training should translate into better health care delivery. To ensure the quality of care, oversight with metrics similar to those required by accrediting agencies outside of the correctional system should be in place within the corrections setting.

Recommendations: (1) DOCCS should recruit medical care staff to fill vacancies and add additional positions, (2) the Legislature should ensure that sufficient funding is available for this purpose; and (3) the should increase DOCCS' medical budget, including for specialty care and for staffing. Further, correctional medical providers should be audited by oversight agencies that utilize metrics similar to those required by accrediting agencies outside of the correctional system. Further, correctional medical staff should participate in continuing education and training with other forensic and non-forensic health care providers and medical academics on evolving over time the standards for patient care, medical ethics and medical professionalism.

3. Chronic Care Treatment Must be Improved

Significant numbers of people in New York State jails and prisons suffer from chronic medical conditions that require diagnosis and treatment during confinement.⁴⁸⁹ If these are not provided, then upon release there will be poor health outcomes that may preclude successful re-entry.⁴⁹⁰ If individuals do not receive appropriate treatment while confined, they are less likely to participate in programming, such as in education and job training. The lack of programming may then impact ability to obtain parole.

Prevalent chronic medical conditions for people in prison and jails include HIV and HCV infection, hepatitis B infection, diabetes, hypertension and asthma.⁴⁹¹ All of these conditions require proper diagnosing, treatment and monitoring.⁴⁹² The lack of proper diagnosis and treatment is apparent with regard to HIV and HCV infected people in the New York State prison

⁴⁸⁷ NAS Report, *supra* note 454, at 34.

⁴⁸⁸ NAS Report, *supra* note 454, at 14.

⁴⁸⁹ *HIV and Healthcare in Prison*, Correctional Association of New York, available at <http://www.correctionalassociation.org/issue/hiv-health>. (Last accessed December 15, 2015)

⁴⁹⁰ See CA Report, September 10, 2013 at 44-45, available at: <http://www.correctionalassociation.org/wp-content/uploads/2015/01/CA-Memo-2013-Comments-DOH-Oversight-Law-Final2.pdf>. (Last accessed December 15, 2015)

⁴⁹¹ *Medical Problems of State and Federal Prisoners and Jail Inmates*, 2011-12 (February 2015), U.S.D.O.J. Office of Justice Programs, Bureau of Justice Statistics at 1.

⁴⁹² *Id.*

system.⁴⁹³ It is estimated that 3,080 people incarcerated in New York State prisons are HIV-infected.⁴⁹⁴ And the Department of Health (DOH) studies indicate that women in state custody are infected at more than double the rate for men.⁴⁹⁵ Yet, based on 2012 data, DOCCS had apparently identified only about 45% of all HIV-infected people in custody, leaving 55% of HIV-infected people without a diagnosis.⁴⁹⁶

Similarly, people in New York State prisons who have the Hepatitis C virus ("HCV") suffer deficiencies in diagnosis. An estimated 6,000 to 6,600 people incarcerated in New York State prisons are HCV-infected.⁴⁹⁷ Based on 2012 data, DOCCS had apparently identified less than 75% of HCV-infected people (4,504 individuals), leaving approximately 25% of HCV-infected people in custody without a diagnosis.⁴⁹⁸ Medical care in local jails is provided by a variety of providers that include county health departments and, by contract, individual physicians and private health care companies. Care is often inconsistent and inadequate.

Several analyses reflect the extent of the problem. For example, the New York State Attorney General's Office ("OAG") undertook a probe in April 2013, regarding Correctional Medical Care ("CMC") Inc., a public health care contractor which has become the state's largest provider of medical services to New York State jails.⁴⁹⁹ The OAG investigation began after the New York State Commission of Correction's Medical Review Board made findings critical of the care provided by CMC in the deaths of nine people in custody.⁵⁰⁰ "The findings are detailed in death reports drafted by the commission's Medical Review Board, which accused CMC employees of 'gross negligence,' 'fundamental and egregious lapses of care' and 'grossly and flagrantly inadequate and improper' treatment of inmates."⁵⁰¹

The Attorney General's probe of CMC resulted in a settlement and monitoring agreement in September 2014.⁵⁰² The Settlement agreement includes OAG's making findings indicating gross deficiencies in CMC's contractual obligations. Examples of other findings include: CMC's failure in Monroe County to provide the number of health professionals required by contract. "The understaffing notably included high-level clinicians like physicians, nurse practitioners/physician assistants, psychiatric physician assistants, and mental health director."⁵⁰³ Further, in Monroe County "[s]everal professional staff members were hired without appropriate licenses and experience...."⁵⁰⁴ The agreement similarly indicates deficiencies in Tioga County, noting that "CMC substituted less qualified staff for the required level of qualification required

⁴⁹³ The Correctional Association of New York, CA 2013 *Comments Re DOH Oversight of HIV/HCV Care in NYS Prisons* (Oct. 2013).

⁴⁹⁴ *Id.* at 4.

⁴⁹⁵ *Id.* at 6.

⁴⁹⁶ *Id.* at 4.

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

⁴⁹⁹ *Newsday, State probes jail medical service provider*, April 14, 2013.

⁵⁰⁰ *Rochester Democrat and Chronicle, Some find bad medicine behind bars*, April 14, 2013.

⁵⁰¹ *Id.*

⁵⁰² Attorney General of the State of New York, *In the Matter of Correctional Medical Care, Inc.*, Assurance No.: 13-495, Assurance of Discontinuance.

⁵⁰³ *Id.* at 8.

⁵⁰⁴ *Id.* at 10.

by the contract" -- including its substituting a physician's assistant for a physician.⁵⁰⁵ Further, in Tioga County "CMC employed, for 20 months -- almost two years -- a full-time Director of Forensic Mental Health...who was illegally engaged in the duties of a social worker without a social worker license."⁵⁰⁶

The agreement requires CMC to submit to monitoring, audits and sanctions for failure to comply with provisions such as timely initial screenings of inmates and providing necessary "medical, obstetrical, psychiatric, dental and emergency care, including medications in a timely manner."⁵⁰⁷ The breadth of the findings in the settlement agreement also confirm the existence of substantial deficiencies in local facilities throughout the state in providing medical and mental health care. Moreover, an audit conducted by the New York State Controller in August 2008 regarding the New York State Commission of Correction (SCOC)⁵⁰⁸ and Medical Review Board (MRB)⁵⁰⁹ further corroborate this conclusion. The Controller's audit found that SCOC was "not fulfilling its responsibilities for overseeing State Correctional Facilities."⁵¹⁰ The Comptroller said that SCOC's "lack of oversight [means that] any unsafe or inappropriate practices at State correctional facilities are less likely to be detected and corrected."⁵¹¹

The Department of Health (DOH) Oversight Law, passed in September 2009, requires the DOH to provide oversight to New York prisons and local jails regarding HIV and HCV care.⁵¹² The law provides for DOH review of policies and practices at each facility regarding HIV/AIDS and HCV, including prevention of transmission and treatment. DOH is also required to conduct annual reviews and issue reports on its findings. There is no DOH oversight in other areas of medical care in New York's jails and prisons. Yet, even with the implemented Oversight Law, there are significant concerns whether DOH is implementing its responsibilities in conducting annual reviews as required.⁵¹³ There is a significant variation in diagnosis and care based on prison location that has not been addressed by the DOH oversight.⁵¹⁴

Recommendations: DOH should be required to fulfill its obligations under the DOH oversight law regarding HIV and HCV assessment and treatment in all prison and jail settings in the state; (2) the Legislature should monitor DOH's performance of its statutory duties; (3) DOH oversight responsibility should be expanded to encompass all medical care in prison and jail

⁵⁰⁵ *Id.* at 13.

⁵⁰⁶ *Id.* at 14.

⁵⁰⁷ *Id.* at 28.

⁵⁰⁸ The SCOC is charged with making inspections of correctional facilities to determine if regulations are being followed, including on the provision of health care.

⁵⁰⁹ The MRB is charged with reviewing deaths of people in custody at correctional facilities and with making systemic recommendations for improving the delivery of health care. New York Correction Law, Art. 3, Section 47.

⁵¹⁰ New York State Comptroller, Division of State Government Accountability, New York State Commission of Correction Oversight of Correctional Facilities and Handling of Grievances and Complaints, at 2, August 20, 2008.

⁵¹¹ *Id.*

⁵¹² N.Y. Pub. Health Law § 206(26).

⁵¹³ The Correctional Association of New York, *CA 2013 Comments Re DOH Oversight of HIV/HCV Care in NYS Prisons* (Oct. 2013).

⁵¹⁴ *Id.*

settings. Substantial funding needs to be made available for this purpose; and (4) there should be legislative reform providing for DOH oversight of all care. (5) Legislative hearings and coordinated efforts amongst advocacy groups are necessary.

4. There are Delays in Referring and Providing Specialty Medical Care

State prison patients often raise concerns about problems with specialty care access. The complaints received by The Legal Aid Society's Prisoners' Rights Project include facility reluctance to refer patients for specialty care or diagnostic testing, undue delays in obtaining specialty care appointments and diagnostic testing, and a failure to honor specialists' treatment recommendations.⁵¹⁵ The reluctance to refer for specialty care may also stem from the lack of ongoing and productive patient-doctor relationships.⁵¹⁶ As former DOCCS Medical Director Dr. Greifinger reported, the correctional environment is one that promotes "stereotyping and cynicism that results in distrust."⁵¹⁷ Prisoners often report, in writing, that prison doctors are dismissive of reported symptoms and therefore do not order diagnostic tests and specialty consults to determine the cause of those symptoms.⁵¹⁸ Also well documented is the danger of serious irreparable injury that may result from the reluctance and delay regarding patient referrals for specialty care consultation and diagnostic testing.⁵¹⁹

Specialty care use also fluctuated dramatically from prison to prison, with some prisons referring patients to specialty care at rates 2.5 times that of other prisons.⁵²⁰ For instance, "patients in prisons located in the northern regions (Watertown and Clinton Hubs) had specialty care services ordered at a rate that was 65% lower than patients residing in the Green Haven and

⁵¹⁵ The New York City Board of Correction, Public Hearing on *Proposed Rule to Amend the Minimum Standards Creating Enhanced Supervision Housing and Limiting the Use of Punitive Segregation*, December 19, 2014, at 7,

http://www.nyc.gov/html/boc/downloads/pdf/Variance_Comments/RuleMaking_201412/Legal%20Aid%20Society%20TESTIMONY%20for%20BOC%20and%20appendices.pdf. (Last accessed December 15, 2015)

⁵¹⁶ This problem may be best addressed by seeking culture change within correction medical departments and has implications beyond the specialty care context. Accordingly, this report considers the remedy of culture change in greater depth below.

⁵¹⁷ NAS Report, *supra* note 454, at 13.

⁵¹⁸ See e.g., In re Application of John Vera Moreno, Milburn v. Coughlin, 79-CV-5077 (LAP), Findings of Fact and Conclusions of Law ¶102 (Oct. 2010) (finding that Green Haven prison "repeatedly refused to take Vera's complaints seriously, as when Dr. Chakravorty crumpled up Vera's list of symptoms and copies of medical records and as when, only two weeks before the May 2006 syncopal episode, Dr. Chakravorty documented his scorn for Vera's concerns"); J.W. v. State of New York, No. 111947 (Ct. of Claims 2014) (finding DOCCS negligent where there was a 16 year delay in diagnosing seizure disorder where "repeated complaints were ignored" and patient "was told he was imaging his symptoms").

⁵¹⁹ See e.g., Black v. State of New York, No. 115567 (Ct. of Claims 2012) (client became quadriplegic in case where a delay in referring the patient for a neurological consultation were "solely attributable to Defendant's failure to recognize the urgency and risks of Claimant's condition and a failure of prompt and efficient internal procedures"); Hinds v. State of New York, No. 113024 (Ct. of Claims 2011) (patient lost all vision in right eye where "repeated deferral of appropriate treatment were departures from good and acceptable medical practice"); Johnson v. State of New York, No. 111516 (Ct. of Claims 2014) (permanent injury to leg where DOCCS failed to promptly refer for orthopedic consultation and emergency surgery).

⁵²⁰ *Id.* at 5.

Great Meadow Hubs located in the Albany region and lower part of the state.⁵²¹ These are "differentials that cannot be explained by differences in patient populations."⁵²²

Individual medical provider judgment and regional medical director judgment may account for some of the differentials in ordering specialty care. The variability in provider judgment is so great that the Prisoners' Rights Project often receives reports from patients that after a facility transfer, their longstanding (sometimes decades long) diagnoses and treatments are questioned and effective medication and treatment plans are changed or discarded because a medical provider at the patient's "new" facility disagrees with the doctor at a previous facility.

Recommendation: DOCCS should conduct more comprehensive quality assurance of individual medical providers in their employ or under contract, and assure that referrals to specialists are made appropriately and in a timely manner.

5. Lack of Continuity of Care in Facility-to-Facility Transfers

Lack of continuity of care for patients in the state prison system undermines quality of care and specialty care access. Transfers between facilities and housing units often delay care or lead to seemingly arbitrary major changes to a patient's diagnosis and treatment. Psychologist and prison health care expert Dr. Craig Haney declared transitions to be "the weakest points," as "the very best intentions flounder at the point at which there is a pass off."

The Prisoners' Rights Project regularly receives complaints from patients stating that scheduled diagnostic testing, specialty care appointments, and even scheduled operations are not honored when a patient is transferred to a different prison. For example, a patient was serving a sentence to solitary confinement when he was scheduled for surgery related to his cancer. After his sentence to solitary confinement ended and he was transferred to general population at a different facility, he had to start the approval process again. Delayed needed treatment for a serious medical matter complicated his entire situation. In such circumstances, prison custody is costly, and negatively impacts the quality of care and level of patient health by delaying necessary treatment.

Recommendations: DOCCS should use central agency medical care case managers to track needs of patients and assure that care is consistent and uninterrupted during transitions. If need be and wherever practicable, a transfer should be postponed so that scheduled medical procedures may be administered.

6. Need for Effective, Individualized Discharge Planning

Transition from custody to community can undermine the quality of medical care for the individual when there is no effort to ensure continuity of that care. Providing continuity of care and support is critical to fostering better life outcomes for re-entrants and for the community.

⁵²¹ *Id.* at 30.

⁵²² *Id.* at 5.

"[I]t is important to ensure that offenders leaving prison are given structured guidance and support to maintain a healthy, crime-free lifestyle in the community."⁵²³

A lack of continuity of care can also have negative public health consequences. The weeks after release can be a particularly dangerous time. A study in Washington State found that re-entrants from state prison had in the two weeks following release a risk of death 12.7 times that of other state residents.⁵²⁴ Additionally, re-entrants' "[r]eturning to the community without medical services and other necessary supports can contribute to the spread of infectious diseases, decompensation, and relapse."⁵²⁵ For example, a researcher found that high rates of Hepatitis C and HIV in prison pose transmission risks to communities.⁵²⁶ Another research similarly found heightened transmission risks of tuberculosis to communities.⁵²⁷

Despite the need for robust discharge planning, in New York "except for HIV-infected patients, there is no adequate system to ensure that patients leaving prison are provided with appropriate documentation of their condition and a treatment plan or a connection to community providers to ensure timely continuity of care."⁵²⁸

Recently, Governor Cuomo in September 2015 issued an executive order designed to increase the number of individuals leaving prison who are enrolled in health care coverage.⁵²⁹ Accordingly, New York State plans for new Medicaid enrollment efforts, led by the Department of Health and the Department of Corrections and Community Supervision.⁵³⁰

Recommendations: DOCCS discharge planning process must be available to more people and be more transparent. Discharge planners should be available to work with advocates for prisoners. Moreover, the DOCCS should implement oversight of discharge planners to assure that eligible prisoners are identified and applications for SSI benefits are filed. Further, the DOCCS should implement policies and oversight regarding discharge planners to make sure that community medical and mental health care providers and appointments are in place for prisoners prior to discharge. With this recommendation in mind, we suggest expansion and quick

⁵²³ Kim, Becker-Cohen & Serakos, *"The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System: A Scan of Practice and Background Analysis,"* Urban Institute Research Report (2015) at 39, available at <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000173-The-Processing-and-Treatment-of-Mentally-Ill-Persons-in-the-Criminal-Justice-System.pdf>. (Last accessed December 15, 2015)

⁵²⁴ Binswanger et al. *"Release from Prison – A High Risk of Death for Former Inmates,"* The New England Journal of Medicine (2007) at 157; NAS Report, *supra* note 454, at 26 ("former prisoners are nearly 13 times more likely to die in the two weeks following release than the general population").

⁵²⁵ Woods et al. *supra* note 469, at e2.

⁵²⁶ Michele Westhoff, *An Examination of Prisoners' Constitutional Right to Healthcare: Theory and Practice*, 20 HEALTH LAW. 1, 10 (2008).

⁵²⁷ John V. Jacobi, *Prison Health, Public Health: Obligations and Opportunities*, 31 AM. J.L. & MED. 447, 448 (2005).

⁵²⁸ The Correctional Association of New York, *CA 2013 Comments Re DOH Oversight of HIV/HCV Care in NYS Prisons* (Oct. 2013).

⁵²⁹ Press Release, N.Y. State, *Governor Cuomo Announces Executive Actions to Reduce Barriers for New Yorkers with Criminal Convictions* (September 21, 2015) <https://www.governor.ny.gov/news/governor-cuomo-announces-executive-actions-reduce-barriers-new-yorkers-criminal-convictions>. (Last accessed December 15, 2015)

⁵³⁰ *Id.*

implementation of the new Medicaid enrollment efforts so that all individuals recently discharged are enrolled in health care coverage.

B. Current Programs in New York State

In some respects, New York State and DOCCS have made some laudable strides in recent years to enhance continuity of care by greatly improving discharge planning. New York is one of few states with Medicaid suspension, and is the only state to suspend Medicaid indefinitely upon an individual's incarceration.⁵³¹ This means that if, prior to incarceration, an individual was receiving Medicaid, the benefit is suspended rather than terminated during the incarceration and will be automatically reinstated upon that individual's release. Qualified individuals⁵³² do not need to re-apply for Medicaid in anticipation of release. Before the suspension law was enacted, re-entrants had a wait 30-45 days for their Medicaid to become effective; now, that waiting period is eliminated.⁵³³

A significant number of individuals are not covered by the Medicaid Suspension law despite being Medicaid eligible and needing Medicaid immediately after release. In the spring of 2014, DOCCS rolled out across its facilities a Medicaid application process in an effort to fill the gap in the Medicaid Suspension Law.⁵³⁴ Also, New York now provides a way for individuals incarcerated in local facilities to enroll in Medicaid under a "suspended status" with coverage to be reinstated for five months after release.⁵³⁵

DOCCS and New York State also now assist people in custody in applying for social security cards and birth certificates, which helps re-entrants obtain vital identity documents.⁵³⁶ DOCCS also has a Pre-Release Agreement with the Social Security Administration, setting out a process by which DOCCS can apply for Supplemental Security Income (SSI) for individuals with disabilities who are anticipating release.⁵³⁷ However, many people who are almost certainly SSI-eligible regularly report that they are released without ever having had an SSI application

⁵³¹ N.Y. Comp. Codes R. & Regs. tit. 18, § 360-3.4. See Council of State Governments, Justice Center, Policy Brief: *Opportunities for Criminal Justice Systems to Increase Medicaid Enrollment* at 7 (December 2013), available at <http://csgjusticecenter.org/wp-content/uploads/2013/12/ACA-Medicaid-Expansion-Policy-Brief.pdf>. (Last accessed December 15, 2015)

⁵³² This law does not apply to people incarcerated outside of New York State or who are in federal custody. This law does not apply to people incarcerated before April 1, 2008.

⁵³³ N.Y. SOC. SERV. LAW § 153(8); "Re-entry and Reintegration: the Road to Public Safety", page 153 (May 2006), NYSBA, Report and Recommendations of the Special Committee of Collateral Consequences of Criminal Proceedings

⁵³⁴ New York State Department of Corrections and Community Supervision, Acting Commissioner Anthony J. Annucci on Governor Andrew M. Cuomo's 2014-2015 Executive Budget before the Senate Assembly Fiscal Committees, February 5, 2014, at 4, http://www.dccs.ny.gov/Commissioner/Testimony/DOCCS_Final_Budget_Testimony.pdf (Last accessed December 15, 2015)

⁵³⁵ See New York State Office of Health Insurance Programs, *"Medicaid Applications for Individuals Incarcerated in Local Correctional Facilities"* (GIS 14 MA/12) (May 15, 2014).

⁵³⁶ New York State Department of Corrections and Community Supervision, *Transitional Services Program*, <http://www.dccs.ny.gov/ProgramServices/transitional.html>. (Last accessed December 15, 2015)

⁵³⁷ See attached Exhibit. See discussion in Section III.

filed for them.⁵³⁸ They must then apply for SSI benefits on their own and wait, without having SSI income in the interim.

A more fundamental problem is that advocates seeking discharge planning services for their clients often cannot identify the discharge planner assigned to a particular client. They often cannot determine how to get their clients onto the discharge planners' caseloads.⁵³⁹

More must be done to enhance continuity of care between prison and community. Individuals with chronic and specialty care needs should have pre-scheduled appointments with a primary care physician, community mental health clinic or other specialist, so they can see a doctor as soon as possible after leaving custody.

Re-entering the community is a moment of great vulnerability. Unfortunately, many clients report that a "drop-off in care occurs at exactly the moment at which the patient needs the most care or the most attention." Bringing community care providers or their representatives into the prisons to assess treatment and programming needs would help alleviate this lack of continuity by starting the process prior to release.⁵⁴⁰

C. Need for Legal Assistance in Local Jails

There is no shortage of reports on the deficiencies in the provision of medical and mental health care in New York's local jails. The SCOC Medical Review Board cited to deficiencies in their review of the following cases:

- Maria Viera, 53, died on Sept. 2, 2010, from myocarditis, or inflammation of the heart muscle, while in the Monroe County Jail. The Medical Review Board said an inexperienced CMC nurse failed to follow proper detoxification procedures.

- Nikko Gambino, died on July 8, 2011, after Genesee County Jail medical staff ignored his medication needs and his serious signs of opiate withdrawal. The nursing staff missed "florid signs and symptoms of worsening acute withdrawal," according to a March 19, 2013 report from the SCOC.

- Alvin Rios, Jr., age 40, was left "in an emergent, life-threatening status without appropriate medical attention" at the Broome County jail, prior to his death on July 20, 2011, according to a report from SCOC.

Although there are serious issues related to the delivery of medical and mental health care in local jails, there are few resources available to help people in custody. There should be state

⁵³⁸ See Alison Evans Cuellar and Jehanzeb Cheema, As Roughly 700,000 Prisoners are Release Annually, About Half Will gain Health Coverage and Care Under Federal Laws, *Health Aff.* May 2012 31:5 at 931-32 (describing the challenges former inmates face in applying for SSI).

⁵³⁹ See Failure to Provide Discharge Services, Human Rights Watch, October 2003, <http://www.hrw.org/reports/2003/usa1003/24.htm>. (Last accessed December 15, 2015)

⁵⁴⁰ NAS Report, *supra* note 454, at 11-12.

funding to provide indigent people in jail with access to attorneys for assistance with medical and mental health treatment issues.

Legal service providers funded by the Legal Services Corporation are prevented by federal regulation from representing prisoners in federal, state or local prisons regarding conditions related to their confinement or in any civil litigation. The result (absent the availability of other legal service providers – who could receive state, local or private funding) is that there are few avenues to pursue for someone in confinement who is not receiving needed necessary medical or mental health care.

Additionally, significant numbers of people in custody have literacy deficiencies and for whom English is not a primary language. They face substantial hurdles communicating and advocating their medical and mental health needs without legal assistance. Those prisoners who do attempt to litigate civil rights claims *pro se* in the federal courts are faced with daunting challenges as they attempt to interpret and understand federal law and court rules without legal counsel. Additionally, prisoners lack the resources to hire medical experts making the likelihood of success on *pro se* medical and mental health litigation further limited.

There are numerous cases where deficiencies in medical and mental health care in New York prisons and jails have been successfully addressed through the Court system with the assistance of legal counsel. See *DAI v. OMH*, 02-CV-4002 (S.D.N.Y. 2002) (systemic action challenging failures in mental health care in DOCCS prisons resulting in increased treatment and state funded allocations for mental health care; *United States v. Erie County, NY*, 09-CV-0849 (W.D.N.Y.) (DOJ settlement with Erie County addressing high suicide rate, medical and mental health treatment deficiencies); *Hilton v. Wright*, 05-CV-1038 (N.D.N.Y.) (action addressing deficiencies in DOCCS treatment for Hepatitis C). These actions were brought after systemic failures in the provision of care and legal counsel was necessary to achieve results. People housed in jails that have medical and mental health needs must be able to adequately access attorneys to advocate, and if necessary litigate, on their behalf. Current public funding is grossly inadequate for this purpose.

Recommendation: NYSBA should advocate for civil legal services funding for prisoners housed in local jails for assistance with medical and mental health treatment issues.

VIII. MENTAL HEALTH

The rate of mental illness among inmates is *significantly* higher than in the general public.⁵⁴¹ Nationally, more than half of prisoners in state prisons and local jails have at least one mental health problem,⁵⁴² and approximately 16% have been diagnosed with severe mental

⁵⁴¹ Fred Osher; David A. D'Amora, Martha Plotkin, Nicole Jarrett & Alexa Eggleston, *Adults with Behavioral Health Needs Under Correctional Supervision: A Shared Framework for Reducing Recidivism and Promoting Recovery*, COUNCIL OF STATE GOV'TS JUSTICE CTR., 6 (2012), http://csgjusticecenter.org/wp-content/uploads/2013/05/9-24-12_Behavioral-Health-Framework-final.pdf. (Last accessed December 15, 2015)

⁵⁴² BUREAUS OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NCJ 213600, SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISONS AND JAIL INMATES. (basing diagnoses on the criteria in the Diagnostic and Statistical Manual IV (DSM-IV)).

health problems⁵⁴³ -- such as schizophrenia, delusional disorder, major depressive disorder, bipolar disorder and substance-induced psychotic disorder.⁵⁴⁴

Corrections and parole protocols need to address mental health needs at each step of the process: prior to and during incarceration; in anticipation of re-entry; and while on parole. Integrated treatment for substance abuse and mental health needs, accommodations to facilitate the parole process, and parole plans that specifically address and support both an individual's mental health needs and risk factors for recidivism must be addressed.

A. Overview of Issues and Corresponding Recommendations

1. Integrated Substance Abuse and Mental Health Treatment

A significant percentage of people in DOCCS' custody are on the mental health caseload. Data from July 2013 indicate that 8,478 people, representing 15.6 % of the total in-custody population, were on the OMH caseload.⁵⁴⁵ The needs of this population during incarceration and re-entry are voluminous, and failing to provide proper diagnosis and treatment results in cycling people between prison and the community.⁵⁴⁶

There are a great many prisoners with co-occurring mental health and substance disorders. Nationwide, it is estimated that 75% of state prisoners who need substance abuse treatment also have a mental health condition.⁵⁴⁷ Clinically, programs that are integrated to treat both disorders produce the most beneficial outcomes for this population because they address both aspects of the individual's treatment needs rather than taking a bifurcated approach. People with both disorders who receive treatment for only their mental health needs have poorer treatment outcomes including low engagement and early termination from services.⁵⁴⁸ If individuals with a co-occurring disorder are not treated for both disorders, they "are at a greater

⁵⁴³ Osher et al., *supra* note 541, at 6.

⁵⁴⁴ New York State Department of Corrections and Community Supervision Bureau of Mental Health – Mental Health Program Descriptions – 7/5/11 <http://www.op.nysed.gov/surveys/mhpsw/doccs-att6.pdf>. (Last accessed December 15, 2015)

⁵⁴⁵ Testimony of Mental Health Alternatives to Solitary Confinement, NYS Legislative Joint Fiscal Committees, Mental Hygiene Budget Hearing, February 11, 2014, <https://www.nysenate.gov/sites/default/files/articles/attachments/NYAPRS.pdf>. (Last accessed December 15, 2015)

⁵⁴⁶ The Treatment of Persons with Mental Illness in Prisons and Jails: A State Survey, Treatment Advocacy Center, April 8, 2014 at 18, <http://tacreports.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf> (noting that most mentally ill prisoners do not receive follow-up treatment when they leave prison, and that mental ill individuals constitute at least half of "frequent fliers," individuals who repeated recycle through the criminal justice system).

⁵⁴⁷ The Correctional Association of New York, *Treatment Behind Bars: Substance Abuse Treatment in New York Prisons 2007-2010*, at page 193 (Feb. 2011).

⁵⁴⁸ Commission on Quality of Care and Advocacy for Persons with Disabilities, *A Review of Mental Health Screening, Access to Mental Health Services, and the Mental Health Status of People in Segregated Confinement in New York State Correctional Facilities*, at page 10 (February 2013).

risk of relapse, suicide, HIV infection, unemployment and poor interpersonal relationships than the general population."⁵⁴⁹

People housed in general population in DOCCS prisons who are receiving mental health treatment are generally referred to DOCCS for substance abuse treatment rather than being provided with an integrated treatment plan that involves OMH. Due to the shortage of substance abuse treatment slots, there is a waiting list for this dually diagnosed group of people to be admitted to DOCCS substance abuse treatment programs, and treatment is prioritized based on a person's earliest release date. Further, some DOCCS facilities require that an individual be within one year of release before being admitted to substance abuse treatment.⁵⁵⁰ This results in people receiving mental health services and no substance abuse treatment, where services should be provided in an integrated format.

Recommendations: People in prison with both substance abuse issues and mental health diagnoses should receive integrated treatment while in DOCCS' custody. Funding should be made available to provide a sufficient number of substance abuse treatment slots for state prisoners in a timely manner.

2. Lack of Parole Accommodations for People with Mental Disabilities

The *Olmstead v. L.C.* decision and Title II of the Americans with Disabilities Act require the State to develop programs to accommodate people with disabilities.⁵⁵¹ Governor Cuomo created the "Olmstead Cabinet" in 2012 to develop a plan to implement *Olmstead*.⁵⁵² The Cabinet subsequently issued a report with recommendations on *Olmstead* implementation.⁵⁵³ The report addressed only two issues relating to the criminal justice system: access to needed community-based services for people with mental disabilities after they leave correctional facilities; and the desirability of reviewing state policies to make sure that people with mental disabilities are not unnecessarily incarcerated for minor offenses arising from their disabilities.⁵⁵⁴

The Olmstead Cabinet did not address a critical re-entry issue for imprisoned people with mental disabilities: the parole process at DOCCS' facilities. The current process fails to accommodate the needs of people with mental disabilities – thereby negatively affecting their ability to obtain parole and to succeed with re-entry. Legal organizations advocating for prisoners with disabilities have raised with state officials the absence of numerous important parole accommodations.⁵⁵⁵ Parole plans and release conditions should take into account mental

⁵⁴⁹ The Correctional Association of New York, *Treatment Behind Bars: Substance Abuse Treatment in New York Prisons 2007-2010*, at page 195 (Feb. 2011).

⁵⁵⁰ *Id.* at page 10.

⁵⁵¹ *Olmstead v. L.C.*, 527 U.S. 581 (1999); Americans with Disabilities Act, 42 U.S.C. Section 1213, et seq.

⁵⁵² Executive Order Number 84.

⁵⁵³ Report and Recommendations of the Olmstead Cabinet, *A Comprehensive Plan for Serving People with Disabilities in the Most Integrated Setting*, October 2013.

⁵⁵⁴ *Id.* at page 25.

⁵⁵⁵ Mental Health Alternatives to Solitary Confinement (MHASC) December 3, 2013 letter to Governor Cuomo and Roger Bearden, Special Counsel for *Olmstead*; MHASC January 31, 2014 letter to Terrence Tracy, Counsel
(cont'd)

illness and provide for accommodations. Otherwise, the likelihood of a person with mental illness violating his or her release conditions significantly increases. For example, a discharge plan that requires employment instead of income support, such as Supplemental Security Income (SSI), will likely not work for someone whose mental illness makes employment impossible or highly unlikely. Similarly, a discharge plan that ignores a typical cycle of chronic mental illness that includes periods of mental decompensation that interfere with a parolee's ability to follow parole conditions would likely result in a parole violation. A discharge plan should include the provision of mental health services and supports to set the individual back on the path to wellness and not back to prison.

People with mental disabilities are not advised at their parole consideration interviews that they are entitled to reasonable accommodations. Further, DOCCS and the New York State Office of Mental Health (OMH) fail to have procedures in place to provide needed accommodations. The absence of the latter causes people with chronic mental illness to appear without counsel at parole board appearances, often unable to prepare and present release plans for parole board consideration. Further, an individual's appearance, demeanor and manner of speaking at a parole board appearance, which may be symptomatic of mental illness, may adversely impact the decision of the parole board.

Additional parole process obstacles for people with mental disabilities include the lack of OMH assistance in the parole release process. OMH submits a mental status report in advance of the parole interview only if requested by the parole staff. Even when OMH mental status reports are prepared, they do not include a plan for receiving mental health care in the community. OMH discharge plans are only developed after an individual is approved for release. These severe deficiencies increase both (1) the chance that parole will be denied and (b) the likelihood that discharge plans will be inadequate for the individual -- making re-entry unlikely to succeed.

People with mental illness face further difficulty obtaining parole release due to use of the COMPAS Reentry Risk Assessment (COMPAS) tool by DOCCS and the Parole Board. COMPAS has not been tested for validity with regard to people with mental illness. The firm that developed the COMPAS tool specifically warns that "discretion may need to be used as to the appropriateness or accuracy of any assessment on a chronically mentally ill person" and that reliance instead on the clinical community may be necessary.⁵⁵⁶ The use of COMPAS by the Parole Board may result in its denying parole for people with mental illness, or imposing overly restrictive conditions that lead to parole violations.

Recommendations: New York State should monitor *Olmstead* implementation for people in DOCCS' custody, to assess how DOCCS, OMH and Parole are dealing – both procedurally and substantively -- with people with mental disabilities. The parole process and

Board of Parole; and Urban Justice Center testimony for the Assembly Standing Committee on Correction, Public Hearing Board of Parole, December 4, 2013, Albany, New York.

⁵⁵⁶ Urban Justice Center testimony, *Id.*, footnote 3, citing Northpointe Institute for Public Management, Inc., *COMPAS Risk and Need Assessment System: Selected Questions Posed by Inquiring Agencies*, at 3 (Jan. 14, 2010).

discharge plans must provide appropriate accommodations to maximize the chances for granting parole and for successful re-entry.

3. Higher Revocation of Probation and Parole

An estimated 7 to 9% of individuals on probation or parole have a serious mental illness,⁵⁵⁷ and these individuals are more than twice as likely to have their probation or parole revoked.⁵⁵⁸ Mental illness may directly result in revocation if the mental illness causes the person to behave in a publicly bizarre or dangerous way which gets him arrested.⁵⁵⁹ Mental illness may also result in the indirect revocation of parole if, for example, the mental illness prevents the individual from maintaining a job whose wages would enable her to pay court-ordered fines. Additionally, parole officers may monitor parolees with mental illnesses more closely – resulting in their noticing more missteps that then lead to parole revocation.⁵⁶⁰

While mental illness may legitimately factor into some parole revocation and recidivism assessments, traditional recidivism factors such as substance abuse, limited education and unstable employment are still the best predictors of recidivism for individuals with mental illness. Because people with mental illness tend to have these risk factors, it is necessary to address these factors to reduce recidivism for this population.⁵⁶¹ For example, an important way to deal with the risk factor of an addictive disease is to use a chronic care model for treating the addictive disease and the person's mental health disorders. A chronic care model should be used for the treatment of addictive diseases and mental health disorders. People being treated for addictive diseases need to be "in treatment" for a length of time that is consistent with the treatment of chronic diseases. Intensive levels of care are appropriate when addiction and/or a mental health disorder needs to be stabilized or when there is a major change in the "recovery environment." Long term monitoring of persons being released should be completed by physicians, psychologists, social workers and therapists who are certified by or are members of the American Board of Addictions Medicine.

Also contributing to increased recidivism rates among parolees with mentally illness are parole officers with full caseloads, resulting in inadequate time to ensure compliance with mental health treatment recommendations.⁵⁶² Additionally, officers may not know how to best interact with individuals who have a mental illness.⁵⁶³ This can affect recidivism rates. For example,

⁵⁵⁷ *Id.* at 6.

⁵⁵⁸ Seth Jacob Prins & Laura Draper, *Improving outcomes for People with Mental Illnesses under Community Corrections Supervision: A guide to Research-Informed Policy and Practice*, Council of State Gov'ts Justice Ctr., 8-10 (2009), <https://s3.amazonaws.com/static.nicic.gov/Library/023634.pdf>. (Last accessed December 16, 2015)

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.*

⁵⁶¹ *Id.* at 15.

⁵⁶² *Id.* at 16 (2009).

⁵⁶³ *Id.*

using traditional negative threats of incarceration is correlated with parole revocation and re-arrest among individuals with mental illness.⁵⁶⁴

In New York, OMH and the Parole Board are supposed to collaborate on discharge plans for individuals with mental illness. Often a condition of parole is seeking mental health treatment services. Additionally, some officers in New York City specialize in supervising people with mental illness and are given a lower caseload. Making sure these protocols are implemented can reduce the frequency of parole revocation.

Recommendations: Parole supervision should be based on an individual's risk factors and the support provided should be matched to the risk factors to reduce the chance of reoffending. For example, support that addresses substance abuse, housing, education and employment which are known risk factors in re-incarceration and are commonly encountered by individuals with mental illness, should receive necessary support. Further, the individual's mental health treatment and behavioral needs should be addressed by the parole plan to provide support and services upon release from custody.

B. Conclusion

Corrections and Parole systems that fail to recognize and accommodate the particular needs of individuals with mental illness result in inability of individuals to achieve parole, and once placed on parole hinder success. Addressing criminal risk factors for people with mental illness must begin while in custody by providing adequate mental health treatment and timely integrated substance abuse treatment. Protocols must be implemented to notify prisoners of the right to request accommodations for their mental illness in the parole process, accommodations must be provided throughout the parole process and continued on discharge from custody. Discharge plans must address risk factors for recidivism, which are common for people with mental illness, and people must be provided with the necessary supports to avoid recidivism. Furthermore, there is a strong need for legal assistance in local jails, and there should be state funding to provide indigent people in jail with access to attorneys for assistance with mental health treatment issues.

IX. JUVENILES

Undoubtedly, there are many competing philosophies on punishment and rehabilitation. The Special Committee on Re-Entry recognizes, however, that where juveniles are involved, society – via its criminal and juvenile justice systems – must embrace a significantly different approach. Re-entry issues regarding our youngest offenders raise distinct considerations, not the least of which is the enhanced impact the state may have – for good or for ill – on the remainder of the youth's life.

⁵⁶⁴ *Id.* at 22 (2009).

A. Distinguishing Young Offenders

It has been generally accepted by social scientists, legal scholars, and the community-at-large that children have incomplete levels of development and maturity.⁵⁶⁵ This presents as much of an opportunity for the criminal justice system as it does a challenge. Indeed, in New York the legal system's approach to prosecuting and sentencing youth charged with crimes is complex and out of step with information emerging about adolescent development.⁵⁶⁶

1. Juveniles (7-15)

In New York State, a child less than 16 years old is generally not considered criminally responsible for his or her conduct.⁵⁶⁷ Accordingly, the illegal actions of individuals over 7 and less than 16 years old are addressed by delinquency petitions in the Family Court of the State of New York. Each petition is adjudicated in a proceeding by a Family Court Judge,⁵⁶⁸ ultimately resulting in either a finding of delinquency or dismissal.⁵⁶⁹ Under Family Court Act Section 166, the records of Family Court proceeds are afforded certain privacy protections and "shall not be available for public inspection. A "juvenile delinquent" is an individual found, after such a proceeding, to have committed an act that *would* constitute a crime if committed by an adult.⁵⁷⁰ A finding of juvenile delinquency, however, is not a criminal conviction and should carry no civil stigma.⁵⁷¹ However, supervision, treatment and even confinement may be ordered by the Family Court Judge following a dispositional hearing.⁵⁷² A significant exception to the "defense of infancy," which otherwise shields juveniles below the age of 16 from criminal liability, is "juvenile offender" (JO) status. This status requires that juveniles to be tried and convicted in adult criminal courts – thereby deeming them criminally responsible for conduct despite their age – for certain enumerated (severe) offenses.⁵⁷³ An "exception to the exception," however, is that even a putative juvenile offender – capable of being prosecuted as an adult – may, by application of a party and acceptance by the court, be granted leave from criminal prosecution and his or her case may be "removed" to the Family Court for prosecution as a juvenile delinquency proceeding.⁵⁷⁴ Such "removal to Family Court" may only occur for certain enumerated juvenile offender offense upon a finding that (a) mitigating factors exist; (b) the

⁵⁶⁵ See, e.g., Arnett, J.J., *Emerging Adulthood: A theory of development from the late teens through the twenties*, AMERICAN PSYCHOLOGIST, 55(5), at 469, 480 (2000); Bardo, M.T., *High-risk behavior during adolescence: Comments on Part I, ADOLESCENT BRAIN DEVELOPMENT: VULNERABILITIES AND OPPORTUNITIES*, 59-60 (2004); Byrnes, J.P., D.C. Miller, et al., *Learning to make good decisions: A self-regulation perspective*, CHILD DEVELOPMENT, 1121-1140 (1999); Giedd, J.N., *Brain Development during childhood and adolescence: A Longitudinal MRI study*, NATURE NEUROSCIENCE, 861-863 (1999).

⁵⁶⁶ The Special Committee notes and acknowledges the comprehensive legislative initiative, spearheaded by Governor Andrew Cuomo in the 2015 Legislative Session, which would, *inter alia*, upwardly adjust the various age-ranges described in this section and change the nature of placement entirely.

⁵⁶⁷ N.Y. Penal Law § 30.00.

⁵⁶⁸ FAM. CT. ACT § 341.1.

⁵⁶⁹ *Id.* at § 352.1.

⁵⁷⁰ *Id.* at § 301.2(1).

⁵⁷¹ *Id.* at § 380.1.

⁵⁷² *Id.* at § 352.2.

⁵⁷³ See N.Y. Penal Law § 30.00(2).

⁵⁷⁴ See N.Y. CRIM. PROC. L. Art. 725; see also N.Y. CRIM. PROC. L. §§ 210.43; 180.75.

offender was a relatively minor participant in multi-offender criminal act, and/or (c) there are possible deficiencies of proof of the crime.⁵⁷⁵ For other offenses, removal is assessed based on an interests-of-justice calculation by the court.⁵⁷⁶ Once removed, the criminal action is terminated and a delinquency petition proceeds.⁵⁷⁷

2. Youths (16-18)

For criminal prosecution purposes, a "youth" is a person charged with a crime alleged to have been committed when he or she was at least 16 years old and less than 19 years old (or as previously mentioned a person charged as a juvenile offender between the ages of 13 and 15).⁵⁷⁸ Upon conviction for a crime, a youth may be granted a special status under the law called "youthful offender status."⁵⁷⁹ Put more plainly, an offending youth who is given "youth offender" treatment at sentencing does not have a conviction on his or her record and the records connected with the criminal prosecution are sealed.⁵⁸⁰ This avenue of adjudication, which has existed by statute in one form or another in New York since 1944, is predicated upon the logic that the criminal justice system, via its courts, should be empowered to "exercise discretion upon conviction for certain young offenders to: (a) avoid branding a youth with the lifelong stigma of a criminal conviction; and (b) eschew imposition of certain mandatory sentences of imprisonment."⁵⁸¹ Youth are *eligible* to be deemed "youthful offenders," unless: (a) the youth has previously been convicted and sentenced for a felony; (b) the youth has previously been adjudicated a youthful offender following a conviction for a felony; (c) the youth stands convicted of a class A-I or A-II felony; (d) the youth stands convicted of an Armed Felony; or (e) the Youth stands convicted of Rape in the First Degree, Criminal Sexual Act in the First Degree, or Aggravated Sexual Abuse. Additionally, even in the last two circumstances listed above ((d) and (e)), the offender still may be deemed eligible if the court determines that either mitigating factors exist or the offender was a relatively minor participant in multi-offender criminal act.⁵⁸² An eligible youth *must* be granted a youthful offender adjudication if the conviction occurred in a local criminal court (i.e. a district court, New York City criminal court, city court, town court, or village court) and the youth had never before been convicted of a crime or adjudicated a youthful offender. In cases, where youthful offender adjudication is not mandatory, aAn eligible youth may only be granted a youthful offender adjudication if the court finds that the interests of justice would be served.⁵⁸³ Upon such an adjudication, the youth's criminal conviction is

⁵⁷⁵ See N.Y. CRIM. PROC. L. § 210.43.

⁵⁷⁶ See *id.*

⁵⁷⁷ See N.Y. CRIM. PROC. L. Art. 725; N.Y. FAM. CT. ACT Art. 3.

⁵⁷⁸ See N.Y. CRIM. PROC. L. § 720.10.

⁵⁷⁹ See *id.* at § 720.10(6).

⁵⁸⁰ See *id.* at § 720.35.

⁵⁸¹ Preiser, *Practice Commentaries*, MCKINNEY'S N.Y. CRIM. PROC. L. § 720.10.

⁵⁸² See N.Y. CRIM. PROC. L. § 720.10(3).

⁵⁸³ See N.Y. CRIM. PROC. L. § 720.20(1).

deemed vacated and all official documents and records in connection with the criminal prosecution are sealed, and thereby deemed confidential (with limited exceptions).⁵⁸⁴

B. Sentencing and Disposition of Young Offenders

The re-entry issues for young offenders are likely to be affected by the type of facility from which the youths are released, the location of that facility, and the age of the offenders upon re-entry. Thus, it is first important to draw distinctions in how and where these individuals may be sent:

1. Juvenile Delinquents (7-15)

After fact-finding and dispositional hearings, the Family Court may "place" a juvenile delinquent with the New York State Office of Children and Family Services (OCFS) –i.e. an OCFS-operated secure, limited secure, or community facility for up to twelve months or eighteen months make other less restrictive dispositional determinations. Youth adjudicated for certain statutorily defined "designated felonies" maybe placed restrictively for an initial period of three or five years.⁵⁸⁵ The Family Court may extend the term of placement if the youth requires further services up to the age of 18 – without consent – or until 21 years of age with the consent of the juvenile delinquent. Most youths who are found to be delinquents by the Family Court are not placed in facilities but are given needed services subject to court oversight.

2. Youthful Offenders (16-18)

Youthful offenders over the age of 16, having been prosecuted in the adult courts of criminal jurisdiction, may be sentenced to local jail facilities (for less serious crimes) or New York State Department of Corrections and Community Supervision (DOCCS) correctional facilities for major offenses. On December 22, 2015, Governor Cuomo signed an Executive Order to separate 16- and 17-year-olds in New York State prisons to a separate facility where they can receive age-appropriate services, and such site, Hudson Correctional Facility, will be the site of collaboration between the DOCCS and the Office of Children and Family Services.⁵⁸⁶

3. Juvenile Offenders (13-15)

If convicted in adult court, juvenile offenders may be sentenced to a secure OCFS facility until age 16, 18 or 21. They may then be potentially transferred to a DOCCS correctional facility, unless permitted to remain under OCFS supervision. If the juvenile offender is below the age of 16, he or she cannot be transferred. However, those above the age of 16 can be transferred.

⁵⁸⁴ See N.Y. CRIM. PROC. L. § 720.35(2). A youthful offender adjudication cannot even be utilized to impeach the credibility of the offender as a witness at a subsequent trial, although he or she can be questioned as to the underlying conduct for that purpose. See *People v. Cook*, 37 N.Y.2d 591 (1975).

⁵⁸⁵ FAM. CT. ACT § 353.5.

⁵⁸⁶ New York State, *Governor Cuomo Signs Executive Order to Separate Teens from Adult Prisoners*, <https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-separate-teens-adult-prisoners> (last accessed January 7, 2016).

4. Effect

Whether the youth is "incarcerated" or "placed," he or she faces the potential of being removed from family, community, and mainstream education. With regard to education, the "opportunity to learn" is sometimes exclusive to an individual's younger years – when he or she is not legally responsible for housing, food, and family expenses. The later ability to afford housing, food, and family expenses – in turn – requires gainful employment. Cycling back, gainful employment requires a strong aptitude of scholastic basics. Therefore, by no stretch of argument, a young offender who loses his youth to incarceration or placement may lose his or her chance at becoming a productive member of society for the remainder of his or her life.

Compounding the issue, due to the above-referenced social science regarding the development, maturation, and impressionability of individuals from this age group, the community removal and locative aspect of placement or incarceration may indeed focus undesirable traits rather than correct them. There are demonstrably higher ratio of recidivism among youth who have been placed in placement or incarceration.⁵⁸⁷ Indeed, the scenario is potentially the complete inverse of rehabilitation. Therefore, with respect to young offenders in particular, the "re-entry" process begins with an assessment of appropriate sentencing options, the objectives of placement or sentencing on a youthful population, and the balancing of immediate public safety considerations with long-term crime and recidivism prevention. Accordingly, this portion of the report focuses on issues of educational and family engagement and continuity as well as diversion and alternative sentencing.

C. Continuity of Education

Under New York State law, individuals under the age of 21, without a high school diploma or its equivalent, have a right to secure a high school education, even if they are confined in a county or New York City jail, prison, or youth placement facility.⁵⁸⁸ Moreover, the protections of the federal Individual with Disabilities in Education Act (IDEA)⁵⁸⁹ require that all youths with educational disabilities – including those incarcerated or in placement – receive educational services tailored to their individual needs, including transitional services to prepare the youths for continued education, employment and community integration.

However, there are impediments to youths obtaining the necessary educational services while involved in the juvenile justice system or the adult criminal justice system. Most notably, while juveniles in county or city jails are guaranteed a high school education, this right is not extended by statute to those under 21 years of age confined in the New York State correctional system.⁵⁹⁰ While DOCCS regulations do extend the right to a high school equivalency degree, they do not extend the right to a regular diploma. In contrast, New York City's jails on Rikers

⁵⁸⁷ Holly Wilson and Robert Hoge, The Effect of Youth Diversion Programs on Recidivism (September 3, 2013) http://www.soc.umn.edu/~uggen/Wilson_CJB_13.pdf.

⁵⁸⁸ N.Y. Educ. Law Sec. 3202 (7).

⁵⁸⁹ Pub. L. No. 101-476, 104 Stat. 1142 (1990) *as amended by* Pub. L. No. 102-119, 105 Stat. 587 (1991), Pub. L. No. 105-17, 111 Stat. 37 (1997), Pub. L. No. 108-446, 118 Stat. 2647 (2004).

⁵⁹⁰ See N.Y. Correct. Law Section 136.

Island and the facilities maintained by the New York City Agency for Children's Services provide the opportunity for both. Facilities maintained by OCFS for youths placed by the Family Court or as a result of a Juvenile Offender sentence do provide education leading to a high school equivalency diploma, however, since they are not registered schools,⁵⁹¹ they cannot grant regular diplomas. However, they may be able to earn credits that can lead to a diploma from a school in their home county if they are released while still eligible for such.

Furthermore, it must be remembered and noted that, all too often, youths who end up in the juvenile or adult criminal justice systems have typically not progressed at a normal rate academically and are well behind their chronological peers. This means that youths whose educational attainments have already varied widely from the traditionally expected norm prior to being placed or incarcerated only have their issues compounded. Some may be functionally illiterate,⁵⁹² but many more need programs that address educational attainments at a middle school level. Such literacy and math supports need to be developed if the mandates of the New York State Education Law are to be met.

The problems faced by youths with special needs who are in placement or are incarcerated also need to be addressed with greater urgency. The obligation to address special educational needs exists under federal law as well as under various state statutory provisions or regulations. For example, a DOCCS directive states that special education services will be provided to all youths under 21 years of age who are identified as having a disability.⁵⁹³ However, there is a greater need for Individualized Education Program (IEP) or other educational placement assessment for youths as they enter and leave OCFS and DOCCS facilities as well as locally based facilities and far more resources need to be devoted to addressing the educational needs of these youths while in custody. Prior research by the New York State Bar Association has revealed that, in 2006, about 30% of the youths between 16 and 21 in DOCCS custody were identified as students with disabilities and yet there were only 29 special education teachers to teach these youths.⁵⁹⁴ In 2011, the New York City Department of Education reported that between 33 and 50% of students in District 79's involuntary programs are classified as Special Education compared with 14% in community schools. While some of the local facilities housing youths have addressed some of these issues,⁵⁹⁵ many have not.

New York City has developed its Passages Academy which addresses the needs of youths subject to the Family Court who are in detention facilities maintained by the New York City Administration for Children's Services (ACS). The Passages Academy is operated under the

⁵⁹¹ However, in many instances credits are not accepted by local educational jurisdictions.

⁵⁹² N.Y. State Bar Ass'n, "Reentry and Reintegration: The Road to Public Safety" – Report and Recommendations of the Special Committee on Collateral Consequences of Criminal Proceedings 119 (2006) (hereinafter Reentry and Reintegration Report) (stating that 25% of the inmates of DOCCS facilities have reading skills below a fifth grade level).

⁵⁹³ DOCCS Directive 4805 "Special Education Services" (Oct. 20, 2014), <http://www.dccs.ny.gov/Directives/4805.pdf>. (Last accessed December 16, 2015)

⁵⁹⁴ Reentry and Reintegration Report; see Mary Magee Quinn, *Youth with Disabilities in Juvenile Corrections: A National Survey* (Spring 2005), http://www.helpingganguyouth.com/disability-best_corrections_survey.pdf.

⁵⁹⁵ New York City's Rikers Island Facility, for example, made improvements post-*Handberry v. Thompson*, 446 F.3d 335 (2d Cir. 2006).

auspices of the City Department of Education. It is a full-time educational program located in each secure facility and has four programs for those in non-secure facilities. Its goal is to provide education while in detention and aid in the transition back to the regular school. This program is worthy of study. The ability to accrue credits while in detention is one that needs to be addressed statewide.

In all instances where a youth returns to school in the community there is a need to improve the coordination between the local school system and the justice system. All too often there is a considerable gap between the release of youths from the justice system and the youth's ability to re-enter the community-based school system. For example, in the past when the New York City Department of Education undertook an assessment of a youth released from placement it often took as much as three months for that assessment to be completed and this would be followed by another review by the school to which the youth was assigned. The needed coordination should take place both before release and after release to reduce any delays in re-entry to the community based school. One recommendation would be to create an electronically based system to assist the coordination of support agencies, the justice system facility, the courts and the local department or board of education. Local boards of education or departments of education need to play an active role in securing placement for youths in the appropriate community school. To the extent feasible, re-entry should be coordinated with the school year calendar to aid in a more seamless transition.

Additionally, a "Close to Home" program began operating in New York City after passage of legislation in 2012. This initiative seeks to place youths subject to Family Court jurisdiction, who would otherwise be in placements under the auspices of OCFS in facilities elsewhere in New York, in placements closer to home. It is also the goal of the Close to Home program that many youths will be assisted in re-entering or remaining at their community schools. From an educational perspective, these are most welcome developments.

Recommendations: New York State should ensure that youths entering the juvenile justice or adult facilities receive adequate assessments so that their educational needs may be met. Youths would also greatly benefit from adequate resources for assessment and educational instruction and strong transition planning from the DOCCS or OCFS educational environment to mainstream educational environment. To this end, improved coordination between local school systems and the justice systems is needed to enable youths to transition more easily to schools within the community. Furthermore, OCFS facilities and other facilities where juveniles are placed or sentenced should all be "registered schools" so that the youths may not only benefit from the education they received while in placement but also be able to stay on track after they return to the community. At a minimum, educational programs which result in high school equivalency degree should be available in all state correctional facilities. IDEA assessments and services which are required by federal law should actually be available for youths whether in the juvenile or adult system. Finally, programs similar to the Close to Home program, which keeps youths within their home community and educational system should exist throughout the state.

D. Alternative Approaches to Placement or Incarceration

1. Youths Subject to Family Court Jurisdiction: Close to Home Program

In 2012, Governor Cuomo signed legislation permitting the development of the Close to Home program in New York City. The goal of the program is to improve outcomes for youth in the juvenile justice system through a program that would keep youth within or relatively close to their communities and their families. The expectation is that recidivism will be reduced because the youth, whether in the community or in a residential placement in or near the community, will be able to avail themselves of local programs and opportunities, and will be able to utilize resources provided to them and to their families to aid in the youth's rehabilitation.

As indicated in the earlier section on youths and education, it is contemplated that school success for youths in the Close to Home program will increase because they will attend schools that are part of the city school system. For the most part, credits obtained in these schools, the Passages Academy, will be automatically accepted in the New York City schools they enter upon discharge.

Oversight of the Close to Home program by all involved – government, advocates, families, service providers and communities – will be strengthened as a result of locating the program in the city. Aftercare services will naturally flow for the youths who are discharged from residential placements because those services will be linked directly to the services received while in placement.

The Close to Home program began in 2012 by bringing youths who were in non-secure placements with OCFS back to New York City where they would have local non-secure placements. The second phase, returning youths to New York City from limited secure OCFS placements is underway. The Close to Home placements consist of small facilities with services tailored to the needs of the youths that are placed there.

Re-entry is far more likely to be an easier process where the youths are carefully assessed before placement, provided with needed services, able to accrue school credits that can be readily transferred and able to be engaged with their families. Furthermore, there are at least seven levels of service that are available short of placement, including three levels of probation intervention and four additional service intensive programs (Peak, AIM, ECHOES and JJI) that allow for youth to remain at home. This combination, all locally based, should provide close to optimum outcomes.

Although the Close to Home program is a relatively new initiative and therefore is not likely to have long-term data about outcomes, it is a model that is likely to produce results that are worth emulating.

2. Youths Subject to Criminal Court Jurisdiction: Youth Court and Adolescent Diversion

As noted many times in this report, recidivism is a nationwide concern that continues to plague our society and bleeds each respective state of judicial (and other) resources.⁵⁹⁶ It is respectfully added herein, however, that the younger the offender, the more expansive the time with which he or she might re-offend.⁵⁹⁷ Accordingly, placing a much stronger emphasis on rehabilitation than on retribution in juvenile justice has much greater potential to combat recidivism in the population overall. In this respect, the justice system response to juveniles – with their still-maturing brains – cannot be formulaic or one-size-fits-all. While the Penal Law and Criminal Procedure Law customarily focus on the type and level of *offense* (for jurisdiction, procedure, and sentencing), there must be, with youths in particular, a greater and more specialized focus on the individual circumstances of the young person.

Guided by the above principles, an understanding and appreciation of the adolescent mind, and its differences from the adult mind, juvenile justice programs such as New York's Adolescent Diversion Programs (ADP) and Youth Courts have had great success while maintaining public safety and offering a second chance to young offenders. The ultimate objective of these programs and courts is to reduce secondary contact with the criminal justice system through the tailored application of age-appropriate social services.

(a) Adolescent Diversion

New York State Chief Judge Jonathan Lippman pioneered ADP in New York by launching a statewide pilot program on January 17, 2012.⁵⁹⁸ The program established specialized Adolescent Diversion parts within the court system that focused on sixteen and seventeen year-old defendants – those just beyond the reach of Family Court but not yet at the age of legal majority. The program's overall objective was to minimize teenagers' exposure to the adult criminal justice system, with research having demonstrated that juveniles processed by the adult criminal system, as compared to juvenile facilities, resulted in worse outcomes.⁵⁹⁹ Indeed, according to one study, felony recidivism increased by 34% among young people transferred into the adult criminal justice system.⁶⁰⁰ In addition, another study estimates that

⁵⁹⁶ Danyelle Solomon, *Judiciary Committee Gets Smart on Criminal Justice*, BRENNAN CTR. FOR JUSTICE L. BLOG (Mar. 7, 2014), <https://www.brennancenter.org/blog/senate-must-act-criminal-justice-reform>. (Last accessed December 16, 2015)

⁵⁹⁷ See generally Harris, Lookwood, Mengers & Stoodley, *Measuring Recidivism in Juvenile Corrections*, JOURNAL OF JUVENILE JUSTICE, 1:1 (2011), <http://www.journalofjuvjustice.org/jojj0101/article01.htm>. (Last accessed December 16, 2015)

⁵⁹⁸ New York's ADP pilot program was launched in nine counties (Bronx, Erie, Kings, Onondaga, Nassau, New York, Richmond, Queens, and Westchester).

⁵⁹⁹ The Governor's Commission on Youth, Public Safety and Justice, FINAL REPORT: RECOMMENDATIONS FOR JUVENILE JUSTICE REFORM IN NEW YORK STATE 78 (2015).

⁶⁰⁰ Centers for Disease Control and Prevention. (2007) *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*. MMWR 2007; 56 (No. RR-9), <http://www.cdc.gov/mmwr/pdf/rr/rr5609.pdf>. (Last accessed December 16, 2015)

approximately 80% of the youth released from adult prisons recidivate with more serious crimes.⁶⁰¹

At its core, ADP is a vehicle for early intervention and recidivism reduction through age-appropriate rehabilitative services. These services are also meant to be *individual*-appropriate. To this end, all of the pilot counties administer some type of clinical screening or assessment and are equipped to provide a variety of options for each adolescent offender, depending on his or her "risk" level.⁶⁰² In the pilot counties, successful program completion almost always leads to case outcomes that avoid permanent criminal records.⁶⁰³ Indeed, in most cases of a "low-risk" assessment, the adolescent customarily receives an outright dismissal – the prevailing wisdom being that the effect of the arrest and brief court experience has effectively interceded the conduct and that any further exposure would be counter-productive.

With only a few years behind the ADP initiative, it is naturally difficult to evaluate its long-term efficacy. However, in 2014, the Division of Criminal Justice Services (DCJS) endeavored to conduct an audit of the Nassau County Adolescent Diversion Program,⁶⁰⁴ specifically focusing on program deliverables. In order to compare ADP disposition and processing times with a non-ADP population, DCJS compiled a "reference group," consisting of 16- and 17-year-old offenders arrested in Nassau County for non-violent felony offender crimes whose cases were disposed between January 17, 2011 and December 31, 2011 (the year immediately prior to the ADP launch in New York State).⁶⁰⁵ In its analysis, DCJS found 42.3% more dismissals, 12.7% less criminal dispositions, and 6.5% less use of incarceration as a sentence in the ADP population.⁶⁰⁶ Moreover, DCJS noted that ADP achieved a 77% reduction in the median length of prosecution from arraignment to disposition.⁶⁰⁷ Most importantly, DCJS noted that the above listed program benefits had been achieved at no perceivable increase in recidivism.⁶⁰⁸ A similar statewide study in 2013 (one year into the initiative) also showed no marked increase in recidivism in any category.⁶⁰⁹ The data sets are encouraging, as they

⁶⁰¹ National Campaign to Reform State Juvenile Justice Systems. *The Fourth Wave: Juvenile Justice Reforms for the Twenty - First Century*, at 20, <http://www.modelsforchange.net/publications/530>. (Last accessed January 5, 2016)

⁶⁰² With respect to Nassau County, for 2013, 51% of cases were deemed "low-risk" after intake screening, and were generally dismissed or adjourned in contemplation of dismissal on the first court appearance. Across all levels of risk and offense, approximately 90% of cases against adolescents were ultimately dismissed, and 98% resulted in non-criminal dispositions. Office of the District Attorney of Nassau County, NCDA REPORT 2014: YOUTH PROGRAM SYLLABUS 6 (2014).

⁶⁰³ Depending on the nature of the offense, the age group may also be shielded under New York's youthful offender statutes, detailed above.

⁶⁰⁴ N.Y. Div. of Crim. Justice Services (DCJS), Office of Justice Research and Performance, *Nassau County's Adolescent Diversion Program: A Preliminary Outcome Analysis* (May 2014).

⁶⁰⁵ *Id.*

⁶⁰⁶ *Id.* at 7.

⁶⁰⁷ *Id.* at 8.

⁶⁰⁸ *Id.* at 9 (calling the difference in recidivism "not statistically significant").

⁶⁰⁹ Rempel, Michael, Suvi Hynynen Lambson, Carolyn R. Cadoret, and Allyson Walker Franklin, *The Adolescent Diversion Program: A First-Year Evaluation of Alternatives to Conventional Case Processing for Defendants Ages 16 and 17 in New York*, Center for Court Innovation (2013), http://www.courtinnovation.org/sites/default/files/documents/ADP_Report_Final.pdf. (Last accessed December 16, 2015)

demonstrate how ADP can rapidly remove a young offender from the mainstream criminal prosecution environment, provide a rehabilitative service, and eliminate a lifelong stigma, all without impacting public safety.⁶¹⁰

(b) Youth Courts

It is noted, at the outset of this section, that the New York State Bar Association has already established a Special Committee on Youth Courts, and many reports and writings have exhaustively covered this issue. Indeed, in January 2011, the New York State Bar Association Journal devoted an entire issue to Youth Courts.⁶¹¹ Writing the introduction to the issue, the Honorable Judith S. Kaye eloquently stated: "Why not take a full-fledged, enthusiastic stab at interrupting the School to Prison pipeline with youth courts in schools, in courts, and in police and probation departments? Why not second chances for deserving offenders to avoid the lifetime scar of arrest and conviction?"⁶¹² Accordingly, this section will not re-hash the well-trod ground of its venerable predecessors, but instead focus on supportive data and innovative concepts.

There is no statutory framework or endorsement for a "Youth Court" in New York State – despite ardent efforts to the contrary.⁶¹³ Nonetheless, over a hundred such programs exist in New York State, each operating under similar conceptual guidelines but utilizing disparate approaches, tailored to the individual community. While there is great variety as to format, Youth Courts (also called teen, peer, and student courts) are typically programs in which youths sentence their peers for minor delinquent and status offenses.⁶¹⁴ They may be used on their own or in conjunction with other programs.⁶¹⁵

Participation in New York's Youth Courts have been increasing since their implementation and the tracking data for compliance only gives cause for much more encouragement. Since 2011, the Brownsville Youth Court has heard over 300 cases,⁶¹⁶ with 90% of respondents completing their sanctions as ordered, and performing over 1,500 hours of community service.⁶¹⁷ Likewise, in 2012, the Harlem Youth Court heard over 100 cases,⁶¹⁸ and

⁶¹⁰ It is noted that Nassau County, with over 1.3 million residents, is a fairly significant statistical sample for New York State.

⁶¹¹ Youth Courts: The Power of Positive Peer Pressure, N.Y. State Bar Ass'n Journal, Vol. 83, No. 1 (Jan. 2011).

⁶¹² *Id.* at 11.

⁶¹³ See, e.g., Kaye & Rodriguez, Memorandum to the Executive Committee of the New York State Bar Association, *Proposed Amendments to the Unconsolidated Laws, the Family Court Act and the Criminal Procedure Law in Relation to the Establishment of Youth Courts and Authorizing Criminal and Family Courts to Transfer the Dispositional Phase of Proceedings to Youth Courts* (Feb. 15, 2011).

⁶¹⁴ NATIONAL ASSOCIATION OF YOUTH COURTS, http://www.youthcourt.net/?page_id=24. (Last accessed December 16, 2015)

⁶¹⁵ Office of the District Attorney of Nassau County, NCDCA REPORT 2014: YOUTH PROGRAM SYLLABUS 10 (2014).

⁶¹⁶ CENTER FOR COURT INNOVATION, Brownsville Youth Court, <http://www.courtinnovation.org/brownsville-youthcourt> (last visited September 4, 2015).

⁶¹⁷ *Id.*

⁶¹⁸ CENTER FOR COURT INNOVATION, Harlem Youth Court, <http://www.courtinnovation.org/harlem-youth-court>. (Last accessed December 16, 2015)

it also achieved 90% of its respondents completing their ordered sanctions.⁶¹⁹ In 2013, the Staten Island Youth Court heard 140 cases,⁶²⁰ and more than 34 young people served as judge, jurors and advocates.⁶²¹ In Nassau County, which has made efforts to interweave its Youth Court program into both its Family Court and Adolescent Diversion Program, Youth Court has experienced profound compliance: of the 424 cases heard between March 2011 and October 2014, only 19, or 4.5%, needed to be referred back to prosecution for noncompliance.⁶²² Regarding recidivism specifically, a study of the Livingston County Youth Court data demonstrated that its participants recidivated 14.4% less than a nonparticipating comparison group.⁶²³ All this above data demonstrates that Youth Courts are thriving, experiencing community and court cooperation, and producing quantifiable results as far as successful juvenile re-entry.

Indeed, a brief turn outward reveals that Youth Courts nationwide have been successful in achieving various objectives. In Utah, for example, the Salt Lake Peer Court has found that recidivism directly correlates to certain risk factors and methods of case resolution.⁶²⁴ It found that substance abuse offenders are 49%-61% more likely to recidivate,⁶²⁵ but they are 24% less likely to recidivate back to Juvenile Court upon completion a peer court contract (an agreement to adhere to the respective treatment and resolution requirements).⁶²⁶ The study also found that females sentenced to active case management were 244% less likely to recidivate.⁶²⁷

This data, coupled with that of the New York Youth Courts supplied above, tells two stories. First, an age-specific, youth-specific program can effectively reduce future justice system contact. Second, when viewed in comparison to control groups, it becomes clear that, without the proper guidance, counseling, education, and support, many youthful offenders lack the tools to successfully return to their communities. Coupled with a blemished criminal record, youth re-entrants are often exposed to psychological and emotional trauma from either incarceration, societal labeling, or both.⁶²⁸ The re-entry strategy of youth court, therefore, depends greatly on social inclusion to combat the social ostracism.

For example, Nassau County's Youth Court program makes a specific effort, in each case, to link a court participant with a "pro-social" activity – one where the youth is paired with an apposite mentor or experience. For example, youths who express interest in cooking are paired with chefs for a private lesson; youths who have interest in communications are paired

⁶¹⁹ *Id.*

⁶²⁰ CENTER FOR COURT INNOVATION, Staten Island Youth Court, <http://www.courtinnovation.org/staten-island-youth-court>. (Last accessed December 16, 2015)

⁶²¹ *Id.*

⁶²² Office of the District Attorney of Nassau County, NCDA REPORT 2014: YOUTH PROGRAM SYLLABUS 10 (2014).

⁶²³ Thomas H. Nochajski, HILLSIDE CHILDREN'S CENTER: LIVINGSTON COUNTY YOUTH COURT AND COMMUNITY SERVICE EVALUATION 40 (2010).

⁶²⁴ Lane Crisler, RECIDIVISM WITHIN SALT LAKE PEER COURT 1 (2013).

⁶²⁵ *Id.* at 13

⁶²⁶ *Id.*

⁶²⁷ *Id.* at 16.

⁶²⁸ Kristy N. Matsuda, THE IMPACT OF INCARCERATION ON YOUNG OFFENDERS 41 (2009).

with staff at local radio stations. Each pro-social pairing is unique and coordinated through the District Attorney's Office. Furthermore, in Nassau County's program, after the resolution of his or her own case, a Youth Court participant will serve as a juror, and the lessons he or she learns continue through the actions of others.⁶²⁹ The approach – which is just one example of using an "inclusion" methodology to combat any stigma or ostracism – is an invaluable way to convert the youth's contact into a growth opportunity. Indeed, it is of the utmost importance for the state to engage in assisting youthful offenders so that they can obtain the skills and self-assurance to overcome their mistakes and become a part of society in a positive way.⁶³⁰

(c) Effects

Coincidentally, if not revealingly, New York has seen a statewide decline in the number of 16 and 17-year-olds arrested for misdemeanors and non-violent felonies since 2012.⁶³¹ This is not to imply that these programs alone are responsible for the reduction in crime, but with an evolving focus on rehabilitation, education, and community outreach, these programs have been benefiting society greatly.⁶³² It is worthwhile to note that, while trend data may be difficult to source, New York City – a stronghold of both Adolescent Diversion Programs and Youth Courts – accounts for a significant portion of the state population and statistics.

Focusing first on misdemeanor offenses: during 2012 the total number of 16 year-olds arrested in New York State was 13,009, and the number of 17 year-olds was 16,001.⁶³³ The following year, 2013, those respective numbers fell to 11,163 and 13,562.⁶³⁴ Furthermore, in 2014, arrests continued to decline falling to 9,817 and 12,383.⁶³⁵ Accordingly, from 2012 to 2014 the number of 16-year-olds arrested for misdemeanor offenses in New York State was reduced by 3,192, or 24.5%. During that same time frame, the number of 17-year-olds arrested was reduced by 3,618, or 22.6%.

With regards to non-violent felony offenses (NVF),⁶³⁶ in 2012, the number of 16-year-olds arrested in New York State was 2,237,⁶³⁷ and the number of 17-year-olds arrested for NVF was 2,739.⁶³⁸ The next year, 2013, those arrests dropped respectively to 1,961 and 2,392.⁶³⁹ New York saw the trend continue in 2014, where the number of NVF arrests of 16-year-old group totaled only 1,790, and the 17-year-olds 2,370.⁶⁴⁰ Here the number of arrests for NVF

⁶²⁹ Office of the District Attorney of Nassau County, NCDA REPORT 2014: YOUTH PROGRAM SYLLABUS 8 (2014).

⁶³⁰ *Id.* at 6.

⁶³¹ NEW YORK STATE DIVISION OF CRIMINAL JUSTICE, <http://www.criminaljustice.ny.gov/crimnet/ojsa/youth-arrests/NewYorkState.pdf>. (Last accessed December 16, 2015)

⁶³² Office of the District Attorney of Nassau County, NCDA REPORT 2014: YOUTH PROGRAM SYLLABUS 6-7 (2014).

⁶³³ NYSDCJ, *supra* note 631.

⁶³⁴ *Id.*

⁶³⁵ *Id.*

⁶³⁶ Violent felonies were omitted from the comparison because such offenses are disqualifiers for participation in any ADP, the criteria varies based on program location.

⁶³⁷ NYSDCJ, *supra* note 631.

⁶³⁸ *Id.*

⁶³⁹ *Id.*

⁶⁴⁰ *Id.*

offenses of persons 16 years-old were reduced from 2012 to 2014 by 447, or 20%. Likewise, the number of NVF arrests of 17-year-olds for this duration was reduced by 369 arrests, or 13.5%.

Recommendations: The Adolescent Diversion Program should be expanded to additional jurisdictions in New York State, if not universalized, with appropriate state funding. Likewise, Youth Courts, due to their success, should finally receive a statutory authority, under which program funding could be regularized. In the absence of legislation modifying the age ranges for juvenile and adult prosecutions, the court system should continue its trend of compartmentalizing juvenile prosecutions, including, if possible, separate court facilities entirely.

ATTACHMENT

PRE-RELEASE AGREEMENT

New York State Department of Corrections and Community Supervision and the Social Security Administration

INTRODUCTION

The Social Security Administration (SSA) and the New York State Department of Corrections and Community Supervision (DOCCS) propose a Pre-Release Agreement for individuals or Mental Hygiene Law Article 10 respondents located in State correctional or secure NYS Office of Mental Health (OMH) treatment facilities who are to be released to supervision by DOCCS or Strict and Intensive Supervision and Treatment (SIST) by DOCCS. The purpose of the Pre-Release program is to provide a guarantee of financial help for those who are released to the community and to ensure that Title XIX (Medicaid) eligibility is established as quickly as possible. Proper use of a Pre-Release procedure will facilitate release plan development and will ensure continuity of medical care upon release to the community. (The Title XVI application will also serve as a filing for Title II benefits and to reinstate an SSI recipient if applicable)

Upon notification that an individual has been scheduled for release to the community or in anticipation of a likely release decision by the Parole Board, the DOCCS will review the individual's income, resources and disability, to the extent known, for potential Supplemental Security Income (SSI) eligibility.

If an individual is in a secure treatment facility and ordered to SIST by a Court of competent jurisdiction, OMH will review the individual's income, resources and disability, to the extent known, for potential Supplemental Security Income (SSI) eligibility.

In addition, where an individual who is in post-release supervision status appears eligible to apply for SSI, DOCCS staff will encourage completion of the SSI application process with the released individual. SSA will provide DOCCS and OMH with guidance in evaluating both medical and nonmedical criteria. Individuals filing post release will be asked the name and contact information of the Parole Officer as a medical source. If unknown, SSA will obtain this information from DOCCS.

Those individuals who appear to be SSI eligible will have an SSI and food stamp application filed in accordance with the Pre-Release program procedures. In no case will a potential SSI applicant be considered for the program more than 120 days prior to the scheduled release date or imposition of a Court order of SIST. This will allow Social Security sufficient lead-time to make a medical determination prior to release.

I. THE APPLICATION PROCESS

A. DOCCS and OMH Responsibilities

Note: New York State Office of Mental Health (OMH) staff are also empowered to take applications for individuals in DOCCS custody.

DOCCS and/or OMH staff located at the correctional or secure treatment facility will identify individuals who could benefit from the Pre-Release procedure according to the following guidelines and in coordination with other associated medical staff:

1. The individual's release is imminent, i.e., could be released within 120 days from the date of identification and within 30 days of notification by SSA of potential SSI eligibility;
2. The individual has a need for funds, i.e., meets the SSI income and resource limitation criteria;
3. The individual has a condition which may meet SSA's disability criteria;
4. The individual does not have a pending application or at the time of release will have been in suspense from disability benefits for more than 12 months.

NOTE: If the individual is not a U.S. citizen and is age 65 or older a favorable disability determination may also be required for eligibility if the individual does not meet another exception condition. The criteria is lawful residence in the U.S. on 8/22/96 and a current qualifying status, e.g. LAPR (Lawfully Admitted Permanent Resident), Cuban/Haitian entrant, refugee, asylee, parolee, conditional entrant.

Upon identification of an individual who meets the basic criteria, the DOCCS Senior Offender Rehabilitation Coordinator (SORC) or Offender Rehabilitation Coordinator (ORC) and/or OMH staff facilitating the application will initiate the Disability application.

When internet access is available, the application process will be begun by completion of the i-3368 (the Adult Disability and Work Activity Report) and assistance with completion of the internet claim (iClaim) in lieu of the paper SSA-16 (the Social Security Disability application) submitted. It is understood that the SSI application, the SSA-8000, is not available via the internet, but if available in the future, SSA would assist with the internet SSI claim. Until such time, the local Social Security offices, in conjunction with their Area Directors and the Regional Office, will determine whether the remaining non-disability SSI application (the SSA-8000) will be completed via teleclaims or mail. Procedures may vary depending on local preferences. (Other documents, e.g. a signed medical release form, SSA-827, will always require claimant signature).

In the absence of internet capability and until internet capability is available, SORC/ORC and/or OMH staff facilitating the application will prepare a packet to be forwarded to the parallel SSA field office (FO). *(Note: Some forms are also available in Spanish).*

The packet should contain the following completed forms:

1. SSA-3368 – Disability Report
2. SSA-3369 – Vocational Report – (should not be completed if claimant never worked or had only one occupation in the 15-year period before he/she stopped working)
3. SSA-827 – One signed Authorization to Release Medical Information to the Social Security Administration
4. SSA-8510 – Authorization to Obtain Personal Information
5. SSA-4814 – Medical Report for Individuals with HIV/AIDS, if applicable
6. SSA-8000 – Application for Supplemental Security Income (taken via teleclaims or by DOCCS and/or OMH staff)
7. SSA-16 - Application for Disability Insurance

8. SSA-795 – Statement from Claimant with Release and Identifying Information (*Exhibit 2*)
9. Prerelease Case Flag (*Exhibit 1*)
10. Copy of the DOCCS or OMH Comprehensive Medical Summary Form (CMS) or other summary of medical evidence.

Staff facilitating the application will download the forms from the Social Security internet website at www.socialsecurity.gov. The Exhibits attached to this document are not available online and must be photocopied for use.

Signed evidence from an acceptable medical source, e.g. a licensed physician or a licensed psychologist, is required to determine the existence or severity of an impairment. Staff facilitating the application, in collaboration with DOCCS Health Services and OMH, will make every effort to obtain and submit the required documentation with the application packet.

Therefore, at the time of filing, staff facilitating the application will obtain and submit from the facility Health Services Staff and/or OMH, where appropriate, all available medical evidence, including:

1. dates of current and prior periods of hospitalization;
2. medical history covering the past 12 months;
3. description of findings including orientation, coherence, emotional status, results of psychological tests, and current mental status examination results (for mental disability claims);
4. diagnosis;
5. course of condition during present hospitalization if applicable, including changes in mental/physical status, adjustment to hospital routine, adjustment to work detail, personal adjustment, relationship with others;
6. prognosis;
7. recommendation for post-hospitalization follow-up; i.e., medications, dosage and any other type of therapy;
8. statement on impact on ability to perform work related activities.

The entire medical packet will be forwarded to the FO parallel to the correctional or secure treatment facility under cover of both a flag (*Exhibit 1*) and SSA-795 (*Exhibit 2*). The flag will identify information pertaining to the SORC/ORC or OMH staff (e.g., name, address, phone, and fax numbers). The flag enables the FO to identify the case as a TERI (terminal illness case) where applicable. The SSA-795 will serve to provide basic identifying information on the prospective released individual and to serve as authorization by the individual for release of information to DOCCS and/or OMH staff.

If the social security number is not known, or if the individual never had one, the staff facilitating the application should contact the FO for further instructions.

Where case followup is required in order to determine status updates and outcomes, staff may request the applicant to complete SSA Form 3288 Consent to Release of Information by SSA to the specific person listed on the form. This optional form is found in *Exhibit 6*.

B. SSA Responsibilities

SSA will provide DOCCS and OMH with updated lists of all FOs parallel to correctional and secure treatment facilities and a contact person (name and telephone number) within the FO.

Upon receipt of the Pre-Release packet, the FO will determine if additional applications/forms are needed. The FO will mail the SSA-8000 receipt to the individual, care of the facility. An appropriately completed DSS-2474, SSI Referral and Certification of Contact (*Exhibit 4*) will be mailed to staff facilitating the application to provide to the individual upon release. Section II of the DSS-2474 should refer the releasee for both emergency medical and financial assistance.

If the SSA-8000 was not included in the package, the FO will initiate action within timeframes consistent with SSA's policy for scheduling appointments to complete the application through a face to face or teleclaim/mail procedure at a date and time prearranged with the SORC/ORC or OMH staff. Note: The SSA 827 must be received by SSA before a teleclaim can be successfully completed. If necessary, staff must fax a copy to the assigned SSA office prior to the phone interview.

When necessary, the FO may subsequently contact the institution's staff that facilitated the application to obtain additional information for purposes of determining eligibility. All applications, statements and referrals should have the name and telephone number of the staff that facilitated the application in remarks and, thereafter, a copy of any manual notice should be sent to the staff that facilitated the application. The staff that facilitated the application should also be informed as to the contents of any automated notice issued as a result of the application process.

If it appears that the individual is ineligible for SSI based on technical reasons, (i.e., alien status, excess income or resources), the FO will mail an informal denial notice to the staff that facilitated the application and process the denial immediately. A formal notice will also be sent to the individual/claimant.

If it appears that the individual meets all technical requirements of SSI entitlement, the FO will review the Pre-Release Flag (*Exhibit 1*), annotate "TERI", if appropriate, and forward it to the NYS Division of Disability Determinations (DDD) if appropriate for a medical determination. Any unresolved technical issues will be developed concurrently.

II. PRE-RELEASE NOTIFICATION AND FOLLOW-UP

A. SSA Responsibilities

Whenever potential eligibility for payments exists, e.g., the medical determination is an allowance, the FO will provide the Informal Notice of SSI Medical Allowance (*Exhibit 3*) to the staff that facilitated the application. (Note: For individuals with Renal Dialysis needs, *Exhibits 3 and 4* must also be faxed by the FO to DOCCS Health Services at 518-457-2115 or OMH at 518-956-9440.)

However, if release does not occur within 30 days or release is no longer anticipated, the FO will take action to disallow the claim for nonmedical reasons. It is understood that in most cases a favorable medical decision is good for 12 months and the SORC/ORC or other staff

that facilitated the application may contact SSA to initiate reinstatement. If 12 months has elapsed a new application and new disability decision will be required.

If the decision is a denial, a formal notice with appeal language will be sent to the individual. In the event that more than 90 days has elapsed from the date of FO receipt of the application, and the SORC/ORC or other staff that facilitated the application has not received status on the claim, the SORC/ORC or other staff that facilitated the application may obtain status from the FO.

B. DOCCS/OMH Responsibilities

During the pendency of the claim, the SORC/ORC or other staff that facilitated the application should advise the FO of any change in the anticipated release date or any change in circumstances of the individual. At the time of application, SSA will fully advise the individual and the staff that facilitated the application of all reporting responsibilities.

DOCCS and OMH will assist DDD in attaining any additional information required for case processing, including arranging claimant conferences where applicable.

If the decision is a denial, the staff that facilitated the application may advise the individual to appeal.

III. ACTION UPON IMPENDING RELEASE

A. DOCCS/OMH Responsibilities – Pre-Release

As soon as the staff that facilitated the application is aware of the release date (no earlier than one week prior to release), they will notify the parallel FO of the planned date of release, the new address of the releasee and the receiving Community Supervision Field Office's address and telephone number. Upon notification of release and the new address the Community Supervision Parole Officer should consult both www.socialsecurity.gov and the list of Social Security offices addresses and names of the Pre-Release liaisons that has been provided to determine the address of the new servicing office and the contact information. This can also be obtained by calling the FO parallel to the facility where the individual was housed.

The SORC/ORC or other staff that facilitated the application should also advise the releasing individual of the need to contact the receiving SSA FO immediately upon release and/or assist him/her in scheduling an appointment in the servicing FO. The staff that facilitated the application should notify the receiving Community Supervision Field Office that the released individual is participating in the Pre-Release program so that contact with the new servicing FO and emergency medical assistance can be pursued by the Community Supervision Field Office.

In pending release cases where interstate release is planned, the staff facilitating the application will contact SSA for further instructions.

B. SSA Responsibilities

The parallel FO will transfer jurisdiction to the new servicing FO. The FO should annotate the mainframe (MCS/MSSICS) with the information provided by staff that facilitated the application regarding the release date, the receiving Community Supervision Field Office's

address and telephone number, and the released individual's new address. A copy of the Informal Notice of SSI Medical Allowance (*Exhibit 3*) and the DSS-2474 (*Exhibit 4*) should be included in the file.

The DDD will be notified of the post release address and Community Supervision Field Office assignment if a final medical determination has not been made.

Presumptive Disability (PD) provisions may apply upon an individual's release from an institution. PD payments can be made for up to six months even if DDD has not completed a final medical determination. Therefore, both SSA and DDD should be alert to situations where the individual could be eligible upon release. If the final DDD decision is a denial, SSA will not consider the PD an overpayment.

In the event of a favorable medical determination, the servicing FO will attempt to make contact with the released individual to verify current factors of entitlement in his/her new living arrangement. Upon successful completion of the verification process, which may require third party contacts, e.g., with a landlord to verify current rental agreement, adjudication (claim finalization) should be initiated within 10 to 14 days. The Parole Officer should be aware of this process and encourage the individual to make immediate contact with the FO. It is not necessary to wait for SSA to contact the individual. If problems arise in the adjudication of the individual's claim, the FO may contact the Parole Officer for assistance. If the individual is unable to report to the FO in person, the Parole Officer should contact the SSA FO in order to arrange for a field representative to contact the released individual either by phone or home visit.

C. DOCCS Responsibilities (Field)

The Parole Officer should also refer the released individual to emergency assistance pending completion of the SSI application process. Released individuals diagnosed with AIDS residing in New York City should be advised to show a copy of the DSS-2474 (*Exhibit 4*) to the New York City Human Resources Administration – Division of AIDS Services, Medical Assistance Program. All other disabled releasees residing in New York City should be advised to bring the DSS-2474 to their local NYC Department of Social Services office. All releasees residing outside New York City should be instructed to visit the County Department of Social Services in their county of residence with a copy of the DSS-2474.

IV. SSA REGIONAL OFFICE RESPONSIBILITIES

The SSA Regional Office, Program Operations Center, will be responsible for oversight of this Pre-Release Agreement.

V. PRE-RELEASE AGREEMENT FREQUENTLY ASKED QUESTIONS (FAQ'S)

See *Exhibit 5*.

Revised – December 31, 2012

Exhibit 1

PRERELEASE CASE

Releasee Name:

Other Names Used:

SSN:

DIN:

NY State ID Number:

Mother's Name:

Father's Name:

Date of Birth:

Place of Birth:

Offender Rehabilitation Coordinator or OMH Staff:

Facility Address:

Telephone #:

Fax#:

Expected Release Date:

Release Address if known:

Release Contact (relative/friend/interested party):

Release Telephone #:

CHECK IF TERMINAL ILLNESS

☐

CHECK IF HOMELESS

☐

SOCIAL SECURITY ADMINISTRATION

Exhibit 2

STATEMENT OF CLAIMANT OR OTHER PERSON

NAME OF WAGE EARNER, SELF-EMPLOYED PERSON, OR SSI CLAIMANT SOCIAL SECURITY NUMBER

NAME OF PERSON MAKING STATEMENT (If other than above wage
earner, self-employed person, or SSI claimant)

RELATIONSHIP TO WAGE EARNER, SELF-
EMPLOYED PERSON, OR SSI CLAIMANT

Understanding that this statement is for the use of the Social Security Administration, I hereby
certify that -

I will shortly be released from

I wish to file for any SSI benefits I may be entitled to

I wish to have this inquiry protect my rights to these benefits

My mother's name is/was (include maiden name)

My father's name is/was

My date of birth is

My place of birth is

I give permission to SSA to provide information concerning my benefits to

DOCCS/OMH to determine my eligibility for SSI/Social Security benefits.

I authorize SSA to disclose the eligibility determination to DOCCS/OMH regarding my application

for SSA/SSI benefits.

Privacy Act Statement

Collection and Use of Personal Information

Public Law 110-328 and section 1631(e) of the Social Security Act, as amended, authorize us to collect this information. The information you provide will be used to determine if you have made a good faith effort to pursue U.S. Citizenship, so that we may make a decision on additional Supplemental Security Income (SSI) benefits.

The information you furnish on this form is voluntary. However, failure to provide the requested information will prevent us from making a timely decision on your benefits.

We generally use the information you supply for the purpose of determining eligibility for benefits. However, we may use it for the administration and integrity of Social Security programs. We may also disclose information to another person or to another agency in accordance with approved routine uses, which include but are not limited to the following:

1. To enable a third party or an agency to assist Social Security in establishing rights to Social Security benefits and/or coverage, including the U.S. Citizenship and Immigration Service in order to verify information provided;
2. To comply with Federal laws requiring the release of information from Social Security records (e.g., to the Government Accountability Office and Department of Veterans Affairs);
3. To make determinations for eligibility in similar health and income maintenance programs at the Federal, state, and local level; and
4. To facilitate statistical research, audit or investigative activities necessary to assure the integrity of Social Security programs.

We may also use the information you provide in computer matching programs. Matching programs compare our records with records kept by other Federal, state, or local government agencies. Information from these matching programs can be used to establish or verify a person's eligibility for Federally funded or administered benefit programs and for repayment of payments or delinquent debts under these programs.

Additional information regarding this form, routine uses of information, and our programs and systems, is available on-line at www.ssa.gov or at your local Social Security office.

Paperwork Reduction Act Statement - This information collection meets the requirements of 44 U.S.C. §3507, as amended by Section 2 of the Paperwork Reduction Act of 1995. You do not need to answer these questions unless we display a valid Office of Management and Budget control number. We estimate that it will take about 15 minutes to read the instructions, gather the facts, and answer the questions. **SEND THE COMPLETED FORM TO YOUR LOCAL SOCIAL SECURITY OFFICE.** The office is listed under U. S. Government agencies in your telephone directory or you may call Social Security at 1-800-772-1213 (TTY 1-800-325-0778). You may send comments on our time estimate above to: SSA, 6401 Security Boulevard, Baltimore, MD 21235-6401. Send only comments relating to our time estimate to this address, not the completed form.

I declare under penalty of perjury that I have examined all the information on this form, and on any accompanying statements or forms, and it is true and correct to the best of my knowledge. I understand that anyone who knowingly gives a false or misleading statement about a material fact in this information, or causes someone else to do so, commits a crime and may be sent to prison, or may face other penalties, or both.

SIGNATURE OF PERSON MAKING STATEMENT

Signature (First name, middle initial, last name) (Write in ink)	Date (Month, day, year)
SIGN k HERE r	Telephone Number (Include Area Code)
)
Mailing Address (Number and street, Apt. No., P.O. Box, Rural Route)	
City and State	ZIP Code

Witnesses are required ONLY if this statement has been signed by mark (X) above. If signed by mark (X), two witnesses to the signing who know the individual must sign below, giving their full addresses.

1. Signature of Witness	2. Signature of Witness
Address (Number and street, City, State, and ZIP Code)	Address (Number and street, City, State, and ZIP Code)

Exhibit 3

INFORMAL NOTICE OF SSI MEDICAL ALLOWANCE
(N.Y. STATE DOCCS—PRERELEASE CASE)

RELEASEE'S NAME _____
SOCIAL SECURITY NO. _____
DATE _____

GENERAL — The releasee named above has been medically allowed for Supplemental Security Income.

Further action on the claim will be delayed pending release of the releasee from the Institution. In the event that release does not occur or is no longer anticipated, final action to disallow the claim will result.

The attached form DSS-2474 will assist in obtaining emergency assistance for the releasee, pending final processing of the food stamp and SSI application (which also serves as an application for Medicaid).

INSTRUCTIONS FOR:

A. OFFENDER REHABILITATION COORDINATOR OR OMH OFFICE — The following actions must be taken upon release of the releasee (named above) from the facility to ensure the timely receipt of SSI payments and appropriate emergency assistance.

- Notify the local SSA office of the individual's release, the new address of the releasee and the receiving Field Parole Officer's address and telephone number.
- Forward a copy of these instructions and the attached DSS-2474 to the receiving Community Supervision Office.
- Provide a copy of the attached DSS-2474 to the releasee and advise him/her to contact the Social Security Office nearest his/her new residence for an appointment to complete the SSI application process.

B. RECEIVING FIELD PAROLE OFFICE — The releasee should be advised and assisted in taking the actions noted as soon as possible after arrival at his/her new residence. This will insure the timely release of SSI payments and that appropriate emergency assistance is made available.

- If the releasee has not already done so, instruct him/her to contact the Social Security Office nearest his/her new residence for an appointment to complete the SSI application process so that payments can be initiated.
- Direct the releasee to bring a copy of the DSS-2474 (attached) to the appropriate office as indicated below so that emergency assistance can be made available pending final processing of the SSI application.

IN NEW YORK CITY — Releasees diagnosed with AIDS should contact the New York City Human Resources Administration — Division of AIDS Services-Medical Assistance Program. All OTHER disabled releasees should contact their local New York City Department of Social Services office.

OUTSIDE NEW YORK CITY: Contact the local county Department of Social Services.

SSI REFERRAL AND CERTIFICATION OF CONTACT

NEW YORK STATE

OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE

SECTION I: CLIENT IDENTIFICATION INFORMATION

CLIENT'S NAME	SEX: <input type="checkbox"/> Male <input type="checkbox"/> Female	DATE OF BIRTH Mo. Day Year	SOCIAL SECURITY NUMBER
ADDRESS <input type="checkbox"/> New	TELEPHONE NUMBER ()		
ALSO KNOWN AS:	OTHER SSN's:	DATE OF MOST RECENT TEMPORARY ASSISTANCE APPLICATION OR RECERTIFICATION:	Mo. Day Year
APPLICANT FOR OR RECIPIENT OF <input type="checkbox"/> Family Assistance <input type="checkbox"/> Safety Net Assistance <input type="checkbox"/> DSS Case Number <input type="checkbox"/> DSS CIN			

SECTION II: REFERRAL

DSS INITIATED REFERRAL FOR: <input type="checkbox"/> SSI Initial Application <input type="checkbox"/> SSI Appeal <input type="checkbox"/> Other (explain): _____	SSA INITIATED REFERRAL FOR: <input type="checkbox"/> Medical Assistance <input type="checkbox"/> Temporary Assistance <input type="checkbox"/> Food Stamp Benefits <input type="checkbox"/> Social Services (explain) <input type="checkbox"/> Emergency needs (explain) <input type="checkbox"/> Other (explain) (Reason for Referral) _____
MEDICAL IMPAIRMENT RELATED DOCUMENTATION Describe Alleged Impairment _____ _____ _____ <input type="checkbox"/> Description and Documentation of Inability or Restriction on Working Attached <input type="checkbox"/> Medical Documentation Attached <input type="checkbox"/> Social History and Assessment Attached	
REFERRING AGENCY	NAME OF WORKER
AGENCY ADDRESS	SIGNATURE
	DATE Mo. Day Year TELEPHONE NUMBER ()

SECTION III: CERTIFICATION OF SSA CONTACT

SSA ACTION <input type="checkbox"/> Initial Application Filed for <input type="checkbox"/> SSI <input type="checkbox"/> RSDI <input type="checkbox"/> Appeal Filed for <input type="checkbox"/> SSI <input type="checkbox"/> RSDI <input type="checkbox"/> No application or appeal taken, or <input type="checkbox"/> case denied because _____ <input type="checkbox"/> Other (explain): _____	Date of Client Contact Mo. Day Year
SSA OFFICE	NAME OF WORKER
SSA OFFICE ADDRESS	SIGNATURE
	DATE Mo. Day Year TELEPHONE NUMBER ()

SECTION IV: CERTIFICATION and RELEASE AUTHORIZATION

This is to certify that this referral is made with my knowledge and approval. I authorize release of the information contained in this referral, including documentation and medical information from my temporary assistance "and medical assistance" (DRAW LINE THROUGH "and medical assistance" IF YOU WISH TO DELETE FROM AUTHORIZATION) case records, for the purpose of determining my eligibility for benefits administered by the Social Security Administration, including SSI State Supplement. I wish to protect my rights to any such benefits for which I may be eligible. I understand that my refusal to sign this release will make me ineligible for Temporary Assistance. However, I understand that my authorization for release of medical information from my Medical Assistance case record is completely voluntary and refusal will not affect my eligibility for Medical Assistance.	
SIGNATURE OF APPLICANT	DATE Mo. Day Year
If another person is acting on applicant's behalf, show relationship:	

GUIDE TO FILING AN SSI APPLICATION UNDER THE DOCCS-SSA PRE-RELEASE AGREEMENT

What benefit is there to the filing of a SSI application pre-release?

A successful SSI application provides a guarantee of financial help to inmates/respondents being released to the community. It also ensures that Medicaid eligibility is quickly established thereby ensuring continuity of care for eligible cases re-entering the community.

Who should be identified as eligible for filing a SSI application?

- The individual could be released within the next 120 days; and
- The individual was either not in receipt of benefits prior to incarceration or has had benefits suspended due to incarceration but expected release is more than 12 months from date of incarceration; and
- There is a need for financial assistance and where it appears SSI income and resource limitation criteria would be met; and
- The individual has a condition which may meet SSA's disability criteria.

What if the individual doesn't know his or her social security number, or never obtained one?

Consult with the local SSA field office.

What is needed to file an application?

Internet filing of the disability application is the preferred method for beginning the disability application process. As not every form is available yet for internet filing, and not every DOCCS-OMH office has internet access available, application formats and filing may take various combinations. Individual Social Security offices may work out local arrangements with the facilities in their service area regarding the method of filing, e.g. internet, telephone interview, mail. All applications, whether filed on line, via telephone interview, or by mail must include the following:

- **i-3368** (the internet based Adult Disability and Work Activity Report) **or** the **SSA-3368** (Disability Report) form.
- **SSA-3369** (Vocational Report) form. *Note:* this form should not be completed if the individual has never worked or only had one occupation in the 15 year period before he/she stopped working.
- **SSA-827** (Authorization to Release Medical Information to SSA). *Note:* this must be a hard-copy, with the original applicant signature.
- **SSA-8510** (Authorization to Obtain Personal Information).
- **SSA-4814** (Medical Report for Persons with HIV/AIDS), if applicable.

- **SSA-8000** (Application for SSI) form *unless* taken from individual by teleclaim with SSA office.
- **SSA-16** (application for Disability Insurance) form.
- **Pre-Release Flag** (exhibit 1 from pre-release agreement, not available on-line).
- **SSA-795** (Statement from Claimant with Release and Identifying Information) form (exhibit 2 from pre-release agreement, not available on-line).
- Copy of CMS or other summary of medical evidence signed by a licensed physician or licensed psychologist.

How do I obtain SSA forms?

With the exception of the Pre-Release Flag and the SSA-795, which are in the pre-release agreement and must be photo-copied for use, all SSA forms can be downloaded from the internet at www.socialsecurity.gov.

Where do I send the materials?

The entire medical packet, the Pre-Release Flag, and the SSA-795, the SSA-827 and any other hard-copy completed forms must be mailed to the SSA field office parallel to the facility. In some instances where a phone interview is scheduled to occur, staff should fax a copy of the signed SSA-827 to SSA.

Should I keep a copy of the materials?

Yes, it is recommended that a copy be kept on file.

What happens next?

- The SSA will determine if any additional forms or materials are necessary. Staff facilitating the application may receive a DSS-2474 SSI Referral and Certification of Contact form from SSA, which must be provided to the applicant at the time of release. This will assist the releasee in obtaining emergency assistance.
- If the applicant appears ineligible for SSI for technical reasons, SSA will mail an informal denial notice.
- If the SSA finds that the medical determination is an allowance, an Informal Notice of Medical Allowance will be mailed to staff.

What happens if the applicant is not released as planned?

If there are any changes to an applicants anticipated release or other factors that might affect the applicants status with SSA, staff should immediately notify the SSA field office.

How does post-release follow-up occur?

The applicant must immediately follow-up directly with the SSA office in the area where he/she will reside. An appointment can be scheduled for the applicant prior to release by contacting the appropriate SSA office.

Social Security Administration
Consent for Release of Information

Exhibit 6
Form Approved
OMB No. 0960-0566

SSA will not honor this form unless all required fields have been completed (*signifies required field).

TO: Social Security Administration

*Name

*Date of Birth

*Social Security Number

I authorize the Social Security Administration to release information or records about me to:

*NAME

*ADDRESS

*I want this information released because:

There may be a charge for releasing information.

*Please release the following information selected from the list below:

You must check at least one box. Also, SSA will not disclose records unless applicable date ranges are included.

Social Security Number

Current monthly Social Security benefit amount

Current monthly Supplemental Security Income payment amount

H My benefit/payment amounts from _____ to _____

My Medicare entitlement from _____ to _____

Medical records from my claims folder(s) from _____ to _____
If you want SSA to release a minor's medical records, do not use this form but instead contact your local SSA office.

Complete medical records from my claims folder(s)

Other record(s) from my file (e.g. applications, questionnaires, consultative examination reports, determinations, etc.) _____

I am the individual to whom the requested information/record applies, or the parent or legal guardian of a minor, or the legal guardian of a legally incompetent adult. I declare under penalty of perjury in accordance with 28 C.F.R. § 16.41(d)(2004) that I have examined all the information on this form, and on any accompanying statements or forms, and it is true and correct to the best of my knowledge. I understand that anyone who knowingly or willfully seeking or obtaining access to records about another person under false pretenses is punishable by a fine of up to \$5,000. I also understand that any applicable fees must be paid by me.

*Signature: _____ *Date: _____

Relationship (if not the individual): _____ *Daytime Phone: _____

Social Security Administration
Consent for Release of Information

Form Approved
OMB No. 0960-0566

Instructions for Using this Form

Complete this form only if you want us to give information or records about you, a minor, or a legally incompetent adult, to an individual or group (for example, a doctor or an insurance company). If you are the natural or adoptive parent or legal guardian, acting on behalf of a minor, you may complete this form to release only the minor's non-medical records. If you are requesting information for a purpose not directly related to the administration of any program under the Social Security Act, a fee may be charged.

NOTE: Do not use this form to:

- Request us to release the medical records of a minor. Instead, contact your local office by calling 1-800-772-1213 (TTY-1-800-325-0778), or
- Request information about your earnings or employment history. Instead, complete form SSA-7050-F4 at any Social Security office or online at www.ssa.gov/online/ssa-7050.pdf.

How to Complete this Form

We will not honor this form unless all required fields are completed. An asterisk (*) indicates a required field. Also, we will not honor blanket requests for "all records" or the "entire file." You must specify the information you are requesting and you must sign and date this form.

- Fill in your name, date of birth, and social security number or the name, date of birth, and social security number of the person to whom the information applies.
- Fill in the name and address of the individual (or organization) to whom you want us to release your information.
- Indicate the reason you are requesting us to disclose the information.
- Check the box(es) next to the type(s) of information you want us to release including the date ranges, if applicable.
- You, the parent or legal guardian acting on behalf of a minor, or the legal guardian of a legally incompetent adult, must sign and date this form and provide a daytime phone number where you can be reached.
- If you are not the person whose information is requested, state your relationship to that person. We may require proof of relationship.

PRIVACY ACT STATEMENT

Section 205(a) of the Social Security Act, as amended, authorizes us to collect the information requested on this form. The information you provide will be used to respond to your request for SSA records information or process your request when we release your records to a third party. You do not have to provide the requested information. Your response is voluntary; however, we cannot honor your request to release information or records about you to another person or organization without your consent.

We rarely use the information provided on this form for any purpose other than to respond to requests for SSA records information. However, in accordance with 5 U.S.C. § 552a(b) of the Privacy Act, we may disclose the information provided on this form in accordance with approved routine uses, which include but are not limited to the following: 1. To enable an agency or third party to assist Social Security in establishing rights to Social Security benefits and/or coverage; 2. To make determinations for eligibility in similar health and income maintenance programs at the Federal, State, and local level; 3. To comply with Federal laws requiring the disclosure of the information from our records; and, 4. To facilitate statistical research, audit, or investigative activities necessary to assure the integrity of SSA programs.

We may also use the information you provide when we match records by computer. Computer matching programs compare our records with those of other Federal, State, or local government agencies. Information from these matching programs can be used to establish or verify a person's eligibility for Federally-funded or administered benefit programs and for repayment of payments or delinquent debts under these programs.

Additional information regarding this form, routine uses of information, and other Social Security programs are available from our Internet website at www.socialsecurity.gov or at your local Social Security office.

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January 11, 2016

Sheila A. Gaddis

Ronald J. Tabak

Co-Chairs, New York State Bar Association Special Committee on Re-entry

1 Elk Street

Albany, NY 12207

Dear Ms. Gaddis and Mr. Tabak:

Thank you for the opportunity to comment on the NYSBA Special Committee on Re-entry Draft of Final Report dated November, 2015. I commend the Committee on its extensive review of issues related to the re-entry of formerly incarcerated individuals into society.

There are a few notable issues of concern to District Attorneys that I urge the Committee to consider before the Report is finalized.

Recommendation #3: Enact and implement the Uniform Collateral Consequences of Conviction Act ("UCCCA"), drafted by the National Conference of Commissioners of Uniform State Laws. The recommendation to enact legislation does not appear to have been as thoroughly analyzed and debated as other portions of the Report. Mechanisms already exist in New York for formerly incarcerated individuals to seek and obtain relief from collateral consequences in the form of the Certificate of Relief from Disabilities and the Certificate of Good Conduct. Moreover, New York has already addressed, via administrative action, the issues connected to barriers to professional licenses for certain professions. Indeed, the Report itself acknowledges this, pointing to the governor's acceptance and implementation of all 12 recommendations made by the Council on Community Re-Entry and Reintegration.¹ Given what has already been accomplished administratively, it is unclear how legislation, which erroneously assumes judicial authority over collateral consequences, would benefit New York.

Recommendation #4: Expand Ban the Box (the "Box" being a question on job application forms asking about prior arrests or convictions) statutes statewide and apply them to private and public employers. Unless carefully and narrowly tailored, a blanket "ban the box" on all public and private employments applications and college applications contradicts statutory requirements. Certain professions, such as those involving contact with children, rightly require that employers know and make decisions based upon the applicant's conviction history. It also defies logic to allow individuals with certain conviction histories to be housed, for instance, in a college dormitory when the underlying crime clearly contraindicates that arrangement, such as a sealed disposition in a sex crime. Ban the box must not overwrite existing laws requiring employers to inquire - and refusing them the right to hire -- individuals who have committed certain crimes.

Recommendation #6: Implement the following policies, related to housing: Permit public housing authorities to use discretion and individualized assessment. While it is true that lack of access to housing is problematic for formerly incarcerated individuals, it is also true that residents in public housing are pleading for safe hallways and sound communities in which to live and raise their families. It is essential that the right balance be struck so that residents have a safe place to call home. Proper study of this issue will lead to better procedures and enhanced safety for everyone involved.

Recommendation #9: With regard to juveniles: Expand the Adolescent Diversion Program (with specialized court parts focusing on 16 and 17 year-old defendants). District Attorneys in several counties have seen enormous success with ADP. However, many other District Attorneys have expressed significant concerns about boutique courts and the unfortunate reality that those courts pull personnel away from their routine duties in a sometimes unpredictable manner. The result of understaffed offices trying to meet the demands of multiple specialty courts is deleterious to not only the office, but the entire criminal justice system. Specialty courts have indeed proven effective; specialty courts have also indeed proven expensive for District Attorneys with no corresponding increase in state aid. Therefore funding must be in place before any expansion can be contemplated.

Recommendation # 1. Offer expanded diversion programs. The Report correctly notes that District Attorneys have been at the forefront of creating and supporting effective diversion programs. The Report also rightly highlights that the costs of employing an additional Assistant District Attorney to oversee diversion programs is offset by savings diversion provides in terms of reduced jail population and recidivism. Our concerns, on this recommendation, are two-fold:

1. There are nowhere near enough evidence-based programs to serve the target population, particularly in more rural jurisdictions, and especially with regard to mental health and substance abuse for young people.
2. The proposal to develop a software system tracking available programs can only work **if** the programs in the system have been proven to be effective.

The Report offers many solutions to a problem we all want to solve. Successful re-entry benefits not only the formerly incarcerated individual, but their family, their community, and society as a whole. My hope is that we can work together to address the concerns raised above to create an even more robust final report.

Sincerely,



Thomas P. Zugibe
President, DAASNY
District Attorney, Rockland County

ⁱ See <https://www.governor.ny.gov/news/governor-cuomo-announces-executive-actions-reduce-barriers-new-yorkers-criminal-convictions>.