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Prisoners' Legal Services' Comments on Proposed Regulations 501 CMR 17.00

Prisoners' Legal Services submits the following comments on the proposed changes to the regulations governing medical parole.

501 CMR 17.02 Definitions

Debilitating Condition:

This definition is too narrow and improperly restricts the pool of incarcerated people who are eligible for medical parole under the plain language of the medical parole statute. PLS recognizes that this definition in the proposed regulations is unchanged from that in the current regulations; however, we believe the definition needs to be changed because it is unduly restrictive. Under the statute, to be eligible for medical parole a prisoner must suffer from terminal illness or permanent incapacitation that is "so debilitating that the prisoner does not pose a public safety risk." G.L. c. 127, § 119A(a). The statute does not define "debilitating."

The regulations meaningfully raise the bar for eligible prisoners by creating a definition for "Debilitating Condition," that requires,

> *"A physical or cognitive condition that appears irreversible, resulting from illness, trauma, and/or age, which causes a prisoner significant and serious impairment of strength or ability to perform daily life functions such as eating, breathing, toileting, walking or bathing so as to minimize the prisoner's ability to commit a crime if released on medical parole, and requires the prisoner's placement in a facility or a home with access to specialized medical care.*" 501 CMR 17.02

The heightened standard of the regulations conflict with the statute by appearing to require that a person be physically unable to commit a crime, rather than the statutory requirement that they do not pose a public safety risk. Though the existing language is an improvement over the stark requirement in the original emergency medical parole regulations that a person be "permanently incapable" of committing a crime, their practical effect is similar.

Prisoner:

The definition of "prisoner" in the regulations, which is limited to "a committed offender serving a sentence," 501 CMR 17.02, restricts the pool of eligible incarcerated persons beyond the statute's language by excluding those incarcerated because they are civilly committed as well as those who are incarcerated while awaiting trial. The statute makes no such distinctions; it applies to anyone who is "a "prisoner." E.g.. GL ch. 119A § (b) ("[A] prisoner may be eligible for medical parole….") The medical parole statute does not definite prisoner; chapter 125, however does contains a generally applicable definition: a prisoner is "a committed offender *and such other person as is placed in custody in a correctional facility in accordance with law*." G.L. c. 125 § 1(m)(emphasis added); see also *id.* § 1(d) (defining "correctional facility" as any building or structure used for custody, control, and rehabilitation of committed offenders and of such other persons as may be placed in custody therein in accordance with law"). By its terms, that definition encompasses more people than those included in the regulation's definition, "committed offender[s] serving a sentence." It encompasses both people incarcerated awaiting trial and people subject to civil commitment under G.L. c. 123A–both of whom are persons "placed in a correctional facility." The Legislature was explicit in its intent to create a medical parole law that broadly applied to all people incarcerated in state prisons and county jails. *See*, G.L. c. 127, § 119A(b) ("Notwithstanding any general or special law to the contrary, a prisoner may be eligible for medical parole due to a terminal illness or permanent incapacitation…").

501 CMR 17.03 and 17.06 Submitting a petition.

Requirement of a form, subsection (3) of both sections:

The requirement that a petitioner submit his or her petition on a specific DOC form, and requiring him or her to resubmit, on the "proper form," a petition already submitted, is contrary to the statute and the ruling of the SJC in *Buckman v. Commissioner of Correction*501 CMR 17.03. The Court was unequivocal in declaring that, "a superintendent must consider a written petition for medical parole regardless of his or her view of the completeness or adequacy of the petition. To be sure, a more complete submission is preferable, but by requiring nothing more than that the petition be 'written,' the Legislature intended to make the petition process as accessible as possible and to prevent superintendents from refusing to accept petitions based on form over substance." *Buckman v. Commissioner of Correction*, 484 Mass. 14, 26 (2020). Instead, "the superintendent must accept and review the petition upon its receipt, and

may not return it for incompleteness." *Id.* "The receipt of the petition alone triggers the twenty-one day deadline." *Id*. at 25 Therefore, the regulations must contain the directive that submission of a written petition alone begins the 21 day clock for the superintendent to consider the petition.

Requiring releases, subsections (3)(a) and (b) of both sections:

Similarly, the requirement that a petitioner must submit with his or her petition the signed releases permitting the petition to be shared with certain parties is contrary to *Buckman*.[1] The Court relied on the same interpretation of the statute to determine that while release forms may be required at some point in the petition process, they cannot be required in order to submit the petition and begin the time running on what is supposed to be an expeditious process. *Id.* at 26, n.23 (noting that release forms are "separate and distinct from the petition itself").. The *Buckman* ruling declared void any such requirement. *Id.* at 26; *see also id.* at 26 n.23 ("[T]he Legislature could not have intended a medical release to be a required element of a 'complete' petition.").

Subsection (3)(b) allows for the releases to be signed by a prisoner's guardian where the court has appointed one. This section hints at the reality that there have been, and will continue to be, prisoners who qualify for medical parole but who are not competent to access the process, seek assistance in the process, or even sign their names to a release. The regulations need to make specific provisions for how such eligible people will be affirmatively provided access to this process- and must encompass the reality that there are incarcerated persons who are severely cognitively impaired, and likely incompetent, but without a court appointed guardian. PLS has represented at least three such persons, who were ultimately appointed guardians after the initiation of the petition for medical parole. Our office learned of these incapacitated prisoners only through the concerned reports of others who were aware of them.

Such a haphazard system is unacceptable and runs afoul of the Americans with Disabilities Act. Under the ADA, prisoners with disabilities may not be "excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity." 42 U.S.C. § 12132. Consideration for medical parole constitutes one such program. As such, it must be fully and fairly accessible to prisoners with disabilities. *See Crowell v. Massachusetts Parole Bd.*, 477 Mass. 106, 112 (2017) (stating that ADA prohibits discrimination in context of "fair hearing and parole review decision process").

In *Crowell*, the SJC stated that the Parole Board must provide accommodations to prisoners with disabilities. *Id.* at 112. In particular, the SJC found that "[w]here the board is aware that a mental disability may affect a prisoner's ability to prepare an appropriate release plan in advance of a parole hearing, the board should make reasonable modifications to its policy, for example, by providing an expert or other assistance to help the prisoner identify

[1] *See also*, the argument made in the section entitled 501 CMR 17.07 Notification to District Attorneys, Victims/Family, Prisoner and Petitioner, *infra*.

appropriate post-release programming." *Id.* at 113. This reasoning applies equally to the medical parole process and requires the DOC to affirmatively assist disabled prisoners in this process. The regulations must require DOC and/or their medical vendor to affirmatively identify people in this circumstance and petition for their release on medical parole or, at the very minimum, to notify an entity such as PLS who could pursue a petition on their behalf.

Requiring medical parole plan, subsection (4) of both sections

The proposed language requiring that, "A medical parole plan shall be submitted along with the petition," is in direct contradiction to the holding of *Buckman* that it is the superintendent's responsibility to create the plan and that nothing outside the petition may be required to initiate the process. *See Buckman*. It appears that this language may simply be a drafting error in a section intended to allow for a petitioner to submit a medical parole plan, or part of one, despite the fact that it is not required. The language should be corrected.

501 CMR 17.04 Multi-Disciplinary Review Team

The regulations' description of the duties of the MRT contain the following problematic language:

Subsection (a)

This section refers to the MRT reviewing and assessing the written diagnosis of terminal illness and/or permanent incapacitation "as determined by the Department's health service provider." The statute requires a written diagnosis "by a physician licensed to practice medicine," G.L. c. 127, § 119A(c)(1), not by any particular health service provider. The wording of the regulations should clarify that written diagnoses from licensed physicians not affiliated with the Department must also be considered

Subsection (f)

The statute requires the superintendent to provide to the commissioner an assessment of the prisoner's "risk for violence." G.L. c. 127, §119A(c)(1)(iii). This section of the regulations tasks the MDRT with assisting the superintendent in determining the prisoner's "suitability for parole," which suggests a separate, and different, calculation, not contemplated by the statute.

Additionally, as the obligation of creating a suitable medical parole plan rests with the superintendent, the regulatory language should make clear that if the medical parole plan is determined to be unsuitable, that would not justify a denial of medical parole where the prisoner is otherwise eligible. Instead, DOC would be required to create a plan that meets the need.

501 CMR 17.05 Risk for Violence Assessment

Compounding the confusion, many of the areas of consideration required under this section appear to relate more to the prisoner's potential ability to commit a crime, than to the statutory question of their potential risk for violence. Most notably, the status of a person's

advanced directives and DNR appear to have no rational bearing on a person's risk for violence or their ability to commit a crime.

501 CMR 17.07 Notification to District Attorneys, Victims/Family, Prisoner and Petitioner

The medical parole statute provides that upon receipt of a petition, the Commissioner shall notify the relevant district attorney, the prisoner, petitioner and the victim or victim's family, "that the prisoner is being considered for medical parole." G.L. c. 127, § 119A(c)(2). By contrast, the regulations, at 501 CMR 17.07, go far beyond the statute, granting victims not only the statutory notification, but providing them access to a copy of "the medical parole petition, medical parole plan, and all supporting documents" except for the recommendations of the Superintendent or Sheriff to the Commissioner. 501 CMR 17.07(3).

The regulations' grant of victim access to information is much broader than other Massachusetts laws governing victim rights and access to information. Consistent with the statutory language in the medical parole law, the Massachusetts statute relating to the rights of victims, G.L. c. 258B, § 3, as well as Parole Board regulations governing victim input and notification, 120 CMR 400, and Victim Notification Registry regulations, 803 CMR 9.04, allow notification of victims when a parolee might be released, is released, or escapes. Those statutes and regulations do not, however, allow for the victim or their family to view and access all documentation that may be considered by the relevant agencies in allowing for a potential parolee or defendant's release. In fact, the Supreme Judicial Court confirmed the limits on victims' standing in the criminal justice system stating, "Our jurisprudence simply does not give private persons, even where they are victims, the authority to exercise the discretion involved in determining whose liberty will be placed at risk." *In the Matter of Wayne Chapman*, 482 Mass. 1012, 1015 (2019).

Further, of particular concern is the medically sensitive nature of the petition and the "supporting documents," which will necessarily include medical information about the potential parolee. State and federal laws, including HIPAA, and the Massachusetts Patients' Rights law, recognize the confidentiality of medical records. The emergency regulations themselves acknowledge the sensitive nature of the material they contemplate providing by requiring, under Section 17.03(3)(c), that the potential parolee sign a release form allowing the DOC to provide victims a copy of the petition and all supporting documents.

The current regulations ignore the language of the governing statute as well as the larger context of what notification is permitted to crime victims in criminal justice proceedings and instead improperly invite the victim to participate in assessing the potential parolee's appropriateness for parole by providing the increased information. In line with the established jurisprudence, the regulations should not provide the victim information beyond the statute's detailed notification provisions. Additionally, the regulations should state that no information

such as where the medically paroled person intends to or will be living or receiving care, or the contact information of the medical parolee's family or caretakers will be provided to victims or victim's families. DOC's release of such contact information scuttled the release of a PLS client granted parole due to security concerns at the facility about the risk posed by the victim's family.[2]

501 CMR 17.08 Hearings

In relation to hearings held at the request of the DA, victim or victim's family, subsection (3) states that, "[t]he Commissioner shall determine who may attend the hearing. Attendees may include, but are not limited to" the listed people. As a regular practice, DOC has not permitted the prisoner seeking medical parole to attend the hearing on their own medical parole request if they have a representative- only the representative is permitted to attend. PLS asks that the regulations be changed to clarify that the prisoner, the petitioner and the prisoner or petitioner's attorney may all presumptively attend the hearing. This seems particularly important where the Commissioner may need additional information to make her determination about how debilitated a person is or what risk they may pose.

501 CMR 17.09 Referral to the Parole Board

The language in subsection (4) permits the Parole Board to impose a condition that the person on medical parole, "follow the treatment recommendations of the medical providers." Such a condition would impinge upon the fundamental rights of the medically paroled person to make decisions about his or her own body and medical care. This condition may further impinge on individuals' cultural values and religious beliefs. By contrast, no public safety purpose is served by forcing a medically paroled person to comply with doctors' recommendations with which they may disagree. Doctors often disagree with one another.

501 CMR 17.11 Review of Medical Parole Eligibility

This section should be amended to reflect the fact that it is DOC's responsibility to obtain MassHealth coverage for the person being released on medical parole, as part of the medical parole plan. The condition required of the prisoner should only be to cooperate with DOC's efforts to put all of these conditions into place. There should also be an explicit requirement that these conditions are all achieved in time that the person can be released at the 66 day point of the medical parole process. To permit the addition of conditions to be met prior to release, with no constraints on when DOC must arrange for them to be met, is to flout the Legislature's clear intent that the medical parole process be both simple and expedient. *See Buckman*, at 25 ("In

[2] Such restrictions should apply throughout the regulations where release of information to the victim is referenced, including 501 CMR 17.10(5), 17.11 and 17.12.

medical parole cases, where a petitioner might be terminally ill, there is a need for an expeditious administrative process -- which the Legislature has determined should not exceed sixty-six days -- so that a prisoner may promptly be released or appeal from the denial of the petition.")

501 CMR 17.14: Legal Challenges to Medical Parole Decisions

PLS notes several problems with subsection (4). First, there are reasons other than decline of condition that a person might need to file a second petition or reconsideration of a previous denial, for example, to provide additional documentation of illness or incapacity, to correct errors in the information considered in the first petition process, or to alert the Commissioner to a newly available medical parole plan. Second, the provisions relating to the reconsideration process should be clarified to specify whether a reconsideration should be directed to the superintendent, like a petition, or whether it is directed to the Commissioner at the outset. Third, permitting DOC to take the same full 66 day period to decide a reconsideration that it does to consider a petition originally does not comport with the intent of the Legislature to enshrine an expeditious process for medical parole. *See, id*. The reconsideration process should be a shorter process that cuts out some of the steps for an initial petition that do not need to be repeated again.

Conclusion

PLS looks forward to continuing to work with DOC to smooth the process for considering petitions for medical parole and releasing those who are granted medical parole, in furtherance of the Legislature's intent in drafting this statute.

Thank you for your consideration of these comments.

Respectfully submitted,

Prisoners' Legal Services