

TESTIMONY OF THE LEGAL ACTION CENTER

ON BEHALF OF THE ATI AND REENTRY COALITION

Assembly Ways and Means and the
Senate Finance Committees
Joint Public Hearing on Public Protection
Executive Budget FY 2017-2018

January 30, 2018

Presented by

Sebastian Solomon
Director of NYS Policy
Legal Action Center

Endorsed by

Center for Alternative Sentencing and Employment Services (CASES)
Center for Community Alternatives (CCA)
EAC TASC
Osborne Association
Center for Employment Opportunities (CEO)
Greenburger Center for Social and Criminal Justice
The Correctional Association
TASC of the Capital District
The Fortune Society
Women's Prison Association
Legal Action Center

Good Afternoon. My name is Sebastian Solomon. I am the Director of New York State Policy for the Legal Action Center. I appreciate the opportunity to address you today.

In New York State, we work closely with the coalition of Alternative to Incarceration (ATI), Reentry and related programs. These programs enable many thousands of men and women to be appropriately supervised and served in the community. These services divert individuals who would otherwise be sent to more expensive prison beds to less expensive and more effective community-based supervision and services. They also assist individuals who are released from incarceration reintegrate with their families and the communities by lowering barriers to employment, housing and health services, thereby reducing the likelihood of recidivism.

We recognize the fiscal challenges confronting the State. Now more than ever, we call upon the Legislature to protect New York's investment in nationally-recognized and evidence-based ATI and Reentry programs which have served many thousands of men and women in communities all across the State, at significantly less cost than expensive prison beds. This investment contributes to public safety and is cost-effective. We very much appreciate the Governor's and the Legislature's continued funding and strong bi-partisan support for ATI and reentry programming and commend the decision to maintain baseline funding from last year for ATI and reentry programs. We urge the Legislature to take the following steps to support these programs, and those that have lost funding from prior years, for the benefit of the hundreds of thousands of New Yorkers impacted by the criminal justice system:

- **Restore over \$2 million in cuts to support alternative-to-incarceration, reentry and related programs and allow funding to be used flexibly to address new challenges as they appear. This funding will support New York's efforts to:**
 - **Address the thousands of individuals around the state who have been swept up into the criminal justice system as a result of the opioid epidemic; and**

- Close Rikers Island.
- Support the Governor’s proposal to provide \$2.5 million in funding to help link those in the criminal justice system to the health care services they need;
- Improve access to Medicaid funded services for those being released from incarceration by:
 - *Using an individual’s documented medical history while incarcerated to determine eligibility for services in the community;*
 - *Including recent incarceration as an eligibility factor for health homes.*
- Support investment in an electronic health records system for those incarcerated in DOCCS;
- Provide expanded access to Medication Assisted Treatment to incarcerated individuals and those under community supervision who would benefit from these services;
- Enact geriatric parole and increase access to and use of medical parole;
- Support the Executive’s efforts to:
 - Establish temporary release pilots;
 - Expand merit time eligibility and opportunities for individuals to qualify for the six-month Limited Credit Time Allowance (LCTA) program;
 - End automatic suspension/revocation of driver's licenses for individuals convicted of drug crimes;
 - Require Article 23-A standard for all occupational licenses and clearances by removing unnecessary bars to employment and licensure; and
 - Eliminate parole supervision fees.
- Establish pilots to address parole violations; and
- Shorten the maximum sentence for an A misdemeanor by one day in order to reduce the immigration consequences of such convictions.

Restore over \$2 million in cuts to support alternative-to-incarceration, reentry and related programs and allow funding to be used flexibly to address new challenges as they appear.

In 2013, Governor Cuomo baselined funding for ATI and reentry services. This action freed programs from dedicating substantial time and resources to each year seek funding from the Legislature to maintain essential services. However, in the Executive Budget for FY17, this funding was cut over by \$2 million. Fortunately, the Legislature was able to restore \$500,000 of the reduction. This year, the Executive has proposed the same level of funding as was proposed last year. We urge the Legislature to restore funding for these programs to its pre-FY2018 levels.

Furthermore, since funding was baselined, a number of restrictions have been placed on how this money can be used. These restrictions are well-intentioned – the State wants to make sure that its money is being spent effectively. However, these restrictions have limited the ability to provide an array of vital programming to certain populations. The restrictions have also limited the field's ability to innovate and respond to emerging needs such as the opioid crisis.

The Legislature should add over \$2 million to support proven ATI and reentry programs and should ensure that the money can be used in flexible ways to address unmet or emerging needs. This funding could help the State achieve a number of goals, including:

Addressing the thousands of individuals around the state who have been swept up into the criminal justice system as a result of the opioid epidemic

New York has been a national leader in simultaneously reducing crime, reducing the prison population and saving taxpayers many millions of dollars. A key element of this success has been New York's pioneering support for expanding ATI and reentry services. However, ***most of the State outside the New York City metropolitan area has little or no programming to divert individuals from state prison.*** The need for new services outside New York City

remains immense. Following the enactment of the 2009 Drug Law Reforms, large upstate counties saw an initial small reduction in new incarcerations for the crimes made eligible for diversion, after years of increased drug incarceration. However, this progress has since come to a halt in recent years as the opioid epidemic began to take hold. In 2010, 1869 people from the large counties were sent to prison for diversion-eligible crimes. In 2015, the number was 1,840. Meanwhile, since 2007, small counties have seen a 31% *increase* in incarcerations for drug crimes and a 23% increase in incarcerations for property crimes. ***We, therefore call on the Legislature to create a new allocation to bring these critical services to scale across the State and to build more capacity to address the thousands of individuals who are now being swept into the criminal justice system as a result of the opioid epidemic.***

Closing Rikers Island

While New York City has the strongest network of effective programs providing alternatives to incarceration in the nation, many eligible people who need these services still lack access. Among the populations that continue to be ***especially underserved are: women; young people; LGBTQI; those with complex needs; people with mental health disorders; individuals with substance use disorders convicted of non-drug crimes; and individuals charged with violent offenses.***

In its final report of recommendations for closing Rikers Island, the Independent Commission on New York City Criminal Justice and Incarceration Reform (aka the “Lippman Commission”) called for “invest[ment] in expanding the availability of treatment for underserved populations and underserved problems. Longer jail stays should also be reduced through greater use of evidence-based alternatives” as part of the strategy for closing Rikers.

New funding would enable these programs to apply their expertise to growing needs, thereby contributing to reducing the population at Rikers to the levels needed to achieve the landmark objective of closing the facility. In addition, programs that are successful in reducing the jail population in NYC will serve as models for future efforts for county jails throughout the state.

Support the Governor’s proposal to provide \$2.5 million in funding to help link those in the criminal justice system to the health care services they need

Two years ago, the Governor requested and the Legislature allocated \$5 million in Medicaid funding to support efforts to connect those in the criminal justice system who have chronic health conditions to health home services in the community. The first allocation of \$2.5 million was distributed in December 2016. The Governor has included the second half of this funding in this year’s budget, which will enable key linkage efforts that will result in reduced institutionalization, both in the criminal justice system, through reduced recidivism, and in the health care system, through the reduced use of emergency rooms and detox facilities, and will also allow the State to realize significant financial savings. We urge the legislature to support this funding

Improve access to Medicaid funded services for those being released from incarceration

New York’s redesign of its Medicaid system creates new opportunities to better coordinate services and provide new types of health supports to individuals who have been involved with the criminal justice system. For example, many of those in the criminal justice system would benefit from the “Home and Community Based Services” (HCBS) that New York is starting to provide through Health and Recovery Plans (HARPs), a new insurance product for those with severe addiction and mental illness. Many ATI and reentry programs have already been designated as HCBS providers.

However, because access to these services is based on prior Medicaid billing, those who are incarcerated are not eligible for these services immediately after their release from incarceration.

We therefore recommend the State take the following steps:

- Use an individual's documented medical history while they are incarcerated to determine eligibility for services in the community – Currently, New York does not use an individual's medical history while they were incarcerated to identify what their health needs will be once they are released. As a result, most of this population is unable to receive the expanded menu of available Medicaid services immediately after they are released. Such a policy is completely counterproductive. Between 60% and 80% of individuals involved in the criminal justice system suffer from addiction and/or mental illness. Additionally, because of the accelerated aging that can result from incarceration, many individuals, especially those who have served longer sentences, suffer from a number of other chronic conditions that can be expensive to treat. Without immediate access to the services they need, they are likely to cost the state much more money over the long-term, both as a result of increased hospitalization and increased recidivism because of the greater likelihood of relapse or negative mental health outcomes that can then result in rearrest. We urge the State to use the health records from an individual's incarceration to match them to needed care in the community.
- Include recent incarceration as an eligibility factor for health homes - The State should amend the eligibility criteria for health homes to include recent incarceration as an eligibility factor for those with only one diagnosed chronic condition. Many people who are recently incarcerated may be unable to document that they have two qualifying chronic conditions but

would benefit greatly from the coordination and range of services offered by health homes. Additionally, the experience of incarceration itself often results in a number of negative health consequences, including psychological harm, such as PTSD, and physical damage, such as accelerated aging and early mortality.

Support investment in an electronic health records system for those incarcerated in DOCCS

The lack of a quality electronic health record (EHR) system inside DOCCS is a major challenge contributing to poor levels of health care. It may also be a factor in the unwillingness of some medical professionals to work in correctional settings. DOCCS's information and coding systems are years behind current standards. This gap in technology is also a contributing factor that makes it more challenging to link individuals to health care settings on the outside upon their release. The lack of any such electronic system is particularly nonsensical as OMH has an up-to-date system for the care of the incarcerated individuals in DOCCS for whom it is responsible.

We understand that New York is exploring investing in electronic health record technology that would allow it to better coordinate care between its facilities and between facilities and the community. This would help ensure the continuity of care needed to increase the likelihood of a successful transition to the community. Doing this would both generate cost savings and allow better sharing of information between these systems. We urge the legislature to support funding for the creation of a DOCCS EHR system.

Provide expanded access to Medication Assisted Treatment to incarcerated individuals who would benefit from these services

The risk of death from overdose during the first two weeks following release from incarceration is 129 times higher than for the general population. This is because the body loses its tolerance to

opioids very rapidly. When a person returns to the community after even a short period of incarceration, they are opioid naïve. As a result, if they return to the same or similar doses of opioids compared to what they used prior to their incarceration, there is a high likelihood of overdose, and even death.

Decades of research have resulted in overwhelming evidence that medications are the gold standard for the treatment of the majority of individuals struggling with an opioid use disorder. These medications have been in use on Rikers Island for thirty years and have recently been introduced, with strong, initial positive response, in the Rhode Island correctional system. Furthermore, DOCCS has some limited experience providing medications – specifically methadone – to pregnant women under its custody that come in on methadone.

A 2009 study reported a number of positive effects from providing medications to incarcerated individuals, including: reduced risk of transmission through needle sharing; increased likelihood of entering treatment upon release; and reduced recidivism. The authors of the 2009 study also reported that: “The inmates experiencing withdrawal are not the only ones affected by the situation. The vomiting and diarrhea of withdrawal heightens the likelihood of spreading viruses among other inmates as well as correctional staff. The milieu is negatively affected by the sickness and misery, as well as by the subversive drug-seeking behaviors of the inmates, and the institution experiences a drain on its human and financial resources while attempting to deal with the situation.”

There is also anecdotal evidence that providing these medications may improve behavioral issues inside. A recent article in the Marshall Project regarding the introduction of medications into Rhode Island correctional facilities stated that: “One of the surprises...is that the treatment program has

itself improved security. As doctors enroll an increasing number of people, [Dr. Jennifer Clarke, the medical director for the state corrections department] says she hears from patients that the black market for drugs behind the walls is waning.”

At a time when New York and the US are confronting an overwhelming opioid epidemic, resulting in tens of thousands of deaths per year, providing these medications to those who need them is not only the humane thing to do, it is essential to saving lives.

Enact geriatric parole and increase access to and use of medical parole

We are pleased that both the Governor and the Legislature have recognized the crisis of aging in prison and have proposed the establishment of a geriatric parole program to address this crisis. There are currently 10,140 people in New York State prisons aged 50 and older. Most of these seniors have served lengthy sentences and are at very low risk of recidivism. The elderly are very costly to incarcerate, with the annual costs incurred for older people estimated to be up to 5 times those for younger incarcerated individuals, with medication costs possibly up to 14 times higher.

In light of this population’s extremely low likelihood of recidivism and the long sentences that most have served, we recommend creating a geriatric parole that makes older people eligible for parole after a certain time, regardless of charge or the need for a qualifying medical condition beyond the decline associated with aging. While we are pleased that the Governor’s bill defines geriatric as 55 years of age or older, recognizing that research has repeatedly shown that people who have been incarcerated for a long period of time have health conditions that are similar to those in the community who are 10 to 15 years older, we do not believe that eligibility for this program should be limited by charge or medical condition. Assemblyman Weprin has introduced legislation (A2386, the “New York State Program for Older Prisoners Act.”) to create a geriatric parole program based on

age, rather than charge or medical condition. We strongly support this legislation, while calling on the Legislature to amend the bill to reduce the age of eligibility from 60 to 50.

There are a number of steps that the State can take to increase access to and the use of medical parole. Medical parole release rates have been very low since the inception of this release option in 1992; many, if not most, applicants die before their application is decided. The following recommendations could increase the number of individuals both identified for release and the speed with which decisions are made, including looking at models from other states and the federal system that have been more successful in releasing this population:

- Identify those who may be eligible for release by developing an internal system to flag individuals when they become ill. This should be easy and inexpensive for DOCCS to implement.
- Executive Law should be revised to expand the eligibility criteria of those for whom the Commissioner has discretionary decision-making authority.
- Create a fast-track option for patients who have prognoses of less than 6 months.
- Develop a process for automatic review at regular intervals for patients whose applications are initially denied.
- Require individuals be automatically considered for release if they meet certain criteria to eliminate the need for someone to identify and advocate for the individual.
- Expand the overall eligibility of who may apply for medical parole (both in terms of medical conditions and crimes of conviction).
- Remove all automatic exclusions for medical parole eligibility based on charge.

- Expand criteria for medical parole to include non-terminal illnesses, age and functional capacity.

Additionally, in order to improve the reentry process for those with serious medical conditions, DOCCS should develop and strengthen partnerships with community resources that can facilitate safe discharge planning and community reentry for patients with serious illnesses. Lastly, DOCCS should ensure community-standards of care for palliative and hospice care are available to individuals who do end up dying in correctional settings.

Support the Executive's efforts to establish temporary release pilots

The Coalition strongly supports the creation of pilot college educational leave and work release programs. These proposals will provide an important new option to help people transition more successfully into the community. However, while we understand and support beginning these programs as pilots to establish effectiveness and to allow time to figure out best models, we believe that these pilots need to be bigger than the Governor has proposed. 50 people, while a good start, will not offer a sufficient sample size to provide the kind of meaningful data needed to test the program and to prove efficacy.

Support the Executive's efforts to expand merit time eligibility and to provide opportunity for individuals to qualify for the six-month Limited Credit Time Allowance (LCTA) program

We are pleased that the Governor continues to create opportunities for individuals to be released earlier, including creating opportunities for individuals to secure early release through the completion of programming. Programs of this sort support successful reentry. They can also contribute positively to the environment in correctional facilities. Unfortunately, because of the lack of college

programming within DOCCS, very few people will be able to complete the two consecutive semesters needed to be eligible for the proposed merit time. We therefore recommend that the State provide more resources to DOCCS to allow for the hiring of more relevant program staff and the development of programming needed to enable more people to profit from these important proposals.

End automatic suspension/revocation of driver's licenses for individuals convicted of drug crimes

In 1992, the federal government enacted legislation that reduced by 10% the amount of federal highway funds states would be eligible to receive if they did not enact or enforce a law that revokes or suspends the license of a person who was convicted of any drug offense for at least six months, regardless of whether or not the incident was related directly to driving. States did have the ability to opt out of this requirement without losing federal funds. According to the Prison Policy Initiative, as of December 2016, New York was one of only 12 states not to have opted out of the federal requirement. These policies result in individuals, particularly those outside New York City, losing jobs that they can no longer reach and being unable to access key support services they may need. In his State of the State, Governor Cuomo proposed taking steps to end the mandatory suspension of driver's licenses for non-driving related crimes. We urge the Legislature to pass the needed resolution to opt out of the Federal requirement so that New York is no longer an outlier in how it treats these crimes.

Require Article 23-A standard for all occupational licenses and clearances by removing unnecessary bars to employment and licensure

In 1976, New York enacted Article 23-A of the Correction Law, the first law in the country to protect individuals who have criminal convictions from discrimination in employment and licensure. In

enacting the law, the Legislature recognized the positive effects of employment on public safety, communities and families. Employment can also help the State save money by reducing reliance on benefits. In crafting the law, the Legislature required that employers and licensing agencies perform an individualized determination of each applicant. In making these determinations, decision-makers are required to balance the state's public policy of encouraging the employment and licensure of this population with the need to protect property and public safety.

Yet, even though this law has long required this type of individualized determination to ensure that applicants are not issued jobs or licenses that would put people or property at risk, the state imposed additional barriers for individuals to obtain certain jobs and licenses. These additional barriers are based entirely on the nature of the conviction, rather than the specific circumstances of the individual. In 2015, Governor Cuomo issued uniform guidelines to all licensing agencies that created a presumption in favor of granting a license. However, this guidance is only effective if the individual is eligible to apply for the license. In too many fields, this is still not the case.

In his budget, Governor Cuomo proposed eliminating many of these barriers to ensure that licensing decisions be based entirely on the specific circumstances of the individual being considered. We strongly support these proposals. At the same time, the proposals did not include several areas of licensure and employment that provide important entry level positions to those with criminal convictions. In particular, the proposals do not include security guard licenses, a field that employs many people with convictions. The proposals also do not include clearances that are required for individuals to work in health care fields. Health care is one of the fastest growing areas of

employment, with many entry level jobs that can provide a key stepping stone for those coming out of incarceration.

In all fields that require approval by New York State, the relevant government agencies have the authority to deny an applicant employment or licensure if their criminal record indicates that their conviction is directly related to the job that they are seeking or that they pose a threat to people or property. As a result, the additional restrictions, based solely on the nature of conviction are unnecessary and prevent the agency from making these individualized determination, thereby unnecessarily and unfairly limiting the ability of those with criminal records to access important fields that will help with their reentry. We urge the Legislature to remove all conviction-based barriers to employment and licensure and allow the staff in these agencies to make licensing and clearance determinations based solely on the specific circumstances of the applicant.

Support the Executive's efforts eliminate parole supervision fees

Fines, fees and surcharges are imposed without consideration of an individual's ability to pay them. As a result, they create significant barriers to reentry, including making it difficult for individuals to support themselves through employment if, as often happens, their wages are garnished to pay these charges. As a result, these financial costs can create disincentives to reentering the labor market, a perverse outcome that can harm public safety, as well as further reduce the ability of the State to collect any money owed. These charges can also impose costs on families, who are often forced to help the individual pay their fines, fees and surcharges. We support the Governor's proposal to eliminate the parole supervision fee and hope that this will result in the reexamination of other charges that impose barriers to reentry.

Establish pilots to address parole violations

Across the state approximately 40% of persons returned to prison from community supervision are the result of a parole rule violation. Only 17% of persons on parole charged with a rule violation are allowed to remain in the community while they address the needs that contributed to their violation, the rest (83%) are re-incarcerated at great expense to the state.¹ The majority of these men and women sit in local jails, like Rikers Island, and are not provided any support services while they await the outcome of their violation process. Available research indicates that parole rule violations do little to improve public safety, are disruptive to community reintegration and costlier than treatment and other service options available in the community. While NYS DOCCS has been working to divert more persons to facility-based treatment and “swift and certain” pilots, more needs to be done. NYS DOCCS should work with ATI/Reentry organizations on a violation prevention strategy that includes regular data sharing and more robust communications and collaboration to prevent violations. We urge the NYS Legislature to provide seed funding for parole violation reduction pilots to support efforts by ATI/Reentry organizations and DOCCS to reduce violations.

Modify State law to shorten the maximum sentence for an A misdemeanor by one day in order to reduce the immigration consequences of such convictions

Currently, a conviction for certain misdemeanor offenses can trigger mandatory deportation, even for green card holders. Because A misdemeanors in New York have a potential sentence of one year, legally present immigrants can often be deported for a single misdemeanor conviction, even if they are not sentenced to a single day in jail. This occurs because of the way New York’s one-year maximum sentence for misdemeanors interacts with a draconian provision of federal immigration law. As a result, immigration judges are often deprived of discretion to even determine whether deportation is warranted. Reducing the maximum potential sentence by one day would restore

¹ http://www.doccs.ny.gov/Research/Reports/2017/Legislative_Report.pdf

discretion to immigration judges and spare thousands of such lawfully present immigrants from deportation. This proposed one day change would have little impact on the criminal justice system but it would greatly reduce the immigration consequences faced by immigrant New Yorkers convicted of a misdemeanor offense. Other states, such as California, have already acted to make such a change. We urge the Legislature to introduce and pass legislation to make this change.