Assessment of Public Comment

In response to the proposed revised rulemaking, the Board received a comment submission from #LessIsMoreNY Campaign in February 2023. Prior to this the Board had received comments from The Legal Aid Society of New York City, #LessIsMoreNY Campaign, a New York State Assemblymember, and numerous form letters/emails with the same or substantially similar contents which were addressed in the Assessment of Public Comments published as part of the emergency readoption of the rules published in the July 20, 2022 issue of the State Register (hereinafter the "First Assessment"), and the Assessment of Public Comments published as part of the revised rulemaking and emergency adoption published in the January 4, 2023 issue of the State Register (hereinafter the "Second Assessment") The Board hereby provides the following assessment as to the February 2023 comment submission, and also incorporates by reference the First and Second Assessments:

Section 8000.2(h)

Comment: The comment is that "The phrase 'a person on parole or conditional release' should be deleted and changed to 'a releasee' to harmonize with EL §259-i(3)(a)."

Response: The Board does not believe the proposed change is necessary as the wording is not inaccurate and in context its meaning is clear.

Section 8000.2(i)

Comment: The comments reference the change in the burden of proof at the preliminary hearing, elevated to preponderance of the evidence, and recommends that "the definition of a hearing officer should be

amended to require that an Administrative Law Judge, rather than an employee of the Department, preside over preliminary hearings."

Response: All Board hearing officers, including administrative law judges, are employees of the Department, whose appointment and qualifications are governed by Executive Law §259-d, which was not amended and the Board does not believe that it is necessary for regulation to provide that only administrative law judges preside over preliminary hearings.

Section 8000.2(k)

Comment: The comment is "See comment on 8000.2(i)."

Response: Please refer to the response on 8000.2(i).

Section 8000.2(l)

Comment: The comment recommends that "[g]iven the liberty interests at play for both technical violations and non-technical violations" the Board should require that "any adversary officers be lawyers trained in the rules of evidence, versed in the legal nature of the proceedings and the attendant due process rights of the accused, and bound by the rules of professional conduct."

Response: The Executive Law contains no requirement that the adversary officer representing the Department in a parole revocation proceeding be a lawyer, and the nature of the proceedings does not compel the inclusion of such a requirement in the Board's regulations.

Section 8000.2(q)

Comment: The comment recommends that this subdivision be re-written to include "the definition of a violation in Executive Law §259", asserting that the section as written is unnecessary, "confusing and seeks to

invade the province of the hearing officer", should not refer to a "term of release", and should include that a violation is conduct that violates a condition in an important respect.

Response: As the comment acknowledges, the definitions of non-technical and technical violations consistent with the Executive Law are included in subsequent subdivisions of this section, (r) and (s), respectively. All three subdivisions are in harmony, and consistent with the statue or other regulatory provisions. The Board does not believe that subdivision (q) is improper or confusing, and notes that other provisions incorporate the language "in an important respect" appropriately and in accord with the law. See e.g., 8000.2(s), 8004.2, 8005.20(b).

Section 8002.6(b)

Comment: The comment on this rule includes remarks concerning (b)(2)(i), (b)(3), and (b)(4). Regarding (b)(2)(i), similar to comments submitted last year, the current comment complains of the language that "that time assessments will not be credited with any time in which the releasee is not within the convenience and practical control of the department", and says that it will "impermissibly deny jail time credit" for certain individuals. This new comment also similarly adds that the provision "violates an accepted precept that time spent in custody prior to the imposition of sentence will be credited to that sentence."

Regarding subdivision (b)(3), the comment complains about a long-standing practice that allows administrative law judges the opportunity after the conclusion of a final revocation hearing to review the evidence and thoroughly consider the matter before rendering a final written decision. The comment suggests that the provision formalizes and enacts the practice and recommends that decisions only be issued with "the accused present before the open parole court and the decision should be read on the record." In support of this contention, the comment cites Executive Law § 259-i(3)(f)(viii).

Regarding subdivision (b)(4), which provides that "[a]ny time assessments imposed within the same revocation case shall run concurrently with one another", the comment argues that this is not a proper regulation, further offering that the 2021 legislation did "not authorize the instigation of multiple simultaneous parole violation 'cases' by which the Parole Board may impose consecutive terms of reincarceration."

Response: As to the remarks concerning (b)(2)(i), the Board notes that this provision concerns "Time assessments" and does not discuss time to be credited to a sentence. This provision is not contrary to the law in any respect.

In regard to (b)(3), while the comment appears to take issue with a long-standing reasonable practice rather than concentrate on the provision itself, there is, in any event, nothing inappropriate about either the practice or this provision. The Board also declines to incorporate the suggested requirement that no decision be issued unless the releasee is physically present before the administrative law judge, and notes that a written decision is considered a part of the record concerning the case. The statutory language cited by the comment, Executive Law § 259-i(3)(f)(viii), did not change with the legislation passed in 2021 and the Board does not interpret its provision as requiring either immediate pronouncement of a decision without allowing opportunity to engage in a thorough review and consideration, or adjournment to require appearances on the record at a future date.

Finally, as to (b)(4), this provision is fully consistent with the Executive Law, and we note that the regulations do not mention the instigation of multiple simultaneous revocation cases.

Section 8004.1(c)

Comment: The comment objects to this provision, arguing that it "impermissibly and flagrantly violates the notice provisions in the Executive Law §259-i (3)(c)(iii)" and "seeks to improperly codify a civil law pleading concept of conforming charges to the evidence". It further remarks that "the concept of conforming

evidence to fit the charge is a civil litigation rule and the CPLR does not apply in the administrative hearing context."

Response: The Board does not agree with the characterizations in the comment, as there is nothing within this provision that is inconsistent with or contrary to the Executive Law, including § 259-i(3)(c)(iii). We further note that provision contains an explicit command that that the notice afforded to the releasee have been sufficient to inform them of the relevant conduct.

Section 8004.3(c)

Comment: The comment on this provision is, in part, substantially the same or identical to previous comments submitted on this provision. The comment asks that this provision be eliminated, suggesting it is unfair and counter to common sense to allow a revocation case "when it is clear that no case may be prosecuted in criminal court".

Response: The Board refers to its prior Assessment(s) to the extent it has previously responded to part of this comment. Further, the current submission as to this comment may be based in part on a misreading. To quote from the provision, the decision to proceed with a revocation case may be made "subject to the further requirements of this Part and Part 8005 of this Title, [] notwithstanding there being insufficient evidence available to prosecute alleged criminal conduct in revocation proceedings." Nothing within this provision is improper, unfair, or in conflict with the Executive Law.

Section 8004.4(b)

Comment: Section 8004.4 discusses the notice of violation, violation of release report and related issues. The comment on subdivision (b) of this section is that the portion "which states that the notice of violation shall

be provided 'not less than twenty-four hours in advance of such hearing'" does not provide the releasee with sufficient time.

Response: The provision does not conflict with and is not inconsistent with the Executive Law. The cited portion sets forth a minimum requirement for the agency to meet in regard to written notice of the time and place of the hearing, and that burden does in any way preclude the granting of an adjournment of the proceeding to afford the releasee reasonably necessary time for preparation. The Board properly holds a presumption that its hearing officers will appropriately consider such requests and decide them in a manner consistent with due process.

Section 8004.4(c)

Comment: The submission includes comments under the heading of "8004.4(c)(4)", which provision concerns the notice of violation. While those comments are relatively lengthy, they are focused on arguing that "a person who has been convicted of a new crime will still receive a preliminary hearing".

Response: The provision is appropriate and it is not inconsistent with the relevant parts of the statute, including those in Executive Law § 259-i(3)(c) and (f). 8004.4(c)(4) does not state that the releasee will be denied a preliminary hearing if they have been convicted of a new crime.

Section 8004.4(e)

Comment: There are several related comments in the submission regarding subdivision (e) of this section, and they include citations to paragraphs (1), (2) and (3). The comments include that "[i]n a non-warrant case a preliminary hearing date must always be on the notice", "[t]he direction to appear in response to a notice cannot be a condition of release", "there must be a notice requirement of at least three days", and (e)(3) violates Executive Law § 259-i(3)(c)(iii). The submission also includes allegations about "routines" such as "no

notice to counsel or the accused" of "hearings" and says that "[u]nder these conditions, it is particularly egregious to penalize people for failing to appear at their revocation proceedings."

Response: All the comments on this subdivision have been reviewed and considered, and no changes are necessary. These comments articulate concerns previously addressed in its First and Second Assessments, to which the Board refers. The Board adds that contrary to the comments, the Executive Law does not prohibit a releasee from being required to appear in response to a notice of violation or at any revocation hearings, and a notice restriction "requirement of at least three days" is not appropriate. Nothing within subdivision (e) violates the Executive Law or its intent, its provisions are consistent with the law, and the Board believes the revocation process is certainly significant enough to allow for requirement that the releasee appear for scheduled revocation hearings. Allegations regarding supposed routine practices are not substantiated, and the Board is not aware of any routine practice in which the Department fails to provide notice of hearings, nor is it aware of any routine practice in which releasees are penalized for failure to appear at a hearing for which they were not given notice. It should also be noted that a violation cannot be sustained unless it is in an important respect.

Section 8004.4(f)

Comment: It is claimed that this rule is "is in direct violation of EL 259-i(3)(c)(iii) which states 'the alleged violator shall, at the time a notice of violation is issued, be given written notice of the time place and purpose of the preliminary hearing. . . The notice shall state what conditions of community supervision are alleged to have been violated.'" The comment also states that the "not less than 24 hours" advance notice of the notice of violation requirement does not provide the releasee sufficient time and will never be reasonable.

Response: This provision is consistent with the Executive Law. The cited portion in regard to at least 24 hours advance notice sets forth a minimum requirement for the agency to meet in regard to the relevant written notice and does not diminish the possibility of granting a reasonable adjournment of the proceeding to afford

the releasee reasonably necessary time for preparation. As indicated in a preceding response in this assessment, the Board presumes that its hearings officers will appropriately consider such requests.

Section 8004.4(g)

Comment: The comment is as follows: "DOCCS should also attempt to reach the person at any address(es) where they had previously requested to reside, but which were not approved. Attempts should also be made at all known mailing addresses. The second sentence excuses DOCCS from serving someone who is in the jurisdiction of New York State. There is no service exception in the statute for people who are incarcerated. DOCCS has access to all prisons in the state and data regarding all pending criminal cases. Therefore, it is responsible for checking those databases to determine if one of its supervisees has been incarcerated. The state cannot restrain a person's liberty and then penalize them for not being in a place where they could only be if they were at liberty."

Response: This provision addresses the initial service of a notice of violation on a releasee who is believed to have absconded from supervision and to remain in that status. It indicates that in such a situation "service of the notice of violation may be properly and promptly effectuated by delivering such notice to the releasee's approved address, or last known address if different than the approved address". The Department's general "attempts to reach" an alleged absconder are not being, and need not be, addressed in this provision. Moreover, the suggested additional "attempts" would not be reasonable additional requirements for the notice that is addressed in this provision. The remainder of the comments misconstrue the provision, which does not authorize the penalizing of a releasee "for not being in a place where they could only be if they were at liberty." The provision is not in conflict with the law.

Section 8004.4(h)

Comment: The comment here is substantially the same or identical to previous comments submitted on this rule.

Response: The Board refers to its prior Assessment(s) as it has previously responded to the substance of this comment. We add, however, that there is no legal obligation as suggested in the comment, for prompt service of a notice of violation on a releasee in federal custody whenever that federal custody happens to be within this state.

Section 8004.4(j)

Comment: The substance of the comment is substantially the same or identical to previous comments submitted on this provision. The current comment adds that "there must be a minimum of at least three days notice prior to a hearing on supplemental charges so that a person may prepare a defense in collaboration with their attorney".

Response: The Board refers to its prior Assessment(s) as it has previously responded to the substance of this comment. The Executive Law does not require the claimed "minimum of at least three days notice", and the provision is not inconsistent with the Executive Law or due process.

Section 8004.5(a)

Comment: The comment is "This regulation should clarify that statement by a law enforcement officer that a person under supervision has been arrested cannot provide probable cause to believe a person violated a condition. As the existence of suppression hearings and Fourth Amendment litigation tell us, not all arrests are based on probable cause. A parole officer should speak to witnesses with first-hand knowledge in order to determine whether probable cause exists."

Response: The comment does not dispute the accuracy of the provision and the Board declines the request to add to the provision as suggested. The provision is in accord with the Executive Law.

Section 8004.5(e)

Comment: There are several comments on subdivision (e) objecting to its wording, including in part citations to paragraphs (1) and (2). The comment takes issue with the use of the word "lawful" before "order" in the second sentence of (e) and argues that it "implies DOCCS has the authority to decide which orders issued by a judge are 'lawful.'" The comment next says that the first sentence of (e)(1) "does not make any sense". That sentence reads: "Where there are one or more violations charges involving conduct that would constitute a new felony or misdemeanor offense, detention is also authorized until conclusion of a proceeding pursuant to article 530 of the Criminal Procedure Law wherein recognizance with respect to the parole revocation case may be determined." As to (e)(2) the comment is that it is "particularly problematic", with subparagraph (iv) alleged to be "most egregious as it authorizes retaking on a warrant in spite of a judicial order of release on that very warrant. DOCCS simply does not have the authority to overrule the order of a judge."

Response: The Board notes that comments were previously submitted with respect to subdivision (e) and we refer in part to our prior corresponding Assessment(s). The current comment complains of the use of the word "lawful" in the second sentence of (e), but contrary to the suggestion in the comment, this word does not purport to impart to DOCCS authority over the courts, and there is no cause to delete it from the sentence. In regard to (e)(1), we disagree that the cited sentence is unclear, as it is easily understood as a reference to the circumstances permitted pursuant to Executive Law § 259-i(3)(a)(viii), which in pertinent part states: "If the violation charge involves conduct that would constitute a new felony or misdemeanor offense, such recognizance hearing may be held at the same time as a proceeding pursuant to article five hundred thirty of the criminal procedure law for any warrants issued by the department prior to such proceeding." As for (e)(2), it

includes a list of circumstances that would reasonably permit detention on a parole warrant following an order of release from a recognizance hearing, where there are "one or more violations" that have later come to light. Thus, the comment on (e)(2) mistakenly characterizes action consistent with this provision as something that "would overrule" a recognizance hearing of release. Subdivision (e) is appropriate and is not violative of the Executive Law.

Section 8004.5(f)

Comment: The comment is that subdivision (f) "is improper in so much as it seeks to do by regulation what is not provided by statute. The Department is not entitled to create its own presumption on an issue of fact that is relevant to the legality of the detention pre-recognizance hearing or at the recognizance hearing."

Response: There are no changes to this provision needed as it is not inconsistent with the law and, contrary to the brief comment, it is appropriate as a regulatory provision.

Section 8004.5(g)

Comment: The comment is "This provision seems to be an effort at dictating which remedies are available to a habeas court in response to a challenge to the legality of a warrant. DOCCS cannot regulate the decisions of habeas courts and this regulation should be deleted."

Response: The comment presents no cause to delete this provision., which simply states: "The issuance of a parole warrant and detention under its authority shall be a severable issue from the legality of a parole revocation case, its continuation, or any final determinations therefrom." The provision is not inconsistent with law, and it makes no mention of a "habeas court".

Section 8004.5(h)

Comment: Subdivision (h) is effectively a recommendation for certain language to be included in a parole violation warrant, that in this instance would constitute notification to a recognizance court. The comment on this provision is "The last sentence should be amended to 'the Department and counsel for the accused must be…' so that Defense counsel is also provided a copy of the [recognizance court's] order. Often courts refuse to provide counsel with a copy of the order."

Response: The Board certainly has no objection to the recognizance court providing a copy of its order to the releasee's counsel, but it cannot compel the court to do so through this provision. No changes are necessary.

Section 8004.6(a) and 8004.7(a)

Comment: The comment objects to paragraph (7) of 8004.6(a) and Section 8004.7(a) on the same basis. 8004.6(a)(7) in part provides: "For the purposes of this section, contact with any law enforcement agency does not include a formal accusation of criminal behavior, or an arrest." 8004.7(a) provides in part that technical violations for which reincarceration is possible include "(5) the failure to notify the parole officer of an arrest of the service of criminal summons upon the releasee." The comment objects to the rule treating an arrest for a criminal offense differently from general contact with a law enforcement agency, arguing that that these provisions "completely misstate the statute", and "There is no grounding for this invented exception to the statutory language."

Response: The Board notes that the current comment is similar to prior comments on this issue and refers in part to its prior Assessment(s) in that regard, which was with respect to 8004.7(a). It reiterates that Executive Law § 259-i(3)(f)(xii) provides that failure to notify the parole officer of "contact with any law enforcement agency" is a "certain technical violation" for which no reincarceration is possible. As the Board explained in a prior Assessment, an 'arrest', which relates to a formal criminal proceeding, is distinct from a

'contact'. There is no misstatement of the statute in the regulations, and neither 8004.6(a)(7) nor 8004.7(a), to the extent addressed in this comment, are inconsistent with the law in any way.

Section 8004.6(d)

Comment: As to the opening sentence of subdivision (d) the comment states: "The word 'may' should be changed to 'shall' as this is the only option for a technical case for which incarceration may not be imposed." There are also remarks on (d)(2) "generally" and (d)(2)(i). Regarding (d)(2)(i), which concerns service of a "shall be deemed sustained" conclusion on violation charges without a possibility of re-incarceration (Executive Law § 25-i(3)(a)(i)), similar to a comment on another section, the comment is that "Service should also be to any address(es) where the person had previously requested to reside, but which were not approved as that." The comment further remarks on (d)(2), arguing that the procedure that was created in (d)(2)(ii) for a releasee to challenge the "deemed sustained" conclusion after failing to appear is "draconian and difficult to follow", and urges the creation of an on-line avenue.

Response: The first part of the comment on subdivision (d) recommending changing "may" to "shall" is based on an incorrect reading of the referenced sentence and in any event does not present cause for the proposed change. The proposed addition to the service indicated in (d)(2)(i) is not appropriate. Lastly, the Board does not believe there is anything draconian or difficult about the procedure set forth in (d)(2)(ii). The provision is not inconsistent with the statute, and no changes are needed.

Section 8004.7

Comment: The comment as to this section has two components, one of which is an iteration of the complaint regarding Section 8004.6(a) and the fact that the failure to notify the parole officer of an arrest is a technical violation for which reincarceration is possible. The other component is a complaint about paragraph

(4) of subdivision (a), which paragraph provides, as another a technical violation for which reincarceration is possible, "a violation of any direction that the releasee appear at any recognizance hearing or parole revocation process appearance, including the appearance directed in response to a notice of violation, and any preliminary and/or final revocation hearing and any adjourned or continuation appearances therefrom". The comment on that point is that the paragraph "creates a new type of technical violation not approved or sanctioned by the legislative scheme of Less Is More" and it "overstep[s] the decarceral purpose of Less Is More".

Response: The first component of the comment is substantively addressed in the response regarding the comment on Section 8004.6(a) and, as indicated in that response, prior Assessment(s). The Board therefore refers to those responses. The Board does not agree with the complaint as to (a)(4) and notes that this provision is not violative of anything in the Executive Law. The revocation process is significant and where there is requirement that the releasee appear for related appearances, the violation of that requirement may be approached seriously. See also, the response to the comment on Section 8004.4(e).

Section 8004.9(c)

Comment: It is claimed in the comment that this provision should be revised to show two alleged purposes for a recognizance hearing, one being to determine whether the parole warrant was properly issued and the other to determine whether the releasee is to be detained pending a preliminary or final revocation hearing.

Response: No revision should be made to this provision, as it is in full accord with the Executive Law, which makes clear that the recognizance court's determination is whether the releasee will be detained or released pending the revocation proceedings. Executive Law § 259-i(3)(a)(vi).

Section 8004.9(e), (j)

Comment: The only comment relevant to these provisions is that the last sentence of (j) should be moved to the end of (e) "for clarification and completeness".

Response: The suggestion has been considered and there is no need to move the sentence as recommended. The Board disagrees that there is a lack of completeness or clarity.

Section 8004.9(h)

Comment: Paragraph (1) of 8004.9(h) relates that at the recognizance hearing the Department should demonstrate to the court that the parole warrant was properly issued and that it "should inform the court" of the points listed in subparagraphs (i) through (iv). The comment claims that this provision is "missing [the] foundational element" of other procedural issues concerning technical parole violation cases.

Response: The provision is consistent with Executive Law § 259-i(3)(a)(v). The other procedural issues that the Department is obligated to abide by under the Executive Law are addressed in section 8004.7, and there is no necessity in repeating them in section 8004.9(h). As this provision is consistent with the law and is accurate, no revisions are needed.

Section 8004.9(i)

Comment: The submitted remarks on subdivision (i) of this section include some that are substantially the same or identical to previous comments submitted on this provision. It is also urged that the provision should be revised to give a "shall" direction to the Department to serve the notice of violation on the releasee's recognizance hearing counsel.

Response: The Board refers in part to its prior Assessment(s) as it has previously responded to the substance of this comment on that relative part. As to the remaining portion of the comment, we note that paragraph (1) of subdivision (i) instructs that "[t]he department may also provide a copy of the notice to the

releasee's counsel at such hearing." Neither paragraph (1) nor subdivision (i) as a whole are inconsistent with the Executive Law, and the proposed revision to the language is not necessary.

Section 8005.3(a)

Comment: Paragraph (a) of section 8005.3 states: "The department shall coordinate with the board in matters pertaining to the timely processing of parole revocation cases and revocation hearing schedules. As required and appropriate the department shall also coordinate with the chief administrator of the courts or their designees, the State Office of Court Administration, or courts of law in regard to certain revocation hearings that are to be held in such court facilities." The comment on this provision is that "[a]ll hearings, not just 'certain' hearings, should take place in court facilities pursuant to Executive Law 259-i (3) (c) (i) (A); 259-i (3) (c) (ii); 259-i (3) (f) (i) (B) (2). Also, the word 'certain' is unclear here and should be defined."

Response: There is an assumption that regulatory provisions will be read in the context of and in conjunction with associated and complimentary language in the Executive Law and other provisions within the regulations. There is no basis to revise paragraph (a) as, contrary to the comment, its meaning clear, and it is consistent with the Executive Law. See e.g., Executive Law § 259-i(3)(c)(ii).

Section 8005.6(a)

Comment: The remarks on this provision are substantially the same or identical to previous comments submitted on this provision. The only exception is a new complaint that the use of the words "release on recognizance" in (a)(4) is confusing and non-compliant with the law.

Response: The Board refers to its prior Assessment(s) as it has previously responded to the substance of this comment. We nevertheless add that (a)(2)(iii) states: "Nothing within this paragraph shall be construed as prohibiting the conduct of a preliminary hearing in absentia." While there is an inclusion of new legal

argumentation language and case law citations in the comment regarding (a)(2)(iii), the essential character of the comment is the same as before, and in any event, there remains no valid basis for changing this provision as it is not inconsistent with the law. Lastly, the wording of (a)(4) is not confusing and is not inconsistent with the Executive Law, and therefore need not be changed.

Section 8005.6(b)

Comment: The comment is "Same argument as 8005.6 (a) (4), above."

Response: Please refer to the response on 8005.6(a).

Section 8005.15(b)

Comment: The comment recommends that "no prior supervisory experience' should be clearly defined to ensure an impartial hearing officer."

Response: This rule is consistent with the language on the same subject in Executive Law § 259-i(3)(f)(i), and no modifications are necessary.

Section 8005.17(b)

Comment: The comment submitted on this rule is substantially the same as previous comments submitted on this provision to the extent it is regarding (b)(2). The remainder of the comment is as to (b)(3) and suggests that if the Department held hearings where the commentor says, "there would be no need to extend hearing timelines or reschedule hearings due to a change in custody status".

Response: The Board refers in part to its prior Assessment(s) as it has previously responded to the substance of this comment to the extent it pertains to (b)(2). Regarding the remaining portion of the comment,

(b)(3) is an appropriate provision accounting for practical potentialities, and which is not inconsistent with due process or the law.

Section 8005.17(d)

Comment: The comment on this provision is substantially the same or identical to previous comments submitted on this provision.

Response: The Board refers to its prior Assessment(s) as it has previously responded to the substance of this comment. We nevertheless note that the current comment requests that the Board "create in this regulation an adjournment framework which provides a releasee accused of a parole violation the opportunity to adjourn the parole violation matter to track a concomitant criminal court matter." There remains no need for changing this provision as requested, and the rule is not inconsistent with the statute. The Executive Law does not compel or suggest the need for what is urged, and we reiterate part of the response previously provided, which was that this section allows for proper adjournments of a final revocation hearing on good cause.

Section 8005.21

Comment: The Board believes that the comment on this section, while segmented into remarks under subdivisions (a), (b), (c) and (e), is substantially the same or identical to previous comments submitted on this provision. Notwithstanding this fact, we note that the current comment includes such remarks as "Executive Law § 259-i (9) uses the word shall", "the statute makes the[] input [of a non-profit service provider] an element that the ALJ should consider", and the provisions "contravene" the statute. There are also assertions that the presence of non-profit service providers "should be required", and the section "attempt[s] to give the Department the authority to dictate to the community service providers and/or defense counsel who can

communicate with the community service providers and/or who the community service providers can communicate with and under what circumstances."

Response: The Board refers to its prior Assessment(s) as it has previously responded to the substance of this comment. We nonetheless note that the Board disagrees with the comments. As indicated in a prior Assessment this section affords for qualified non-profit service providers to participate in the process but, as the comment also acknowledges, these entities "are not Department employees or agents". The Executive Law does not confer the legal authority to DOCCS to compel the presence of these providers as a matter of course. Moreover, nothing within this section can reasonably be interpreted as indicating that the Department would control whether a releasee or their counsel communicates with a provider. The section explicitly states "that communications between the releasee or their counsel and the nonprofit service provider may freely occur outside of the time of such proceedings without direction and involvement of the presiding officer or any other employee of the board or department." Relevant information may be submitted "directly" by a provider, or as to information that provider might otherwise offer, "Nothing… shall prohibit such information from being offered by a party at a final hearing." This section is consistent with the Executive Law.

Section 8006.1(g)

Comment: The comment includes remarks on paragraphs (3) and (4) of this section. Part 8006 of the Board's regulations concern the "administrative appeal process". 9 N.Y.C.R.R. § 8006.1(b). Through the legislation passed in 2021, subdivision (4-a) was added to Executive Law § 259-i, providing an adjudicated parole violator the right to appeal directly to court "non-technical violation findings" relating to misdemeanor or felony conduct. Subdivision (g) of section 8006.1 accounts for this right and accommodates the administrative appeal process to the potential exercise of such right. The comment here claims that (g)(3) "contravenes Executive Law § 259-i (4-a) by granting discretion to the board to ignore the right to appeal to the criminal

court." As to (g)(4), the comment argues that the provision contravenes the statute "by attempting to take away the clear right of the releasee to have all sustained allegations reviewed de novo by the court", including sustained technical violation charges.

Response: 8006.1(g) is not inconsistent with the Executive Law. There is nothing within section 8006.1 that can be construed as allowing the Board to disregard § 259-i(4-a) or to otherwise ignore a violator's right to appeal under that statutory provision. To reiterate, 8006.1(g) unequivocally accounts for the right afforded under § 259-i(4-a). The comment also incorrectly contends that (g)(4) contravenes § 259-i(4-a). As indicated, the statute makes clear that it concerns the right to appeal "non-technical violation findings" relating to misdemeanor or felony conduct. The right to administratively appeal the sustaining of technical violation charges is preserved in accord with § 259-i(4).

Sections 8006.2, 8006.3 and 8006.4

Comment: As to each of these sections the comment is that "The Department should clarify that this section applies only to board appeals."

Response: As indicated, Part 8006 of the Board's regulations concern the administrative appeal process, and a plain reading of this Part makes this clear. As such, the Board does not believe that clarification is needed.

Multiple comments were substantially similar to comments upon prior rulemakings which were addressed in prior assessments of public comments. These include comments on sections 8003.2 (14), 8004.1 (f), 8004.1 (g), 8004.1 (k), 8004.4(c)(6), 8004.4 (i), 8004.7 (a) (4), 8004.9 (b), 8004.9 (l), 8005.4(b), 8005.6(c), 8005.17(a), 8005.18(a), 8005.18(e), 8005.19(f), 8005.20(e). For these comments, the Board refers to the responses in the First and Second Assessments.