COMMONWEALTH OF MASSACHUSETTS
THE GENERAL COURT
STATE HOUSE, BOSTON, MA 02133

Secretary Thomas Turco
Executive Office of Public Safety and Security
C/O John H. Melander, Jr.
1 Ashburton Pl., Room 2133
Boston, MA 02133

September 16, 2020

Dear Secretary Turco,

We write again with disappointment and distress at the recently redrafted regulations for the **Medical Parole Program, 501 CMR 17.00**. After a lengthy hearing last year only some edits were adopted. The Supreme Judicial Court invalidated previous regulations in early 2020. It is troubling that the newest regulations continue to undermine and again seem to attempt to dismantle the program.

Since its adoption in April of 2018, the program has been only occasionally successful. According to your March 2020 annual report, there were 24 petitions to the program from June 2018 until July 2019. While 12 incarcerated people were diagnosed with cancer, and 8 others with "end stage" disorders, only 4 people were released during this time.

The Baker/Polito administration seems to approach this program with an attitude of, at best, indifference to its effectiveness, or, at worst, open opposition to its goals. Despite repeated opportunities to get its regulations right, explicit instruction from the Supreme Judicial Court, and specific guidance from the drafters of the statute, the regulations continue to raise new barriers to release for permanently incapacitated and terminally ill incarcerated people that are entirely out of context for the law.

We concentrate our criticisms on some key areas:

1. **Administrative hurdles have no basis in law and were invalidated by Supreme Judicial Court**

When regulations are explicitly released to respond to the *Buckman v. Commissioner* decision by the Supreme Judicial Court, it is distressing to say the least that *the amended regulations still include requirements invalidated by the court*.

In 17.03(3), the petition requires the submission of "a form." This is not required by the statute. *Buckman v. Commissioner* explicitly stated that "As long as the petition is written and is unambiguously a petition for medical parole for a particular prisoner, signed by a person authorized to make such a petition, the superintendent must accept and review the petition upon its receipt..." *Buckman* at 27. *The reference to a form should be removed and no form required.*

In 17.03(4), the regulations again require submission of information that *Buckman* explicitly ruled not necessary for the submission of a petition. The legislature did not require the submission of all releases or the medical parole plan at the time of the submission of the petition. As the statute states, the superintendent "shall consider a prisoner for medical parole upon a written petition." While it may be prudent to submit a plan with a petition, it is not required by the statute. *The regulations should be amended to clearly state that a medical parole plan need not be submitted with a petition and that any petition submitted shall be reviewed and a plan developed by the Department of Correction as required by Buckman.*

2. **Review of the medical parole plan**

We are deeply concerned about the pressure on the Multidisciplinary Review Team (MRT) to make a recommendation to the superintendent within its statutory mandate of 21 days. We fear that an overburdensome process will result in too many negative recommendations for seriously ill incarcerated people. The statute does not include a MRT. It calls for a much simpler review process with two factors: whether the incarcerated person is sufficiently ill and whether they pose a risk to public safety.

It is the superintendents' responsibility to make a recommendation on suitability and *risk*, not on a full review of the medical parole plan. Indeed, it would be non-sensical to require the superintendent to develop a plan and then recommend that it is not a good plan. The Commissioner has sufficient time to review the medical parole plan and suggest changes within the 45 days her office has to review the petition and recommendation. *There is no need to have a multidisciplinary team review all aspects of the release prior to the recommendation by the superintendent and the references should be eliminated or significantly simplified.*

3. **Parole Board procedure is contradictory, burdensome, and repetitive**

In a feat of legal drafting, the regulations take one sentence of statute and turn it into 2 pages of regulation. This seems inconsistent with the Baker/Polito administration's repeated commitment to simplifying regulatory frameworks.

In 17.09 and 17.10, the regulations outline a confusing, duplicative, and obstructive process that seems to apply to multiple parole reviews. After reading these sections, we are left with more questions than answers on how the Parole Board is supposed to act when responding to a medical parole plan.

In 17.10, the parole staff are required to *duplicate* a risk assessment already performed by DOC staff in creating a recommendation from the facility superintendent in 17.03(6). In addition, the parole staff are required to "verify suitability of the prisoner's proposed place of residence" when the medical parole plan was created by DOC. Is there a concern that DOC would propose inappropriate places of residence in a medical parole plan or perform inadequate risk assessments?

The Executive Office should start over with these sections and use only the text from the statute and the language of Buckman as a guide. For reference, the statute says: "The parole board shall impose terms and conditions for medical parole that shall apply through the date upon which the prisoner's sentence would have expired."

4. **Detainee prisoners**

The Merriam-Webster online dictionary defines a "prisoner" as "person deprived of liberty," "one on trial or in prison," and "someone restrained as if in prison." While the medical parole statute did not include a specific definition to what a prisoner is, the regulations before us define a prisoner as only a "committed offender serving a sentence." Removing pre-trial and other incarcerated people from the definition of prisoner has no basis in law.

Both from a common understanding of a prisoner and from the legislative history of that statute, it was absolutely intended to include the broad, common understanding of a prisoner. Sheriffs discussed cases where pre-trial detainees were medically complex and had lengthy, expensive hospital stays while in custody of sheriffs during testimony. *This regulation should be amended to include all incarcerated people under the care of the sheriffs and the Department.*

5. **Risk Assessment includes items that have nothing to do with risk of reoffending**

In 17.05(h), the risk assessment requires review of any advance directive or DNR. It is simply unrelated to a risk assessment in any way. Should a petitioner actually reach a point where an advance directive is at issue for their life, they would clearly not be a risk to the public. *This reference should be entirely removed.*

6. **Hearing has no basis in law and is contrary to statute**

In 17.08, the regulations were amended to allow for a hearing on any petition, at the discretion of the Commissioner. This is a substantial new change that is unrelated to the decision in *Buckman* and does not comply with the statute's explicit text or its intent.

The only hearing described in the statute reads:

"The parties who receive the notice shall have an opportunity to provide written statements; provided, however, that if the prisoner was convicted and is serving a sentence under section 1 of chapter 265, the district attorney or victim's family may request a hearing."

Thus, the plain language of the statute only allows for a hearing when it is requested for those prisoners serving a sentence for murder. All other cases shall only be the subject of written statements, as specifically described in the statute. Nothing in *Buckman* requires changes to the hearing process.

The regulations should be amended to reflect the limited hearing, as it appeared in earlier versions, only allowing a hearing when requested by district attorneys or victims families for crimes of murder.

7. Prior conditions should not cause a delay in release

In a redrafted 17.11, the regulations seem at first glance to enhance the program under the guidance of *Buckman*, allowing for petitioners and other parties to examine the reasons for a petition decision.

Yet, this section also includes a statement brightly in contrast with the statute. It allows for the Commissioner on her own accord to set prior release conditions, including requiring "the signing all necessary release forms" as a condition of release. Nothing in the statute allows for prior release conditions, certainly not for something as banal as a release form signature. Allowing for the Commissioner to create conditions as she saw fit could indefinitely hold an approved petitioner in custody. There is simply no basis in law for allowing a petitioner to be held after a petition has been approved.

This regulation should be amended to require that any condition set by the Department must be fulfilled by the Department within a set period of days.

8. 15 business days return of documents

As in the last round of regulations, we again express our disappointment and disapproval of the 15 day time period for release of materials in 17.14 paragraph two. It should take no longer than 5 business days to release this material, as the very same record was just reviewed by the Commissioner in making her decision. There is no reason that a petitioner should lose 15 business days (at least 21 days counting weekends) of their 60 appeal deadline. *The regulation should be amended to require the release of materials to parties within 5 days of a decision.*

9. Multiple petitions limit has no basis in law

As we have also stated in the past, there is no basis in law for the denial in 17.14(4) of multiple petitions from the same incarcerated person . With the limited process of input between the multiple reviews envisioned by the regulations, it is highly likely that errors of fact will occur. In fact, <u>we know they have occurred.</u> Alex Philips, first was denied when the wrong report was used to make a determination on a first petition. He was subsequently denied an additional

petition under this regulation and it took a court to require the Commissioner to accept another petition from Mr. Philips. He perished from his cancer only 24 days after release. If the Department is concerned about burdensome and frivolous repetitive petitions, it will have no problems denying frivolous petitions when there is nothing materially different in a subsequent petition. *This regulation should be amended to allow for subsequent petitions to be filed regardless of whether medical condition has changed.*

We thank you for the opportunity to comment on these regulations and hope that they will be amended accordingly. Please do not hesitate to reach out with questions.

Sincerely,

Sen. Pat Jehlen	Rep. Ruth Balser	Sen. Cynthia Stone Creem
Sen. Harriette L. Chandler	Sen. Julian Cyr	Sen. Mike Barrett
Sen. Cindy F. Friedman	Sen. John F. Keenan	Sen. Rebecca L. Rausch
Sen. James B. Eldridge	Sen. Jo Comerford	Rep. Christine Barber
Rep. Lindsay Sabadosa	Rep. Kay Khan	Rep. Jack Lewis
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