REPORT BY THE CRIMINAL COURTS COMMITTEE ON THE RECENT ENACTMENT BY THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION OF A PARENTAL CONTACT PROTOCOL

INTRODUCTION

This report is respectfully submitted by the Criminal Courts Committee (the "Committee") of the New York City Bar Association. The Association is an organization of over 24,000 members dedicated to improving the administration of justice. The members of the Criminal Courts Committee include prosecutors, criminal defense attorneys, judges, law students, and academics who analyze laws and policies that affect the criminal courts in New York.

In August 2013, New York's Department of Corrections and Community Supervision ("DOCCS") issued a Parental Contact Protocol (the "Protocol")[1] meant to protect the constitutional rights of people on either parole or post-release supervision ("releasees") for whom DOCCS has issued parole conditions that limit or restrict their contact with their children. The Protocol created an administrative scheme by which releasees may request contact with their children.[2]

The Committee applauds DOCCS's enactment of the Protocol as an important step toward guaranteeing an appropriate balance between the interests of community supervision and the fundamental rights implicated by restrictions on parental contact. The Protocol represents a crucial, affirmative recognition by DOCCS of the fundamental rights attendant to parent-child contact. It makes clear that those "important parental legal rights must be considered" when DOCCS imposes or contemplates imposing restrictions on such contact. And it enacts a mechanism by which releasees can seek administrative review of the imposition of such restrictions.

However, as addressed below, certain elements of the Protocol do not adequately account for the primacy of a releasee's right to parental contact. This report therefore serves to analyze the Protocol, identify potential problems, and recommend areas for amendment.

CONSTITUTIONAL FRAMEWORK

Any law or regulation implicating familial associations is subject to careful scrutiny given the paramount importance of the parent-child relationship,[3] the rights attendant to which

[1] The Protocol is DOCCS Directive No. 9601, effective August 21, 2013. As an aside, male pronouns are used herein for purposes of simplicity only.

[2] The Protocol was created as a result of a class-action lawsuit brought in the Western District in New York, *Doe v. Overfield*, Dkt. No. 08-cv-6294P (W.D.N.Y.). The proposed settlement in that lawsuit was approved on March 27, 2015.

[3] *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (collecting cases confirming the "fundamental rights of parents to make decisions concerning the care, custody, and control of their children"); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 842 (1977) ("[The] liberty interest in family privacy . . . [is] intrinsic in human rights, as they have been understood in this Nation's history and tradition") (internal quotation

are derived from the Due Process Clause of the Fourteenth Amendment[4] and the First Amendment, which protects the right of intimate association.[5] Those rights, in turn, are afforded both substantive and procedural protections.[6]

And because inmates and persons subject to parole and post-release supervision do not forfeit constitutional protections, penological regulations must be sufficiently tailored to avoid undue burden on constitutional rights, including those relating to familial association.[7] Indeed, courts presented with challenges to regulations imposing post-release restrictions on parental contact have viewed such restrictions with considerable suspicion.[8]

THE PROTOCOL IMPROPERLY PLACES THE BURDEN ON RELEASEES TO DEMONSTRATE ELIBILITY FOR PARENTAL CONTACT AFTER CONTACT HAS ALREADY BEEN RESTRICTED, INSTEAD OF ON THE STATE TO JUSTIFY THAT RESTRICTION BEFORE IT IS IMPOSED

Since the laws and regulations affecting the parent-child relationship implicate fundamental rights, the State—in this situation, DOCCS—bears the burden of demonstrating the necessity of such restrictions.[9] In effect, therefore, the right of contact enjoyed by a parent with his or her child is presumed, such that when the State seeks to impose limitations on that right, it must justify them to constitutional satisfaction. Indeed, as illustrated by a number of recent

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marks omitted); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116-17 (1996) (recognizing the "undeniabl[e] importan[ce]" of the "parent-child bond" as an aspect of family association); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) ("[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced[.]") (plurality opinion); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (deeming such rights "fundamental").

[4] *See, e.g.*, *Moore*, 431 U.S. at 499 (1977); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974).

[5] *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

[6] *See Smith*, 431 U.S. at 842.

[7] *See Turner v. Safley*, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); *accord Wolff v. McDonnell*, 418 U.S. 539 (1974) (recognizing due process rights of prisoners); *cf. George v. New York State Dep't of Corrections and Community Supervision*, 107 A.D.3d 1370, 1372 (3d Dep't 2013) (condition of parole or release affecting "fundamental rights to associate and marry" valid only if "'reasonably related to legitimate penological interest'" (quoting Turner, 482 U.S. at 89)); *Boehm v. Evans*, 79 A.D.3d 1445, 1447 (3d Dep't 2010) (recognizing same).

[8] *See, e.g., United States v. Smith*, 606 F.3d 1270 (10th Cir. 2010); *United States v. Voelker*, 489 F.3d 139, 155 (3d Cir. 2007); *United States v. Davis*, 452 F.3d 991 (8th Cir. 2006); *United States v. Myers*, 426 F.3d 117 (2d Cir. 2005) (Sotomayor, J.); *United States v. Loy*, 237 F.3d 251 (3d Cir. 2001); *Goings v. Court Servs. and Offender Supervision Agency for D.C.*, 786 F. Supp. 2d 48 (D.D.C. 2011).

[9] *See generally Moore*, 431 U.S. at 499 ("[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of *the government interests advanced*[.]") (plurality opinion) (emphasis added); *cf. Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended if the State were to attempt to force the breakup of a natural family.") (internal quotation marks and alterations omitted).

federal court actions, supervised release conditions restricting parental contact have foundered precisely because the state failed to identify specific and compelling circumstances necessitating the imposition of such restrictions on a particular individual.[10]

The Protocol admirably "recognizes that important parental legal rights must be considered" when prohibiting or limiting parental contact.[11] But a survey of its provisions confirms that, in practice, DOCCS can limit or prohibit parental contact without satisfying any initial evidentiary threshold.

Preliminarily, the Protocol is silent regarding how, or pursuant to what standard, restrictions on parental contact are imposed, suggesting that the Protocol is not relevant to the initial determination of whether a restriction on such contact is warranted. This impression is confirmed by the introductory language in the Protocol itself, which notes the importance of considering the right to parental contact when a "condition of the releasee's supervision limiting or prohibiting such contact *has been imposed or is contemplated by DOCCS*."[12] Similarly, while the Protocol provides that a releasee will be given "written notice regarding the ability and attendant process for requesting the exercise of certain parental rights while under community supervision," it makes clear that a releasee will only receive notice after a restriction on parental contact has already been imposed.[13] In these respects, then, the Protocol indicates that DOCCS can and will impose parental contact restrictions at its discretion, and it is then incumbent on the releasee to demonstrate eligibility for parental contact and to affirmatively petition for it.[14]

Other sections of the Protocol show that, in general, DOCCS places the burden on a releasee to demonstrate eligibility for parental contact once a restriction has been imposed, instead of on DOCCS to justify that restriction. For example, the Protocol sets forth

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[10] *See, e.g., United States v. Smith*, 606 F.3d 1270, 1283-84 (10th Cir. 2010) (observing that, because a restriction barring contact between a releasee and his child could be imposed "only in compelling circumstances" given "the fundamental right of familial association," the government's failure to produce evidence "unambiguously support[ing] a finding that [the defendant was] a danger to his own children or minor sibling" warranted remand of the case to the sentencing court to clarify the scope of the condition); *United States v. Voelker*, 489 F.3d 139, 155 (3d Cir. 2007) (noting that, absent sufficient evidence that "children are potentially in danger from their parents, the states' interest cannot be said to be compelling, and thus interference in the family relationship is unconstitutional").

[11] Protocol, Sec. I.

[12] *Id.* (emphasis added).

[13] Protocol, Sec. II ("Written notice shall also be provided by DOCCS staff to a releasee whenever conditions modifying, limiting, or prohibiting Parental Contact are . . . imposed.").

[14] Protocol, Sec. III (providing that, when a releasee files a written request for parental contact with DOCCS, the agency will make an initial determination as to whether the releasee is *prima facie* eligible to even petition for such contact).

Conversations with DOCCS staff confirm this view. On March 12, 2014, Terrence X. Tracy, Counsel to the Board of Parole, told members of the Criminal Courts Committee that restrictions on parental contact are imposed initially by individual parole officers on a "case by case" basis when an officer believes that parental contact poses a risk of harm to a releasee's child. Mr. Tracy made clear that there was no written policy governing when parental contact restrictions should be imposed, and that, in general, this process was "fluid and flexible.

requirements that a releasee must satisfy merely so that he can file a petition for contact.[15] He must, *inter alia*, identify the child with whom he seeks have contact; prove that he is the biological or adoptive parent of that child; and provide a written statement from the child's other parent supporting his application for contact.[16] The state bears no burden in this respect, as it is the releasee who must produce the necessary documentation to satisfy these requirements. Placing this burden on the releasee is particularly concerning in cases where the releasee is indigent and may not have the resources to obtain such documentation.

The Protocol also provides that, once a releasee has filed a written request for parental contact and has demonstrated his *prima facie* eligibility, his parole officer will conduct an investigation to determine what restrictions on parental contact "are reasonably necessary and appropriate for a releasee to properly exercise his/her parental rights while protecting his/her child(ren) from harm or danger."[17] Importantly, the investigation does *not* seek to verify whether DOCCS has produced evidence showing a compelling interest to justify abridging the releasee's right to contact with his child, only that the restriction reflects a "necessary and appropriate" balance between that right and the purported risk of danger to the child. And crucially, any restriction on parental contact will remain in effect during the investigation process, confirming that, once imposed, DOCCS will rescind a limitation on parental contact only when it determines to its own satisfaction that the limitation is no longer unnecessary.[18]

Overall, these provisions indicate that while DOCCS is aware that restrictions on parental contact implicate fundamental rights, the Protocol does not place the burden on DOCCS to justify those restrictions. Instead, it permits parole officers to limit parental contact without satisfying any specific evidentiary criteria, and then makes it incumbent on releasees to challenge those limitations once imposed via the administrative procedural set forth in the Protocol, under which the releasee bears the burden to demonstrate his eligibility for contact with his child.

To better align the Protocol with constitutional norms, therefore, it should revised to reflect that parents have a presumptive right of contact with their children that can be abridged only when the State demonstrates a compelling interest in limiting that contact.

THERE ARE NO CONSEQUENCES FOR FLAGRANT VIOLATION OF THE TIME FRAMES SET FORTH IN THE PROTOCOL.

As discussed above, under the Protocol, DOCCS may impose a restriction on a releasee's parental contact prior to an investigation into the need for such a restriction. As such, it is crucial that DOCCS's investigation into whether a releasee actually poses harm to his child be conducted swiftly. Unfortunately, while the Protocol sets forth relatively short time frames by

[15] Protocol, Sec. III.

[16] *Id.*

[17] Protocol, Sec. IV.

[18] *Id.*

which the investigation must be conducted, it fails to create any sanctions for DOCCS's violation of the time limits.

The Protocol lays out a clear set of deadlines for processing a request for parental contact. For example, an investigation into whether a releasee should be permitted contact with his child should be completed within 45 days.[19] Once the investigation is complete, the Bureau Chief of the parole office to which the releasee reports must issue a written opinion regarding the releasee's eligibility for contact within 10 days.[20] If the releasee wishes to challenge the Bureau Chief's decision, he must file a Notice of Appeal within 60 days, and the Regional Director overseeing the parole office to which the releasee reports must conduct a Parental Case Conference within 30 days.[21]

The Protocol addresses DOCCS's failure to abide by a timeframe in only one section. It notes that if the initial investigation into a releasee's request for contact is not complete within 45 days, the releasee may petition the Bureau Chief to provide the reasons for such delay.[22] The Protocol is silent regarding the consequences of the Bureau Chief's failure to provide such reasons, or if those reasons can be reviewed.

The Committee commends DOCCS for establishing relatively short time periods during which it must resolve a releasee's request for parental contact; these time periods reflect the importance of the rights at stake. The Protocol, however, lacks any incentive for DOCCS to follow these time frames since it fails to establish any consequences for their violation. Given the fundamental rights at stake and that irreparable damage may be created by separating a parent from his child, it is critically important that DOCCS address requests for parental contact with haste. DOCCS should address the need for swift resolution of these matters either by amending the Protocol to include consequences for its failure to abide by its current time frames or by amending the Protocol to contain slightly longer, but perhaps more realistic time frames and then enforcing them through sanctions.

THE PROTOCOL OFFERS A CHILD'S OTHER PARENT VETO POWER OVER A RELEASEE'S CONTACT WITH THAT CHILD.

To be deemed eligible for requesting parental contact under the Protocol, the releasee must provide a "signed written statement from the other parent of the child(ren) that reflects support for the releasee having contact with the child(ren)."[23] This provision effectively

[19] Protocol, Sec. IV.

[20] Protocol, Sec. VI.

[21] Protocol, Sec. VIII(C); (I).

[22] Protocol, Sec. V(C) ("A releasee may challenge a delay in the investigation and the reasons for such delay by submitting their challenge in writing to the Bureau Chief on a form [entitled] 'Inquiry Regarding the Timeliness of Investigation.'").

[23] Protocol, Sec. III.

provides the other parent of a releasee's child with veto power over the releasee's request for parental contact.

The Committee strongly supports seeking input from the child's other parent regarding the releasee's fitness as a parent. However, we strongly believe that it is inappropriate to confer veto power on the other parent. Relationships between parents of a child are often complicated, and the other parent's veto power may unnecessarily deprive a child of contact with one of his or her parents.

THE PROTOCOL FAILS TO ACCOUNT FOR THE LEGAL RIGHTS OF CERTAIN TYPES OF CAREGIVERS TO CHILDREN.

The Protocol applies to requests for parental contact from releasees who are the "biological or adoptive parent of a minor child."[24] DOCCS's inclusion of adoptive parents is appropriate and consistent with well-settled principle that an adoptive parent bares the same legal responsibilities as a biological parent for the care and custody of a minor child.[25]

However, the Protocol omits mention of other people who have the legal right to care for a child. For instance, legal guardians and, in some cases, foster parents are legally entitled to the care and custody of minor children.[26] In addition, while they do not hold the same legal stature as other adults charged with caring for children, the law recognizes that both grandparents and adult siblings of minors—who may reside with a minor—have legally recognized rights in regards to those minors.[27]

We, therefore, urge DOCCS to amend the Protocol to include reference to other adults with the legal right to the care and custody of children.

THE PROTOCOL FAILS TO REQUIRE THAT DOCCS OFFICIALS BE TRAINED TO DETERMINE WHEN A PARENT POSES A RISK OF HARM TO HIS CHILD.

There is no mention in the Protocol of the need to train DOCCS's officials carrying out its mandate in how to determine whether a releasee poses a risk of harm to his child. In view of the crucial constitutional rights at stake when DOCCS deprives someone of his contact with his child, the fact that such decisions are being made without any professional or scientific guidance is extremely concerning.

The Committee fears that the lack of training will force each parole officer to rely on his own interpretation and subjectively held beliefs when conducting an investigation pursuant to the

[24] Protocol, Sec. I.

[25] *See* Domestic Relations Law, §§110 and 117; Social Services Law, §371.

[26] *See, e.g.*, Domestic Relations Law §§ 81, 82, 83; Family Court Act § 119(b); Social Services Law § 371

[27] *Cf. Moore*, 431 U.S. at 500-01 (rejecting the proposition that "any constitutional right to live together as a family extends only to the nuclear family").

Protocol.[28] Not only could this lead to the imposition of excessive restrictions on parental contact,[29] but it will almost certainly lead to inconsistent application of the Protocol across New York State.

It is therefore critical that DOCCS officials tasked with implementing the Protocol are trained in validated social and scientific research so that they are properly able to evaluate the risk posed by a releasee to his or her child. Likewise, the Protocol should require that DOCCS officials rely on this training when making a determination about whether a releasee should be permitted contact with his child.

Such training is especially important where the releasee has been deemed a sex offender. The acute public fear of sex offenders has significantly influenced laws and policies regarding their management and treatment. Parole officers are not immune to these feelings and may be susceptible to making reactionary decisions regarding a releasee's supervision requirements if he or she is a registered sex offender.[30] Parole officers also may not evaluate each case with the individualized attention it deserves, even though people convicted of certain types of sex crimes are much less likely to reoffend than those convicted of other types.[31]

Training is also necessary to ensure that DOCCS officials rely on trustworthy documents and sources when making their determinations. The Protocol currently provides a non-exclusive list upon which a parole officer may rely when conducting an investigation into a releasee's request for parental contact.[32] The Protocol, however, fails to explain which of those sources must be consulted, which may be consulted, and what other sources, if any, can be relied upon. While every case undoubtedly poses its own set of variables, parole officers should still be given guidance as to what sources are most important and which should be discounted. Otherwise, there is a great risk of subjective, inconsistent determinations.

CONCLUSION

[28] Report, Council of State Governments Justice Center, The National Summit on Justice Reinvestment and Public Safety, *Addressing Recidivism, Crime, and Corrections Spending* (Jan. 2011), at 13, *available at* www.bja.gov/Publications/CSG_JusticeReinvestmentSummitReport.pdf ("Research has shown that professional judgments alone are, by far, the least accurate risk assessment method. Too often, these judgments are no more than 'gut' reactions that often vary from expert to expert on the same individual.").

[29] *See* Sharon Brett, *No Contact Parole Restrictions: Unconstitutional and Counterproductive*, 18 MIJGL 485, 489 (2012) ("The problem of states moving towards more restrictive conditions is a problem of categorical over-inclusion. Highly restrictive parole conditions may be necessary for some offenders…but they are not necessary for all.").

[30] *See generally* Tim Bynum et al., Recidivism of Sex Offenders, Ctr. for Sex Offender Mgmt. 1, 4 (May 2001), www.csom.org/pubs/recidsexof.pdf.

[31] *See, e.g.*, Brett, *No Contact Parole Restriction*s, at 492 ("Despite the differences in risk factors and the inconclusive results of recidivism studies, the criminal justice system increasingly treats all sex offenders alike, without any regard for the individual danger a particular offender may pose."); Report on Legislation by the Criminal Courts Committee, The Criminal Justice Operations Committee, and The Corrections and Community Reentry Committee, www2.nycbar.org/pdf/report/uploads/20072469-SexOffenderRegistrationActReport.pdf.

[32] Protocol, Section V(3).

DOCCS' adoption of the Protocol represents a large step forward in the protection of the fundamental constitutional rights of people under DOCCS's supervision. The Committee commends DOCCS for this progress. However, we fear that, without accepting our recommendations above, the Protocol could serve as a shield behind which DOCCS can hide while violating releasees' constitutional rights to the care, education, and custody of their children. The Committee thus respectfully requests that DOCCS adopt our recommendations so as to make sure that the Protocol achieves its purpose of ensuring that DOCCS separates families in only the most limited circumstances.