

## CHAPTER 39

### TEMPORARY RELEASE PROGRAMS IN NEW YORK\*

#### A. Introduction

If you are incarcerated in New York State, this Chapter will help you understand many temporary release programs that you may be eligible for. This Chapter tells you about the different types of temporary release programs in New York State, summarizes the application procedures you must follow, and explains your rights regarding temporary release programs.

New York State temporary release programs allow incarcerated people to leave the prison for short periods of time before they are paroled or serve their full sentence. There are different types of temporary release programs, each with a specific purpose and its own eligibility requirements. The superintendent of each New York State correctional institution and a Temporary Release Committee (“TRC”) oversee the day-to-day operations of the various programs. The TRC is made up of a chairperson and two staff members. It represents the parole, program services, and security departments. The superintendent nominates the TRC members, and the Commissioner of Corrections approves them. The TRC must meet at least once a week to consider temporary release applications.

This Chapter is divided into five parts. **Part B** gives an overview of the temporary release programs available in New York. **Part C** discusses the requirements you need to meet to be eligible for temporary release programs. **Part D** gives you information on how to apply for temporary release programs. If your application for temporary release is denied or revoked, **Part E** will tell you what you should do. Finally, **Part F** provides some general information on how the Second Chance Act of 2007 changed state and federal temporary release programs. For more information on how to research procedures in your jurisdiction, see *JLM*, Chapter 2, “Introduction to Legal Research.”

#### B. Overview of Temporary Release Programs

First, you should know that not all facilities have temporary release programs. Those facilities that do offer temporary release may not have every type of program, so you should ask your facility to see what programs it offers. You may also be transferred to another facility to take part in a temporary release program.<sup>1</sup>

There are both short-term release programs and continuous temporary release programs. Short-term programs allow incarcerated people to leave the facility for a specific period of time (often for seven days or less) and only for certain limited purposes. Continuous temporary release programs allow incarcerated people to leave the facility for up to fourteen hours per day until the program is complete.

You should also be aware that getting into these programs is hard. Acceptance depends on which program you are interested in and your particular criminal history. In 2020 (the most recent available data), the percentage of applicants accepted into all of the temporary release programs in the state is about six percent.<sup>2</sup> Also, the total number of participants in these programs has dropped almost every

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<sup>1</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.2(a) (2023).

<sup>2</sup> NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2020 ANNUAL REPORT (2020), <https://doocs.ny.gov/system/files/documents/2021/04/temporary-release-annual-report-2020.pdf> (last visited Apr. 10, 2024).

year since 2006, when there were 2,677 incarcerated people participating in these programs.<sup>3</sup> In 2020, the number was just 930.<sup>4</sup>

### 1. Short-Term Temporary Release Programs

There are three types of short-term temporary release programs: (1) leaves of absence, (2) community service programs, and (3) furloughs. Participation in a community service program may be short-term or continuous.

#### (a) Leaves of Absence

Leaves of absence allow you to temporarily leave a facility to visit a loved one shortly before their death, to attend a loved one's funeral, or to receive urgent medical or dental treatment. You do not need to be within two years of eligibility for release on parole in order to qualify for the program. You may be granted a leave of absence to leave the facility for a certain period of time for one of three reasons:

- (1) If their death is imminent (very likely to happen soon), you may leave to visit your spouse, child, brother, sister, grandchild, parent (natural or legally adoptive), grandparent, ancestral aunt, or ancestral uncle on their deathbed;
- (2) You may leave to attend the funeral of your spouse, child, brother, sister, grandchild, parent (natural or legally adoptive), grandparent, ancestral aunt, or ancestral uncle; or
- (3) If it is absolutely necessary to your health and well-being, you may leave to receive surgery, medical treatment, or dental treatment that is unavailable at the facility.<sup>5</sup>

For the third reason (necessary surgery, medical treatment, or dental treatment), the Commissioner or his or her representative must approve your request for leave.<sup>6</sup> This approval depends on your criminal history and your behavior after incarceration. The Department of Corrections and Community Supervision (DOCCS) uses a point system to determine your eligibility for programs. The point system is discussed in Subsection D(2)(a) of this Chapter. You will need thirty points to participate in a short-term program and thirty-two points to participate in a continuous program. If you have the necessary number of points, you must be considered—but it is possible you may still not be allowed to participate in a program. Leaves of absence are available at all facilities in the state except shock incarceration<sup>7</sup> facilities.<sup>8</sup> However, leaves are fairly uncommon (mostly because very few incarcerated people apply for them). In 2020, two leaves were granted out of thirteen applications.<sup>9</sup>

One deathbed visit may be allowed for each terminally ill relative. If you have already had one escorted visit to your loved one's deathbed, you will not be able to visit that person again. The facility

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<sup>3</sup> NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2020 ANNUAL REPORT (2020), <https://doccs.ny.gov/system/files/documents/2021/04/temporary-release-annual-report-2020.pdf> (last visited Apr. 10, 2024).

<sup>4</sup> NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2020 ANNUAL REPORT (2020), <https://doccs.ny.gov/system/files/documents/2021/04/temporary-release-annual-report-2020.pdf> (last visited Apr. 10, 2024).

<sup>5</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(a) (2023).

<sup>6</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(a) (2023).

<sup>7</sup> Shock incarceration facilities (sometimes called boot camp facilities) are designed to confine people for a short period of time, usually 90 to 180 days. These facilities use a highly regimented program of strict discipline, military drill and ceremony, and physical exercise.

<sup>8</sup> N.Y. STATE DEPT. OF CORR. & CMTY. SUPERVISION, TEMPORARY RELEASE PROGRAM: 2018 ANNUAL REPORT (2018), *available at* <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2018.pdf> (last visited Oct. 8, 2023).

<sup>9</sup> NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2020 ANNUAL REPORT (2020), <https://doccs.ny.gov/system/files/documents/2021/04/temporary-release-annual-report-2020.pdf> (last visited Apr. 10, 2024).

will confirm the facts of your case and may contact the patient's doctor or funeral home director. Once the TRC is sure you have a relative who is ill or deceased, it will make a decision. If it approves your leave, the superintendent must also do so in order for you to get the leave of absence. You will be given only the shortest length of time necessary to accomplish the purpose of the leave. Out-of-state leaves of absence will be granted only with the Commissioner's approval.<sup>10</sup>

If you have applied for medical or dental leave, you must be willing to get such treatment nearby and from a doctor selected by the institution. You must fill out TRC Form 4188 and have the form signed by the facility's Health Services Director.<sup>11</sup> The temporary release committee must:

- (1) Have a plan that predicts the number of visits you will need for treatment;
- (2) Make sure you are examined by your prison's dentist or physician after each visit to the outside doctor to make sure you actually got treated; and
- (3) Make sure that your leaves of absence for dental or medical treatment are never more than a "reasonable number of hours" within a single day (unless a longer leave is medically necessary).<sup>12</sup>

Your bounds of confinement must state that you will proceed directly to the dentist's or physician's office upon release and return directly to your institution once your visit is done.<sup>13</sup> All medical or dental leaves longer than one day, even when you are not a Central Review case, require approval from the Director of Temporary Release Programs.<sup>14</sup> Subsection D(2)(c) of this Chapter will help you identify if your case is a Central Review case.

#### (b) Community Service Programs

Under the community service program, eligible incarcerated people may leave the facility for up to fourteen hours on any day to volunteer at nonprofit organizations or public agencies (for example, hospitals or charities). These organizations must have an established volunteer program with a job description outlining the duties and responsibilities of a volunteer. You may not fill a position ordinarily taken by a paid worker. Participants in a volunteer work program will receive an allowance from the facility's Temporary Release Program appropriations.<sup>15</sup> You may also be allowed to participate in religious services and athletic or cultural events if they are not available at your facility.<sup>16</sup>

#### (c) Furloughs

A furlough program allows eligible incarcerated people to leave an institution for up to seven days in order to:

- (1) Solve family problems or maintain family ties,
- (2) Attend a short educational course,
- (3) Look for a job, or
- (4) Seek post-release housing.<sup>17</sup>

If you can convince the TRC that you need to see your family (for example, because you have children or because your parents are going through a divorce), you may be allowed to take a furlough only for this narrow purpose. You may not take an out-of-state furlough.<sup>18</sup>

<sup>10</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(a)(1)(i)(e) (2023).

<sup>11</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(a)(2)(v)(a) (2023).

<sup>12</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(a)(2)(v)(e) (2023).

<sup>13</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(a)(2)(v)(d) (2023).

<sup>14</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(a)(2)(iv) (2023).

<sup>15</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(b)(1)–(3) (2023).

<sup>16</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(b)(6)–(7) (2023).

<sup>17</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(c) (2023).

<sup>18</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(c) (2023).

Furloughs are available at all facilities throughout the state except for shock incarceration locations.<sup>19</sup> Be aware, though, that furloughs are rarely granted. For example, in some years, 100% of applications were rejected: in 2020, all 22 applications for furlough were denied.<sup>20</sup>

General confinement incarcerated people who have been accepted for previous furloughs may apply with these limitations:

- (1) You cannot take more than twenty-eight days in any furlough year,
- (2) You cannot take more than fourteen days in the first six months of any furlough year, and
- (3) You cannot take more than seven days in any twenty-eight-day period.
- (4) A furlough year begins on the day you take your first furlough and ends 365 days later.
- (5) No furlough can last longer than seven days.<sup>21</sup>

If you apply and do not fit into this timing, the TRC may hold onto your application.<sup>22</sup> Please note that if you want to take a furlough during a holiday season, you must submit your application at a time set by the Director of Temporary Release at your facility.<sup>23</sup>

(i) *Family-Tie Furlough*

If you are applying for a family-tie furlough, you must go to an approved residence. An approved residence must be the home of a relative by blood or legal adoption, a legal guardian, or a spouse. If your family lives out of state, you may request that the TRC and Central Office approve a different in-state location.<sup>24</sup> Even if your family lives out of state, you are still allowed to meet with them. However, the meeting must take place at an approved residence in the state where you are incarcerated.

(ii) *Job-Search and Post-Release Housing Furloughs*

The job-search furlough and the post-release housing furlough are available to incarcerated people preparing for release from prison. There is no pre-approved residence requirement for a one-day furlough. For a longer furlough, you must go to an approved residence (home of a relative by blood or legal adoption), just as for the family-tie furlough. If that is not available, you must go to a legal and verifiable residence, which cannot be a publicly funded residence used for public temporary housing (for example, a shelter).<sup>25</sup> “Legal and verifiable” is not defined any further, but likely just means that the residence is not some sort of illegal building and that the residence has an address that can be verified.

(iii) *Short Educational/Vocational (Job) Training Course Furlough*

To qualify for the short educational/vocational training course furlough, you must be attending one of the following:

- (1) A one-day rehabilitation (rehab) program that will provide you with counseling and therapy for problems such as drug, alcohol, or gambling addictions; or
- (2) An entrance exam or an educational conference, short course, or seminar.

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<sup>19</sup> N.Y. STATE DEPT. OF CORR. & CMTY. SUPERVISION, TEMPORARY RELEASE PROGRAM: 2018 ANNUAL REPORT 5 (2019), available at <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2018.pdf> (last visited Oct. 7, 2023).

<sup>20</sup> NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2020 ANNUAL REPORT (2020), <https://doccs.ny.gov/system/files/documents/2021/04/temporary-release-annual-report-2020.pdf> (last visited Apr. 10, 2024).

<sup>21</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.3(c)(2)(ii) (2023).

<sup>22</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.3(c)(2)–(3) (2023).

<sup>23</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(c)(3)(ii) (2023).

<sup>24</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(c)(2)(i)(a)–(b) (2023).

<sup>25</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(c)(2)(ii)–(iii) (2023).

This program can be for one day or for a longer period of time. Educational furloughs require Central Office approval.<sup>26</sup>

All furlough approvals will last continuously unless the decision says that the furlough is for a specific period of time. After the first furlough, the superintendent will schedule later requests as long as the TRC says that you are still qualified. If you are only approved for a furlough, though, you are not approved for any other temporary release program.<sup>27</sup>

If you have a pending transfer to a work release or educational release program facility, you will be eligible for a furlough from the transferring facility after Central Office approval. Remember that furlough approval, like approval for other temporary release programs, is entirely up to the prison officials. So, even if the Commissioner of Corrections approves you for a work or educational furlough, the superintendent of the prison facility can postpone the furlough in the interest of “the efficient and orderly operation of the transferring facility.”<sup>28</sup>

## 2. Short-Term Temporary Release Procedures

As soon as you are approved for a short-term temporary release program, you will be notified so that you may make the arrangements necessary to complete the program. If the TRC feels that there is not enough information about your requested residence, whom you will be staying with, or any other part of your case, it will investigate the problem. If the result of the investigation is negative, you will be notified and your requested residence may be denied.<sup>29</sup>

You will usually be allowed to bring no more than \$100 more than your transportation costs on a short-term release. If you cannot afford transportation, your release may be postponed until you have the money. If you leave on short-term release, you must pay for the entire trip. In exceptional cases, the facility may grant you an advance to cover the costs of the trip.<sup>30</sup>

You will receive a photo identification card to carry during your temporary release. This card must be with you at all times when you are out of the facility.<sup>31</sup> You will also be required to sign a “Memorandum of Agreement” before you leave. It lists the rules and regulations that you must follow while on temporary release. It also includes any special conditions that apply specifically to you.<sup>32</sup> You will not be allowed to return to the facility with any item that you did not take out with you.<sup>33</sup> The law requires that you be supervised by a parole officer during your short-term temporary release.<sup>34</sup>

## 3. Continuous Temporary Release Programs

There are four different types of continuous temporary release programs. These programs allow incarcerated people to leave prison grounds for up to fourteen hours a day on a continuous basis. They are granted to let incarcerated people work, volunteer for community service, get educational or vocational training, or attend an industrial training leave program. If the Central Office approves you for any long-term temporary release program, that approval also implies that you are approved for all other temporary release programs. However, this implied approval is at the discretion of the TRC and the facility superintendent. There are no out-of-state continuous release programs.<sup>35</sup> Not every

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<sup>26</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(c)(2)(iv)(a)–(b) (2023).

<sup>27</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(d)(1), (9) (2023).

<sup>28</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(d)(7)–(8) (2023). See Subsection D(2)(c) of this Chapter for more information on situations when Central Office approval is required.

<sup>29</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.2(a)(2) (2023).

<sup>30</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.2(a)(6) (2023).

<sup>31</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.2(a)(7)(i) (2023).

<sup>32</sup> For a copy of a typical Memorandum of Agreement, see N.Y. COMP. CODES R. & REGS. TIT. 7, § 1902.1 (2023).

<sup>33</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.2(a)(7)(ii) (2023).

<sup>34</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.2(b)(2)(i) (2023).

<sup>35</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.1 (2023).

institution offers each release program, and where programs are offered, the number of available spots may be limited. You will need to check this at your facility.

(a) Work Release

The work release program allows an eligible incarcerated person to leave a facility for up to fourteen hours per day to work, get on-the-job training, or do any activity that will make employment possible, like shopping for work clothes. One of the purposes of work release is to make it possible for you to save money before your release on parole, in the hope that this will make your return to the community easier.

Work release is by far the most popular temporary release program. This popularity is shown in both the number of applications and the number of incarcerated people who are approved. In 2020 (the most recent data), there were 15,516 applications for work release and, of all 930 temporary release applications that were approved, 862 were approved for work release.<sup>36</sup> To participate in this program, you must be physically, mentally, and emotionally capable of finding and keeping a steady job. Incarcerated people are also expected to find their own employment<sup>37</sup> and satisfy the other temporary release eligibility requirements outlined below in Part C.<sup>38</sup>

(b) Educational Leave

The educational leave program allows incarcerated people to leave a facility for up to fourteen hours on any day to attend school or vocational training. Before you can apply for an academic college release program in New York City, Long Island, Westchester, or Rockland County, you must have completed six semester hours of college-level study with a passing grade. You must also have applied to a college within commuting distance of a participating facility. However, you do not have to complete six credit hours of college-level study to participate in an educational release program from an upstate correctional facility or in a vocational training program upstate or in the New York metropolitan area. For either program, you must submit your temporary release application to the facility TRC by July for the fall semester, November for the spring semester, and April for the summer semester.<sup>39</sup>

Educational leave is one of the rarest of the temporary release programs. In 2020, for example, only six incarcerated people applied, and no one was approved.<sup>40</sup> This should not discourage you from applying if you are qualified, but you should be aware that it may be difficult to get.

If you are approved to participate in an educational release program and are transferred to a correctional facility in New York City to take part in such a program, but your application for admission is rejected by the college, you will be considered approved for the work release program as long as you are physically capable of keeping a job.<sup>41</sup>

(c) Community Service

As described in Subsection B(1)(b) above, the community service program allows incarcerated people to leave the facility for up to fourteen hours a day in order to participate in religious services, athletic events, volunteer work, or cultural events not offered at the facility. For example, through the

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<sup>36</sup> NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2020 ANNUAL REPORT (2020), <https://doccs.ny.gov/system/files/documents/2021/04/temporary-release-annual-report-2020.pdf> (last visited Apr. 10, 2024).

<sup>37</sup> See N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.2(d)(2) (2023) (discussing steps incarcerated people must take to search for a job once granted work release, and the support a correction counselor or temporary release parole officer must provide).

<sup>38</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.1(a) (2023).

<sup>39</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.1(b) (2023).

<sup>40</sup> NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2020 ANNUAL REPORT (2020), <https://doccs.ny.gov/system/files/documents/2021/04/temporary-release-annual-report-2020.pdf> (last visited Apr. 10, 2024).

<sup>41</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.1(b)(2) (2023).

Community Service Leave available at some facilities, incarcerated people can commute to the surrounding areas and work with community organizations on projects like arts festivals and the Special Olympics.<sup>42</sup> The advantage of participating in the continuous community services program is that once accepted, you will not have to re-apply in order to get released. As long as your disciplinary record remains the same, you will be able to leave your facility for up to fourteen hours a day, week after week. The short-term program has fewer benefits (for example, you can only leave the facility for a maximum of seven days at a time before re-applying for temporary release privileges). But, as discussed in Part C below, it has less strict requirements.<sup>43</sup> The short-term version of this program is almost never used. The most recent statistics, from 2020, show that not a single incarcerated person applied for the short-term program, but 30 incarcerated people applied for the continuous program (but no one was approved).<sup>44</sup>

(d) Industrial Training Leave

This program allows an eligible incarcerated person to leave the facility for up to fourteen hours in any day to participate in an industrial training program. An industrial training program assigns a federal, state, county, or local government employee who is not a corrections officer to supervise an incarcerated person and help them perform a job.<sup>45</sup> You must have either a high school diploma or a GED to qualify for this program.<sup>46</sup>

Currently, three locations provide industrial training programs: Hudson Correctional Facility, Fishkill Correctional Facility, and Rochester Correctional Facility.<sup>47</sup> At the Hudson Correctional Facility, incarcerated people participating in this program work at the DOCCS warehouses located in Menands.<sup>48</sup> Incarcerated people accepted into this program will work and learn how to take inventory, complete bills of lading, operate forklifts, and repair furniture. Others will work in the office learning business procedures.<sup>49</sup> This program allows incarcerated people to develop good work habits, acquire job skills, and become familiar with the distribution industry, which can be of great help after release from prison.<sup>50</sup>

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<sup>42</sup> N.Y. STATE DEPT. OF CORR. & CMTY. SUPERVISION, TEMPORARY RELEASE PROGRAM: 2018 ANNUAL REPORT 7 (2019), *available at* <https://doocs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2018.pdf> (last visited Oct. 7, 2023).

<sup>43</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.1(c) (2023) (describing stricter requirement for participating in the continuous version of the program).

<sup>44</sup> NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, TEMPORARY RELEASE PROGRAM: 2020 ANNUAL REPORT (2020), <https://doocs.ny.gov/system/files/documents/2021/04/temporary-release-annual-report-2020.pdf> (last visited Apr. 10, 2024).

<sup>45</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.1(d) (2023).

<sup>46</sup> N.Y. STATE DEPT. OF CORR. & CMTY. SUPERVISION, INDUSTRIAL TRAINING PROGRAM, *available at* <https://doocs.ny.gov/industrial-training-program> (last visited Oct. 7, 2023).

<sup>47</sup> N.Y. STATE DEPT. OF CORR. & CMTY. SUPERVISION, TEMPORARY RELEASE PROGRAM: 2020 ANNUAL REPORT 3 (2021), *available at* <https://doocs.ny.gov/system/files/documents/2021/04/temporary-release-annual-report-2020.pdf> (last visited Mar. 28, 2024).

<sup>48</sup> N.Y. STATE DEPT. OF CORR. & CMTY. SUPERVISION, INDUSTRIAL TRAINING PROGRAM, *available at* <https://doocs.ny.gov/industrial-training-program> (last visited Oct. 7, 2023); *see also* N.Y. State, *About Us*, Corcraft Products, *available at* <https://corcraft.ny.gov/about-us> (last visited Oct. 7, 2023).

<sup>49</sup> N.Y. STATE DEPT. OF CORR. & CMTY. SUPERVISION, TEMPORARY RELEASE PROGRAM: 2018 ANNUAL REPORT 7 (2019), *available at* <https://doocs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2018.pdf> (last visited Oct. 7, 2023).

<sup>50</sup> N.Y. STATE DEPT. OF CORR. & CMTY. SUPERVISION, TEMPORARY RELEASE PROGRAM: 2013 ANNUAL REPORT 8 (2014), *available at* <https://doocs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2013.pdf> (last visited Oct. 7, 2023).

#### 4. Continuous Temporary Release Procedures

In order to qualify for a continuous temporary release, you must first apply and be approved at the facility level. If you are approved, you may be transferred to a different correctional facility that has the temporary release program you applied to. When you arrive at the new facility, you will be interviewed by a corrections counselor and a temporary release parole officer. You will participate in an orientation program that will introduce you to the facility and to the program.<sup>51</sup>

If you have no money when you arrive at the program facility, prison administrators may give you part of your salary in advance. You can use the advanced money to cover the costs of your job search, tuition or related expenses, transportation costs for a weekend furlough, or an emergency leave of absence. You must repay the advanced money as soon as possible. Incarcerated people in a work release program will earn money. All the money you make while you are in a continuous temporary release program must be given to the facility processing officer to be deposited into your account. If you are in a work or educational release program, you must pay for all expenses related to participation in that program. If you do not have money or other educational funds (like a scholarship), you will not be allowed to enroll in college.<sup>52</sup>

Just as with short-term temporary release programs, you must have a photo identification card that you carry at all times and a signed “Memorandum of Agreement.”<sup>53</sup>

There are many restrictions on the types of jobs you may take. If you are accepted into a work release program, the facility will help you determine what job you may accept. If necessary, you may be granted an eight-hour, non-continuous job search furlough. You may be removed from the program if you have not found employment within six weeks after orientation and the TRC decides you are unwilling or unable to secure a job.<sup>54</sup>

#### 5. Family Reunion Program

If you do not qualify for either the leave of absence for funeral/deathbed visits or the family-ties furlough program, you may still have another chance to visit your family. The Family Reunion Program allows some incarcerated people and their families to meet privately for an extended period of time.<sup>55</sup> This program has nothing to do with the temporary release program. Instead, the Family Reunion Program is part of visitation. It is only available if you are *not* eligible for the temporary release program.<sup>56</sup> You may apply if your location offers the program.<sup>57</sup> Twenty-three locations currently offer the program: Adirondack, Albion, Attica, Auburn, Bedford Hills, Clinton, Collins, Eastern, Elmira, Fishkill, Great Meadow, Green Haven, Otisville, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Washington, Wende, Woodbourne, and Wyoming.<sup>58</sup>

The rules state that to be eligible, you:

- (1) Must have been in the department’s custody for at least six months and must have lived for at least thirty days at the facility that offers the program;<sup>59</sup> and

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<sup>51</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.2(b)(2) (2023).

<sup>52</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.2(f)(1)(ii) (2023) (describing the maximum amount of money that may be advanced for participants in the educational release program).

<sup>53</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.2(c)(8) (2023).

<sup>54</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1903.2(d)(2)(vi) (2023).

<sup>55</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 220.1 (2023).

<sup>56</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 220.4(b)(1) (2023).

<sup>57</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 220.2 (2023).

<sup>58</sup> N.Y. STATE DEPT. OF CORR. & CMTY. SUPERVISION, FAMILY REUNION PROGRAM, *available at* <https://doccs.ny.gov/family-reunion-program> (last visited Oct. 7, 2023).

<sup>59</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 220.4(a)(1) (2023). If you already successfully participated in the Family Reunion Program at one facility and are transferred to another facility, you can apply immediately without waiting for the thirty days. N.Y. COMP. CODES R. & REGS. tit. 7, § 220.4(a)(1)(ii) (2023).



- (2) Must have shown good behavior and have not recently had any major bad behavior problems or a long history of bad behavior.<sup>60</sup>

You must also maintain good behavior while applying and visiting.<sup>61</sup> Further, you are not eligible for the Family Reunion Program if you:

- (1) Are eligible for the Temporary Release Program (unless your application for temporary release has been denied);
- (2) Require more security than allowed at the program site;
- (3) Are assigned to special housing for bad behavior; or
- (4) Have violated the Family Reunion Program rules within six months from the date of the bad behavior hearing finding.<sup>62</sup>

Applicants who have violated Family Reunion Program rules in the past must be approved and reviewed by the Central Office.<sup>63</sup> For more information about which family members may participate in the program, the procedures for applying, and the instructions for visiting, see N.Y. Comp. Codes R. & Regs. tit. 7, § 220.

### C. Eligibility Requirements for Temporary Release Programs

If you were *ever* convicted of any of the following offenses, you are **ineligible** for temporary release:

- (1) Escape—first, second, or third degree;
- (2) Absconding—first or second degree; and
- (3) Absconding from furlough or from a community treatment facility.<sup>64</sup>

If you are *currently* serving a sentence for one of these crimes, you are **ineligible** for temporary release:

- (1) Criminally negligent homicide;
- (2) Aggravated criminally negligent homicide
- (3) Vehicular manslaughter—first or second-degree;
- (4) Manslaughter—first or second degree;
- (5) Aggravated manslaughter—first or second degree;
- (6) Murder—first or second degree;
- (7) Aggravated murder;
- (8) Abortion—first or second degree;
- (9) Self-abortion—first or second degree;
- (10) Issuing abortifacient articles;
- (11) Sexual misconduct;
- (12) Rape—first, second, or third-degree;
- (13) Criminal sexual act—first, second, or third degree;
- (14) Forcible touching;
- (15) Persistent sexual abuse;
- (16) Sexual abuse—first, second, or third degree;
- (17) Aggravated sexual abuse—first, second, third, or fourth degree;
- (18) Course of sexual conduct against a child—first or second degree;
- (19) Female genital mutilation;

<sup>60</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 220.4(a)(2) (2023).

<sup>61</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 220.4(a)(2) (2023).

<sup>62</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 220.4(b)(1)–(3), (7) (2023). The most serious violations (Tier III) will prevent you from participating for one year, rather than six months. N.Y. COMP. CODES R. & REGS. tit. 7, § 220.4(b)(7) (2023).

<sup>63</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 220.4(b)(7) (2023).

<sup>64</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(2)(i) (2023). “Absconding” refers to failing to report to your parole officer or moving without informing your parole officer.

- (20) Facilitating a sex offense with a controlled substance;
- (21) Sexually motivated felony;
- (22) Predatory sexual assault;
- (23) Predatory sexual assault also against a child;
- (24) Aggravated harassment of an employee by an inmate;
- (25) Incest—first, second, or third degree;
- (26) Use of a child in a sexual performance;
- (27) Promoting or possessing an obscene sexual performance by a child;
- (28) Promoting or possessing a sexual performance by a child;
- (29) Attempting to get or providing support for an act of terrorism—first or second degree;
- (30) Making a terrorism threat;
- (31) Committing an act of terrorism;
- (32) Hindering prosecution of terrorism—first or second degree;
- (33) Criminal possession of a chemical weapon or biological weapon—first, second, or third-degree;
- (34) Criminal use of a chemical weapon or biological weapon—first, second, or third degree<sup>65</sup>

Also, you are **ineligible** for temporary release if (1) your conviction was for a crime that involved either the use or threatened use of a deadly weapon or a dangerous instrument or (2) if the crime involved causing someone serious physical injury.<sup>66</sup> However, if you can show the Temporary Release Committee Chairperson a document from the court or Office of the District Attorney that the crime you were convicted of did not include: being armed with, using, or threatening to use a deadly weapon or dangerous instrument, or causing someone a serious physical injury as defined in Penal Law, you will be eligible for temporary release.<sup>67</sup>

You are eligible to participate in temporary release programs (short-term or continuous) only if you are within twenty-four months of your next scheduled appearance before the parole board.<sup>68</sup> You must be within twenty-four months of your parole date (except for leaves of absence).<sup>69</sup> If you are serving an indeterminate sentence, you will be considered eligible for temporary release if you have served the minimum period of imprisonment set by either the court or the parole board.<sup>70</sup>

You will not be eligible for a temporary release program if:

- (1) You have an outstanding warrant;<sup>71</sup>
- (2) You have been committed to a local, state, out-of-state, or federal jurisdiction currently or in the past;<sup>72</sup>

<sup>65</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(2)(ii) (2023).

<sup>66</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(1)(iii) (2023).

<sup>67</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(1)(iv) (2023).

<sup>68</sup> N.Y. CORRECT. LAW § 851(2) (McKinney 2014).

<sup>69</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(1)(i) (2023).

<sup>70</sup> N.Y. CORRECT. LAW § 851(2) (McKinney 2014).

<sup>71</sup> Any of the following warrants (from any jurisdiction) will make you ineligible: (1) family court warrant (except alimony, child support, or paternity); (2) out-of-state or federal criminal detainer; (3) felony arrest warrant for a crime which is not barred by the statute of limitations, as provided by N.Y. CRIM. PROC. LAW, § 30.10; (4) misdemeanor arrest warrant for a crime committed on or after your current conviction, and which is not barred by the statute of limitations, as provided by N.Y. CRIM. PROC. LAW, § 30.10; (5) bench warrant; (6) probation violation warrant in or out of state, or out-of-state parole warrant; (7) immigration warrant; (8) military warrant; (9) securing order; or (10) if there is an indication of an active warrant and the warrant has not been filed at the facility, the interviewer must contact the issuing agency to determine the status of the warrant. If no response is received within 30 days, the warrant will be considered inactive, and the prisoner will not be barred from temporary release. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(7)(i)(a)–(j) (2023).

<sup>72</sup> You will be eligible, however, if the sentencing court has indicated in writing that there is no objection to your being in a temporary release program. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(7)(ii)(a)–(c) (2023).

- (3) You have an outstanding charge;<sup>73</sup>
- (4) You are the subject of a Bureau of Immigration and Customs Enforcement (ICE)<sup>74</sup> deportation proceeding;<sup>75</sup>
- (5) You were eligible for the shock incarceration program and either chose not to participate or failed to complete it;<sup>76</sup> or
- (6) In the eight weeks before your application, you engaged in particularly bad behavior.<sup>77</sup>

Repeat parole violators (“RPVs”) must serve at least six months after their most recent return before they can apply for temporary release.<sup>78</sup>

Each incarcerated person receives a certain number of points depending on his criminal history and institutional behavior. You must meet the minimum number of points needed for any program you want to do. The scoring system will be explained in Subsection D(2)(a) below. You will not have to worry about how many points you have if you were only convicted as a youthful offender. Youthful offenders are treated as if they have scored the right number of points that each program needs. Youthful offenders will simply appear before the TRC. They will then make the decision.<sup>79</sup>

Temporary release is a privilege. Approval can be taken away at any time. To remain approved, you must show continuing good behavior from the time you are approved for temporary release until the time you begin the period of temporary release. Conditional approval will be taken away if:

- (1) After the conditional approval, you are found guilty at a disciplinary or superintendent’s hearing;
- (2) You do not do well in your program; or
- (3) If the TRC finds out something very negative about you.<sup>80</sup>

If your conditional approval has been taken away, you may re-apply right away unless you have recently shown particularly bad behavior.<sup>81</sup> In that case, you may not re-apply for eight weeks.<sup>82</sup> If your eligibility for temporary release changes, your new application will be processed as if it were the first one you had submitted.<sup>83</sup>

If you are approved for any continuous temporary release program, you are technically also approved for all other temporary release programs. However, this approval is at the will of the TRC and facility superintendent, so they have the power to approve or disapprove as they choose.<sup>84</sup> If you

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<sup>73</sup> Your interviewer must write to the correct court to make sure that the charge is still outstanding. If the court does not reply within thirty days, it will be assumed that the charge is no longer outstanding. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(7)(iii)(c) (2023).

<sup>74</sup> ICE is the main investigative arm of the U.S. Department of Homeland Security and the second largest investigative agency in the federal government. It is mainly responsible for identifying, investigating, and getting rid of weaknesses having to do with the nation’s border, economic, transportation, and infrastructure security. See the *JLM Supplement on Immigration and Consular Access* for more information on immigration agencies.

<sup>75</sup> You will not be considered for temporary release if ICE shows: (1) that deportation proceedings are underway; (2) a show cause order for deportation has been issued; and (3) there is an actual ICE warrant on file. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(7)(iii)(d)(3) (2023). Your prison facility *must* write to ICE asking it about your alien status. If ICE does not respond within thirty days, your facility will assume that ICE does not plan to deport you. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(7)(iii)(d)(2) (2023).

<sup>76</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(6) (2023).

<sup>77</sup> Serious bad behavior problems include all those that make you lose good-time credit, lead to being placed in special housing unit (“SHU”), or lead to being placed in keep lock for more than 30 days. N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(8) (2023).

<sup>78</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(10)(iii) (2023).

<sup>79</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(12) (2023).

<sup>80</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(d)(1)–(3) (2023).

<sup>81</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(d)(4) (2023).

<sup>82</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(8) (2023).

<sup>83</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(d)(6) (2023).

<sup>84</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(d)(9) (2023).

have been approved for one continuous program (like a continuous educational release program) and you wish to do a different program, there is no formal way to change programs. Once you have been approved for one continuous release program, you can ask the TRC and/or superintendent to change to a different program, and you are able to do so only if both agree.<sup>85</sup>

## **D. How to Apply for Temporary Release Programs**

### **1. Application Procedures**

To participate in a temporary release program, ask your counselor or parole officer for information about the types of programs your facility offers. Also, ask for a form called the “Notification to the TRC.” When you complete this form, you must indicate the type of program you are applying to and explain your reasons for applying. If you are physically unable to submit your application, the facility health services director or another staff member may submit it for you.<sup>86</sup> You should be as specific as possible in explaining what type of release you are seeking and why that particular program fits your needs and qualifications. You should apply as early as possible because the application process takes a while.

If your application is denied, you must wait at least eight weeks from the date it was turned down before re-applying for the same type of release.<sup>87</sup> The eight-week waiting period does not apply to leaves of absence.<sup>88</sup>

### **2. How the Department Handles Applications**

#### **(a) The Point System**

If you are not a youthful offender (the point system does not apply to youthful offenders),<sup>89</sup> you must have a certain number of points to qualify for a particular program, even after you have met all the other requirements. The point system was developed to provide a standard way to measure your willingness to comply with the rules of temporary release. The system rewards good behavior in prison and in prison programs. It is also partly based on your criminal history and the crime for which you have been convicted. Still, if you have a good disciplinary record in prison, or if you are granted a temporary release and follow the rules, your chances of getting a release in the future are better.

After you have filled out your application, it will go to an interviewer. The interviewer will score the application. There are eleven items in the point system scoring. Six are based on your criminal history, and five are based on your behavior while in prison.<sup>90</sup> At the end of Part D(2)(a) of this Chapter, there is a chart that summarizes this point system and the points that may be gained or lost. You can use this chart to easily add up your score. However, it is important to read through these more detailed explanations first because the chart does not include every detail. Pay special attention to the time periods for each section, as some items extend as far back as ten years while others only apply to things that have happened in the last year. The more points you have, the better.

The items in the point system are scored as follows:

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<sup>85</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(d)(9) (2023).

<sup>86</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(a) (2023).

<sup>87</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(11) (2023).

<sup>88</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(11) (2023).

<sup>89</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(c)(12) (2023).

<sup>90</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e) (2023).

(i) *Criminal History*<sup>91</sup>

a. Previous Sentences<sup>92</sup>

You will get one point (+1) if, in the ten years before you started your current sentence, you were not in prison at all because of a conviction. You will get zero points (0) if, in the last ten years, you were in prison for only misdemeanor or youthful offender convictions. You will lose one point (-1) if, in the last ten years, you were in prison because of a felony conviction. If you were sentenced to time served, this counts as incarceration after adjudication.

b. Number of Felony Convictions<sup>93</sup>

Felony convictions from before or during your current sentence will take away points, making it harder for your application to be approved. If the sentence you are serving is your only felony conviction in the last ten years, you will get two points (+2). If, during the last ten years, you were convicted of only one other felony, you will get zero points (0). If, on top of your current conviction and that one other conviction, you have also been arrested for any other felonies, and those arrests have ended in conviction, even if you were convicted of these other felonies while you were serving your current sentence, you will lose two points (-2). If you have never previously been convicted of a felony and were convicted of your only felony during your current prison sentence, you will get zero points (0). If you were convicted of two or more felonies during your current prison sentence, you will lose two points (-2).

c. Number of Misdemeanor Convictions<sup>94</sup>

If you were convicted of a misdemeanor before or during your current prison sentence, that may also reduce your points, making it harder for your application to be approved. If you were not convicted of a misdemeanor in the last ten years, you will get one point (+1). If you were convicted of three or fewer than three misdemeanors in the last ten years, including the one you are serving time for now, you will get zero points (0). If you were convicted of four or more misdemeanors in the last ten years, including the one you are serving time for now, you will lose one point (-1). If you were convicted of your first misdemeanor during the sentence you are currently serving, you will get zero points (0).

d. Outstanding Warrants<sup>95</sup>

Outstanding warrants can also count against your application. You will get two points (+2) if you have no outstanding warrants. You will get zero points (0) if you have one or more outstanding criminal warrants. A criminal warrant does not include alimony, child support, or a paternity warrant. If you can clearly show that the outstanding warrant against you was cleared because there was no evidence or because there was a mistake, then that warrant will not count against you.

e. Parole or Probation Violations<sup>96</sup>

If in the last ten years, or after you started your current prison sentence, your parole or probation was never revoked because of a technical violation or because you were arrested, you failed to report to your Parole Officer, or you moved without telling your Parole Officer (“abscondance”), you will get two points (+2). If your parole or probation was revoked one or more times, you will get zero points (0).

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<sup>91</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(1) (2023).

<sup>92</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(1)(i) (2023).

<sup>93</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(1)(ii) (2023).

<sup>94</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(1)(iii) (2023).

<sup>95</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(1)(iv) (2023).

<sup>96</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(1)(v) (2023).

f. Nature of Prior, Current, and Subsequent Convictions<sup>97</sup>

This category is about the kind of crimes you committed in the last ten years. The more serious the crime, the more points you will lose. If you are not in prison for any of the crimes listed below, you will get zero points (0). In this point system, attempted crimes are counted the same as completed crimes. If you have been convicted of more than one of these crimes, you will be scored according to the most serious of them. If you also were convicted as a youthful offender, that conviction will not be included in the point score.

You will lose six points (-6) if you were convicted of any of the following crimes in the last ten years: murder—first or second degree; kidnapping—first or second degree; rape—first, second, or third degree; sodomy—first, second, or third degree; sexual abuse—first degree; incest; use of a child in a sexual performance; or promoting a sexual performance by a child (including an obscene sexual performance).

You will lose four points (-4) if you were convicted of any of the following in the last ten years: assault—first degree; manslaughter—first or second degree; arson—first or second degree; burglary—first degree; robbery—first degree; sexual misconduct; sexual abuse—second or third degree; or endangering the welfare of a child.

You will lose two points (-2) if in the last ten years you were convicted of any of the following: criminal trespass—first degree; robbery—second or third degree; criminally negligent homicide; assault—second or third degree; possession of firearms and other dangerous weapons; menacing; reckless endangerment—first degree; unlawful imprisonment; coercion—first degree; riot—first degree; arson—third or fourth degree; vehicular assault; or vehicular manslaughter.

If you have been convicted of more than one of these crimes during the last ten years, then you will lose points only for the most serious one. So, if you have been convicted of kidnapping (-6) and vehicular assault (-2), you will lose six points (-6).

(ii) *Institutional Behavior*<sup>98</sup>

Participation months are used to add up the score that describes your behavior in prison. A participation month is a thirty-day period of regular participation. The participation month only counts if you did it within the last two years before you apply for temporary release. Regular participation means that you are taking part in the activity at least once either in the morning, afternoon, or evening, for five days per week and for four weeks per month. For an activity to count towards regular participation, it must be either a program or a work assignment. If you are in involuntary protective custody (“IPC”), and you have no chance to do a work assignment or participate in any programs, you will get one point (+1) for every six months you spent in IPC during the last two years before you apply for temporary release.

a. Program Participation I<sup>99</sup>

In this category, you can get as many as sixteen points (+16), but no more than sixteen points, for participating in programs and/or work assignments. For each three-month period, you can get one point (+1) for doing a work assignment and one point (+1) for doing a program, for a total of two points (+2) for the three months.

b. Program Participation II<sup>100</sup>

In this category, you can get only one point (+1). You can only get this extra point if you have been in prison for longer than twenty-four months. You can get this extra point if you did a program or a

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<sup>97</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(1)(vi) (2023).

<sup>98</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(2)(i)(a) (2023).

<sup>99</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(2)(i)(b) (2023).

<sup>100</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(2)(ii) (2023).

work assignment for eight months in the twenty-five to thirty-six months leading up to your application for temporary release. In other words, you get up to sixteen points for the programs and/or work assignments you did in the two years before applying for temporary release (Program Participation I). You only get one extra point for anything you did before those two years (Program Participation II).

c. Discipline I<sup>101</sup>

In this category, the longer you go with little or no disciplinary proceedings, the more points you get and the more likely it is that your application will be approved. You can get no more than four points (+4) in this category. The disciplinary proceeding decisions that count against you are if you lose your privileges for fourteen or more days or if you are put into special housing or “keeplock.” Room and dorm restrictions count as “keeplock.” If you did not have any of these disciplinary proceeding decisions in the last three months before applying for temporary release, you will get one point (+1). If you have had one or none of these disciplinary proceeding decisions in the last six months, you will get one point (+1). If you have had two or fewer decisions in the last nine months, you will get one point (+1). If you have had three or fewer decisions in the last twelve months, you will get one point (+1).

d. Discipline II<sup>102</sup>

In this category, you can only get one point. You can get this extra point only if you have been in prison for longer than twenty-four months. If you had three or fewer disciplinary proceedings in the twelve to twenty-four months before your application, you get one point (+1). The types of disciplinary proceedings that count are the same as above.

e. Temporary Release Record<sup>103</sup>

This section only applies if you were previously on temporary release. If you were convicted or arrested for a crime while on temporary release in the past year, you will lose six points (-6). If you were removed from work release or educational leave for disciplinary reasons other than re-arrest in the last year, you will lose three points (-3). If you were convicted or arrested while on temporary release in the twelve to twenty-four months before your application, you will lose three points (-3). If you returned late, were under the influence of drugs or alcohol, or broke any temporary release program rules in the last six months, you will lose two points (-2). If you successfully finished your last temporary release within the last year, you will gain two points (+2). If your two most recent releases in the last year were successful, you will get four points (+4).

You will get zero points (0) if (a) none of the above applies to you; (b) your last release was over a year ago, or if it was an escorted or supervised group activity; or (c) you have had your parole revoked since your last successful participation in temporary release.

Anyone found to be an absconder (failing to report or moving without telling your Parole Officer) will not be approved for temporary release.

(iii) *Total Score*<sup>104</sup>

After you have finished scoring, you should add twenty-six points (+26) to your score to make sure that your score is not negative.<sup>105</sup> You need thirty points (30) to participate in a short-term temporary

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<sup>101</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(2)(iii) (2023).

<sup>102</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(2)(iv) (2023).

<sup>103</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(2)(v) (2023).

<sup>104</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(3) (2023).

<sup>105</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(3)(i) (2023).

release program.<sup>106</sup> You need thirty-two points (32) to participate in a continuous program.<sup>107</sup> So, while you could participate for one day in a community service program with a score of thirty, a score of thirty-two lets you participate on a daily basis.<sup>108</sup>

However, having the right number of points is only a requirement. Just because you have scored at least thirty points (30) does not mean that you automatically get the release; it only means that you can meet with the interviewer.<sup>109</sup>

#### a. Point System Chart

As you go through this chart, write the points that apply to you in the right-hand column. Remember to refer back to the previous sections if you do not understand the short-hand explanations included in the chart. This chart is meant to make calculating your own score faster and easier. It is not supposed to replace the in-depth explanations in Subsection D(2)(a)(iv) and Subsection D(2)(a)(v) of this Chapter.

#### (iv) *Criminal History*<sup>110</sup>

	Possible Points available	Your Point subtotal per each category
<b>Previous Sentences</b> (last ten years only)		
No prior incarceration due to conviction	+1	
Prior incarceration due to misdemeanor or youthful offense only	0	
Incarcerated due to a felony conviction	-1	
<b>Number of Felony Convictions</b> (last ten years only)		
Current sentence is your only felony conviction	+2	
First felony conviction was for act committed during your current incarceration	0	
One previous felony conviction	0	
Two or more felony convictions	-2	
<b>Number of Misdemeanor Convictions</b> (last ten years only)		
No misdemeanor convictions	+1	
Three or fewer misdemeanor convictions, including your current sentence	0	
First misdemeanor conviction was for an act committed during your current incarceration	0	
Four or more misdemeanor convictions	-1	
<b>Outstanding Warrants</b>		
No outstanding warrants	+2	
One or more outstanding warrants	0	
<b>Previous Arrests</b> (last ten years only)		
You have never had parole or probation revoked due to re-arrest, absconding, or violating program rules	+2	

<sup>106</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1901.1(a) (2023).

<sup>107</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.3(b), (d)–(f) (2023).

<sup>108</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.3(b) (2023).

<sup>109</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(f) (2023).

<sup>110</sup> The following point computations for Criminal History can be found at: N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(1) (2023).



You have had parole or probation revoked one or more times	0	
<b>Nature of Convictions</b> (last ten years only; apply only the most severe)		
Convicted of murder (1 <sup>st</sup> or 2 <sup>nd</sup> degree), kidnapping (1 <sup>st</sup> or 2 <sup>nd</sup> degree), rape (1 <sup>st</sup> , 2 <sup>nd</sup> , or 3 <sup>rd</sup> degree), sodomy (1 <sup>st</sup> , 2 <sup>nd</sup> , or 3 <sup>rd</sup> degree), sexual abuse (1 <sup>st</sup> degree), incest, use of a child in a sexual performance, or promoting a sexual performance by a child (including an obscene sexual performance)	-6	
Convicted of assault (1 <sup>st</sup> degree), manslaughter (1 <sup>st</sup> or 2 <sup>nd</sup> degree), arson (1 <sup>st</sup> or 2 <sup>nd</sup> degree), burglary (1 <sup>st</sup> degree), robbery (1 <sup>st</sup> degree), sexual misconduct or sexual abuse (2 <sup>nd</sup> or 3 <sup>rd</sup> degree), or endangering the welfare of a child	-4	
Convicted of criminal trespass (1 <sup>st</sup> degree), robbery (2 <sup>nd</sup> or 3 <sup>rd</sup> degree), criminally negligent homicide, assault (2 <sup>nd</sup> or 3 <sup>rd</sup> degree), possession of firearms and other dangerous weapons, menacing, reckless endangerment (1 <sup>st</sup> degree), unlawful imprisonment, coercion (1 <sup>st</sup> degree), riot (1 <sup>st</sup> degree), arson (3 <sup>rd</sup> or 4 <sup>th</sup> degree), vehicular assault, or vehicular manslaughter	-2	
WRITE YOUR TOTAL HERE FOR (i) Criminal History:		

(v) *Institutional Behavior*<sup>111</sup>

<b>Program Participation I</b> (last two years only)	<b>Points Available</b>	<b>Your Points</b>
Each three-month period of participation in a work assignment (max. of +2)	+1	
Each three-month period of participation in a program (max. of +2)	+1	
Each six months in involuntary protective custody (IPC) in which you have not had the chance to participate in a program or work assignment	+1	
<b>Program Participation II</b>		
Eight months of participation in a program or work assignment in the twenty-five to thirty-six-month period prior to application	+1	
<b>Discipline I</b> (max. of +4)		
No disciplinary proceedings in the last three months	+1	
One or no disciplinary proceedings in the last six months	+1	
Two or fewer disciplinary proceedings in the last nine months	+1	
Three or fewer proceedings over the last twelve months	+1	
<b>Discipline II</b>		
Three or fewer disciplinary proceedings in the twelve to twenty-four months prior to application	+1	
<b>Temporary Release Record</b>		
Convicted or arrested for crime while on temporary release during the last year	-6	
Convicted or arrested for a crime while on temporary release during the thirteen to twenty-four-month period prior to application	-3	
Removed from work release or educational leave during the last year for other disciplinary reasons	-3	
Returned late or under the influence or violated any other temporary release rules within the last six months	-2	

<sup>111</sup> The following point computations for Institutional Behavior can be found at: N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(e)(2) (2023).

Successfully completed your most recent temporary release within the last year	+2	
Successfully completed your last two temporary releases within the last year	+4	
None of the above apply	0	
WRITE YOUR TOTAL HERE FOR (ii) Institutional Behavior:		
GRAND TOTAL after combining (i) Criminal History; (ii) Institutional Behavior; and an additional +26 points:		

Once you have added up the scores from both the Criminal History and Institutional Behavior sections of the chart, add another twenty-six points (+26) to determine your GRAND TOTAL score. Remember that short-release programs require thirty points (30), and continuous programs require a score of thirty-two points (32). Also, remember that no score alone guarantees that your application will be granted.

(b) Department Procedures for Considering Your Application

After scoring the application, the interviewer will conduct a preliminary review.<sup>112</sup> The interviewer will review the information in your application and determine if you are eligible based on your point score, your crime, and any other factors that were discussed in Part C above.<sup>113</sup> After the interview, you will have two work days to challenge the information used in the point score.<sup>114</sup> Once any challenges have been resolved, the interviewer will refer the scored application to the Temporary Release Committee (“TRC”) chairperson.<sup>115</sup> See Part E for more information on challenging scoring determinations.

The TRC chairperson will review your file and check to see if you have either low-point status or are included in a special review category.<sup>116</sup> If you are considered a low-point incarcerated person, you may be considered for release by the TRC when one of the following conditions applies:

- (1) You have been given community preparation open date status by the parole board, and central office approval has been obtained;
- (2) You are a graduate of the shock incarceration program;
- (3) You are a graduate of the CASAT annex program; or
- (4) You are a first-time felony offender who legally would have been eligible to get a sentence of probation instead of the sentence of imprisonment that you received.<sup>117</sup>

You will be notified of your official point score, the range into which it falls, and when you will appear before the TRC.<sup>118</sup> If you are in either the regular consideration or low-point range, the TRC will interview you and then decide whether or not to approve your application.<sup>119</sup>

If you receive a score of forty (40) or more, your application for furlough (temporary release) will automatically be forwarded to the superintendent (without a TRC recommendation) for review as long as:

- (1) You are not serving a sentence for a crime involving infliction of serious physical injury upon another, a sex offense involving forcible compulsion, or any other offense involving the use or threatened use of a deadly weapon;

<sup>112</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(g) (2023).

<sup>113</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(b)–(c) (2023).

<sup>114</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(i) (2023).

<sup>115</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(i) (2023).

<sup>116</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(j) (2023).

<sup>117</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(j)(1)(i)–(iv) (2023).

<sup>118</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(k) (2023).

<sup>119</sup> N.Y. COMP. CODES R. & REGS. tit. 7, §§ 1900.4(j)(3), (l) (2023).

- (2) You are not designated as a CMC (central monitoring case);
- (3) Yours is not a “low-O.D. case” (defined in Subsection D(2)(c) below); and
- (4) You are not in a special review category (see Subsection D(2)(c) below).<sup>120</sup>

Once your application has gone to the TRC and has been reviewed, the TRC will schedule a personal interview with you. After the committee members have met with you, they will approve or deny your application. At least two of the three committee members must support a decision to approve. In making its decision, the TRC must look at your score on the eleven items in the point system, your interview, and the other factors used to evaluate incarcerated people. These other factors include recommendations of the professional staff. The committee can also consider aspects of your record that are not addressed by the point system. These other aspects include the quality of your performance in programs or on work assignment. In addition, the TRC must consider what it sees as your ability to benefit from participating in temporary release against any risk to the community or program from your participation.<sup>121</sup>

All applications for temporary release submitted to the TRC will be forwarded to the superintendent for review. Each application will be accompanied by either:

- (1) A statement of reasons for its denial by the TRC; or
- (2) A memo setting out the proposed temporary release program, stating the bounds of confinement, and including any other relevant information.

If the superintendent rejects the application or rejects the specific program that the TRC approved, they must give reasons for doing so in writing. You will get a copy of the reasons. Another copy will go to the Central Office for immediate review by the Commissioner. You will not have to make any other appeals. The Commissioner will tell you whether he accepts the superintendent's decision.<sup>122</sup> If you are denied, see Part E below for legal remedies that may be available to you.

### (c) Applications that Require Central Office Approval

The Central Office must review and approve all applications for temporary release.<sup>123</sup> There are several categories that your application might fall under. Who exactly needs to approve your application depends on which category you fall under.

The first application category is the statutory review category, which requires approval of the Commissioner (or the Commissioner's representative). This category includes your application if you are serving time for:

- (1) Possession, use, or threatened use of a weapon;
- (2) A case resulting in prolonged physical injury, disability, or death of the victim; or
- (3) A sexual offense involving force.<sup>124</sup>

The Commissioner (or their representative) gives final approval for this category of applications.<sup>125</sup>

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<sup>120</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(j)(4) (2023).

<sup>121</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(l)(1)–(5) (2023).

<sup>122</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(m) (2023).

<sup>123</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(n) (2023).

<sup>124</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(n)(1) (2023).

<sup>125</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(n) (2023).

The second category of application is “central monitoring cases” (“CMCs”). Generally, your case will be a CMC if you were convicted of sophisticated or highly publicized criminal activity.<sup>126</sup> CMCs require the approval of the Commissioner (or the Commissioner’s representative).<sup>127</sup>

The third category is for low-open date (O.D.) and low probation eligible (P.E.) cases. These also require the approval of the Commissioner (or the Commissioner’s representative). Low-O.D. cases are those cases where you receive the lowest point score possible, but are given an O.D. (community preparation open date) status by the parole board.<sup>128</sup> Low P.E. cases are those in which you are classified as a “first felony offender” and would have been eligible to receive probation instead of the sentence you actually received.<sup>129</sup> If the parole board has given you O.D. or P.E. status, you will have a better chance of getting approval, even though your point score is the lowest possible.<sup>130</sup>

The fourth category of incarcerated people requiring Central Office approval is the Special Review category. Special Review is different because it does not actually require the approval of the Commissioner. Instead, the Director of Temporary Release will make the final decision.<sup>131</sup> The Special Review category includes incarcerated people who have:

- (1) Any convictions for arson;
- (2) Any convictions for sex-related felonies;
- (3) Any convictions for conspiracy, criminal facilitation, or criminal solicitation in a statutory case;
- (4) Three or more felony convictions (including any youthful offender adjudications);
- (5) Any parole or temporary release violations;
- (6) A history of mental instability;
- (7) Any kidnapping convictions; or
- (8) Victim(s) or bystander(s) who were physically injured as a result of the instant offense, and the instant offense doesn’t fall under the statutory review category discussed above.<sup>132</sup>

If you fall into any of these categories, your chances of being granted temporary release are much lower. In that case, your entire application must be reviewed by the Central Office and approved by the Commissioner (or their representative)<sup>133</sup> (except for some Special Review applications, which may only need final approval from the Director of Temporary Release or their representative).<sup>134</sup> In general, the more people who review your application, the less likely you are to receive approval.

## **E. What to Do if Your Temporary Release Application Is Denied or Revoked**

### **1. Denial of Temporary Release**

#### **(a) Appeals Within the Department**

You can appeal your point score if the interviewer disqualified you because he added up your point score incorrectly. The interviewer can also be disqualified if the information he used was wrong. You

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<sup>126</sup> See *Pugliese v. Nelson*, 617 F.2d 916, 918–919 (2d Cir. 1980) (discussing central monitoring cases); see also *In re Smith v. Goord*, 43 A.D.3d 1236, 1237, 843 N.Y.S.2d 468, 469 (3d Dept. 2007) (holding petitioner’s designation as CMC was not arbitrary or capricious based on the nature of his crimes because he was convicted of a robbery that involved a significant amount of cash).

<sup>127</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(n)(2) (2023).

<sup>128</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(j)(1)(i) (2023).

<sup>129</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(j)(1)(iv) (2023).

<sup>130</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(n)(3) (2023).

<sup>131</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(n)(1) (2023).

<sup>132</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(n)(4)(i)–(viii) (2023).

<sup>133</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(n)(1)–(3) (2023).

<sup>134</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(n)(4) (2023).

can also appeal the decision of the TRC or the decision of the Central Review Office. To appeal your point score or the TRC's decision, you must submit Form 4145 and any other relevant information to the director of central office temporary release programs. You must submit this within ten working days of the date that the notice of denial of your application was sent. The director must receive your completed appeal within thirty days of the denial. If your appeal application is made within the thirty-day limit, the chairperson will send your appeal package to the Central Office. The appeal package will include any information not available in the Central Office files.<sup>135</sup> The Central Office reviewer will notify you and the TRC of his findings.<sup>136</sup>

If you think the disapproval by the Central Review Office was unfair or unreasonable, you may appeal the decision. You can appeal by applying to the Director of the Central Office to review your case. You should only do this when the TRC accepted your application, but then the Central Office denied it. As explained in Subsection D(2)(b) ("Department Procedures for Considering Your Application") above, all denials by the superintendent must be referred directly to the Central Office for an automatic Commissioner review. You do not have to do anything in this case.<sup>137</sup>

If the Deputy Commissioner or the Commissioner denies your application at any point in the proceeding, your administrative remedies are exhausted, and you cannot appeal this decision.<sup>138</sup> If your case has been designated a "central monitoring case" ("CMC"), you may only appeal by using existing departmental policy. Central Office temporary release staff do not handle CMC appeals.<sup>139</sup>

You cannot re-apply for the same program until the appeals process on a prior application is complete. You may withdraw a pending appeal at any time.<sup>140</sup>

#### (b) Other Forms of Review if Your Application Is Denied

If your application is denied, you can appeal to the courts under Article 78 of the New York Civil Practice Law and Rules ("C.P.L.R."). For guidance on appealing, see *JLM*, Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules." However, New York courts have addressed this question often and now apply a test that makes it difficult for a claim to be successful. The Second Department has said that because participation in temporary release programs is a privilege and not a right, courts will only look at claims where either the temporary release committee violated a statutory requirement (such as failing to give you an interview if you have the right amount of points, or failing to inform you of the committee's decision), or if the committee's decision was affected by "irrationality, bordering on impropriety."<sup>141</sup> Because the TRC has such enormous discretionary power, it is very difficult to convince a court that its decision was irrational and unfair. The TRC only has to say that it thinks you might pose a threat to society. The TRC could also say that it does not think you will work hard. The court will accept the TRC's findings. If you have not yet participated in the temporary release program, you also do not have the right to challenge the legislature or executive's decision to make you ineligible for temporary release. The legislature or executive's decision is based upon the crime for which you were convicted.<sup>142</sup>

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<sup>135</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.4(m) (2023).

<sup>136</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.6 (2023).

<sup>137</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.6(a)(2), (c) (2023).

<sup>138</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.6(c) (2023).

<sup>139</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.6(e) (2023).

<sup>140</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1900.6(f) (2023).

<sup>141</sup> *Grant v. Temp. Release Comm.*, 209 A.D.2d 617, 617, 619 N.Y.S.2d 106, 106 (2d Dept. 1994) (citing *Young v. Temp. Release Comm.*, 122 A.D.2d 606, 505 N.Y.S.2d 279, 280 (4th Dept. 1986)).

<sup>142</sup> *See Lee v. Governor of N.Y.*, 87 F.3d 55, 59–60 (2d Cir. 1996) (finding no constitutional violation when the class of incarcerated people excluded from participation in programs based on their crime was expanded to include petitioners while they were incarcerated); *see also Romer v. Morgenthau*, 119 F. Supp. 2d 346, 358 (S.D.N.Y. 2000) (holding that incarcerated person did not have a liberty interest in participating in work release programs);

However, it is possible to win, as seen in *Lopez v. Coughlin*.<sup>143</sup> In that case, an HIV-positive incarcerated person applied for work release. The TRC approved the application because the facility doctor, who was familiar with the incarcerated person's condition, said his medical condition would not affect his ability to be on temporary release. The Central Office reversed and denied the application solely on the basis of the incarcerated person's condition. The Albany County Supreme Court held that this was completely irrational since the doctor had already given his approval for temporary release. The court said that the Central Office's findings "were based on generalizations and possibly inaccurate assumptions." The court ordered the TRC to reevaluate its decision.<sup>144</sup>

## 2. Revocation of Temporary Release

### (a) How Your Temporary Release Can Be Revoked

The superintendent or director of your correctional institution upon recommendation of the TRC, the Commissioner of the Department of Corrections and Community Supervision, or the chairman of the board of parole may suspend or revoke your temporary release.<sup>145</sup> This suspension or revocation can be made at any time if the Superintendent or Director has information that:

- (1) Your continued participation in the program is not in the interest of community safety *or* goes against your best interests; or
- (2) Based on your conduct, there is a substantial likelihood that you cannot successfully complete the temporary release program.<sup>146</sup>

Some factors that will be considered indicators that you are unsuited for temporary release include:

- (3) Arrests and/or convictions for crimes committed while participating in the program;
- (4) Absconding, or attempting to abscond, from the program;
- (5) Violations of departmental, institutional, or temporary release program rules;
- (6) Threats made by you against yourself or others;
- (7) Threats made against you that require protective custody;
- (8) Changes in your physical or mental status that result in your inability to successfully complete the program;
- (9) Poor attitude on your part as shown by a failure to participate successfully;
- (10) Your lack of motivation;
- (11) Significant change in employment or student status;
- (12) Not getting a job six weeks after orientation in a work release program;
- (13) Your refusal to repay the advance;
- (14) Your refusal to repay the weekly work release charge;
- (15) You have outstanding warrants, or your immigration status changes;
- (16) Your presence in the community places you at risk.<sup>147</sup>

Any employee of the Department of Corrections and Community Supervision who is assigned to the facility of your confinement and has firsthand knowledge of your unsatisfactory or worsening progress in the temporary release program can help remove you from the program. The employee who thinks you are not doing well in your program may file a written statement to the Chairperson of the

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*In re* Cody v. Pataki, 24 A.D.3d 1058, 1059, 805 N.Y.S.2d 726 (3d Dept. 2005) (holding that incarcerated people have no right to compel Commissioner of Correctional Services to provide temporary release program).

<sup>143</sup> *Lopez v. Coughlin*, 139 Misc. 2d 851, 529 N.Y.S.2d 247 (Sup. Ct. Albany County 1988); *see also* Flaherty v. Coughlin, 713 F.2d 10, 14 (2d Cir. 1983) (reversing dismissal of incarcerated person's claim because evidence suggested he may have been denied temporary release privileges in retaliation for filing a class action lawsuit challenging state prison policies).

<sup>144</sup> *Lopez v. Coughlin*, 139 Misc. 2d 851, 854, 529 N.Y.S.2d 247, 249 (Sup. Ct. Albany County 1988).

<sup>145</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.1(a) (2023).

<sup>146</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.1(b) (2023).

<sup>147</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.1(c)(1)–(14) (2023).

facility's TRC. This statement may request that the TRC review your unsatisfactory or worsening adjustment to the program. The TRC will then evaluate your progress.<sup>148</sup> If you have not been transferred from the temporary release facility because of disciplinary problems, the TRC will make a recommendation to the superintendent. This recommendation states whether you should continue in temporary release.<sup>149</sup> The superintendent will then either approve or reject the recommendation of the TRC. If the superintendent approves the recommendation of removal from the program, your temporary release is revoked.<sup>150</sup>

If your unsatisfactory progress appears to be caused by departmental, institutional, or temporary release rule violations, these rule violations must be referred to in either a disciplinary hearing or a superintendent's hearing. If you do something to be considered a security risk, you can be transferred to a more secure facility before the TRC has time to review the complaint.<sup>151</sup>

If a temporary release participant is charged with misbehavior, the hearing disposition cannot recommend removal from the temporary release program as a disciplinary penalty. The TRC cannot use a report as the reason for recommending that you be removed from a temporary release program. However, the TRC can do this if you are found guilty at a disciplinary hearing.<sup>152</sup>

### (b) How to Appeal a Revocation of Your Temporary Release

Once you have been granted temporary release, you have a constitutionally protected interest in ensuring that your liberty is not deprived and that you are not re-incarcerated without fair procedures. That is, if you have not violated any rules, and your temporary release is still revoked, you may be protected under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. You may also be protected under the state laws governing your confinement. Due Process, under the Fourteenth Amendment, means that the government must follow certain procedures—including giving you notice and an opportunity to be heard—before it can take away your liberty earned through the temporary release program. You can be removed from the program only if the facility's temporary release administrators follow the required procedures. The Supreme Court's decision in *Sandin v. Conner* makes it rather difficult for you to prove that your removal from the program has caused you harm that is "atypical" of what you should expect as an incarcerated person.<sup>153</sup> The Second Circuit, however, has held that temporary release programs and work release programs are liberty interests protected by the U.S. Constitution for New York State incarcerated people.<sup>154</sup>

Unfortunately, the regulations governing temporary release leave much discretion to the facility's temporary release administrators. They will be able to make many decisions as they see fit. These decisions will generally stand as long as they are considered fair and unbiased. If your temporary release is denied, you will only be entitled to the minimum due process requirements. In *Roman v. Ternullo*, the Dutchess County Supreme Court stated that correctional facility superintendents were

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<sup>148</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.2(a) (2023).

<sup>149</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.2(a) (2023).

<sup>150</sup> N.Y. COMP. CODES R. & REGS. tit. 7, §§ 1904.2(i)-(k) (2023).

<sup>151</sup> For a list of factors that are considered security risks, see N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.2(c) (2023).

<sup>152</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.2(g) (2023).

<sup>153</sup> *Sandin v. Conner*, 515 U.S. 472, 486–487, 115 S. Ct. 2293, 2301–2302, 132 L. Ed. 2d 418, 431–432 (1995) (holding that an incarcerated person is not deprived of a liberty interest when he is removed from the general prison population and placed in segregated confinement for 30 days because discretionary discipline by prison officials in response to misconduct falls within the expected boundaries of the incarcerated person's sentence).

<sup>154</sup> See *Anderson v. Recore*, 446 F.3d 324, 328 (2d Cir. 2006) (holding that an incarcerated person has a liberty interest in continuing his participation in his temporary release program); *Friedl v. City of New York*, 210 F.3d 79, 84–85 (2d Cir. 2000) (holding that due process protections apply to the revocation of work release participation); *Gutierrez v. Joy*, 502 F. Supp. 2d 352, 357 (S.D.N.Y. 2007) (affirming that the Second Circuit recognizes that due process protects an incarcerated person's liberty interest in continued participation in temporary release programs).

required to extend the procedural due process safeguards outlined by the Supreme Court in *Wolff v. McDonnell* to revocation of work release participation.<sup>155</sup> These safeguards include written notice, at least 24 hours to prepare for the hearing, the opportunity to present witnesses and other evidence (if not “unduly hazardous”), and a written statement of the evidence relied on and reasons for the decision.<sup>156</sup> New York regulations now specifically require similar safeguards, including a hearing, at least 24 hours notice before the hearing, an electronic recording of the hearing, and a written statement of the decision made and the reasons relied on at the hearing.<sup>157</sup> If you are in a special housing unit or keeplock, you must be given an opportunity to request an assistant.<sup>158</sup> At the hearing, you can call witnesses, produce evidence and may be able to cross-examine adverse witnesses.<sup>159</sup>

The Second Circuit has also applied a broad list of due process requirements that the Supreme Court set out in the context of parole revocation hearings.<sup>160</sup> These requirements include:

- (1) written notice of the claimed violations;
- (2) disclosure of evidence against you;
- (3) opportunity to be heard in person and to present evidence;
- (4) the right to confront and cross-examine adverse witnesses;
- (5) a “neutral and detached” hearing body; and
- (6) a written statement by the fact-finders as to the evidence relied on and the reasons for their decision.<sup>161</sup>

However, in order to succeed on appeal, you *must* be able to prove that the wrong conclusion was reached in your TRC hearing and that the procedure was incorrect.<sup>162</sup>

If you believe your rights have been violated in a revocation of temporary release, you can file a lawsuit. In order to do this, you must base your complaint on a particular statute or law that will give a judge the power to hear how the prison authorities have treated you. There are two different ways that you can do this in New York: (1) Article 78 of the New York Civil Practice Law and Rules (called

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<sup>155</sup> *Roman v. Ternullo*, 81 Misc. 2d 1023, 1024–1025, 367 N.Y.S.2d 197, 198 (Sup. Ct. Dutchess Cnty. 1975); *Wolff v. McDonnell*, 418 U.S. 539, 563–566, 94 S. Ct. 2963, 2978–2980, 41 L. Ed. 2d 935, 955–957 (1974) (finding that due process safeguards applied to an incarcerated person’s interest in disciplinary proceedings); *see also* *Marciano v. Goord*, 38 A.D.3d 217, 218, 830 N.Y.S.2d 552, 553 (1st Dept. 2007) (discussing an incarcerated person’s due process rights and the requirements for removal of an incarcerated person from a temporary release program, including requirements of prior hearing, notice, and opportunity to be heard); *MacCowan v. Cummings*, 99 Misc. 2d 914, 916, 417 N.Y.S.2d 366, 367 (Sup. Ct. Orleans Cnty. 1978) (holding that “any removal [of the incarcerated person] from the [work release] program should be as a result of a hearing following the rationale and procedures set forth in *Wolff v. McDonnell*”). *See JLM*, Chapter 32, “Parole,” for a more detailed explanation of the due process rights guaranteed under *Wolff*. The U.S. Supreme Court has also held that due process requires certain procedural protections for incarcerated people participating in a state-created pre-parole conditional supervision program. *See Young v. Harper*, 520 U.S. 143, 146–147, 117 S. Ct. 1148, 1151, 137 L. Ed. 2d 270, 276 (1997).

<sup>156</sup> *Wolff v. McDonnell*, 418 U.S. 539, 564–566, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935, 955–956 (1974). *See* Part D of *JLM*, Chapter 18, “Your Rights at Prison Disciplinary Proceedings,” for a more detailed explanation of the due process rights guaranteed under *Wolff*.

<sup>157</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.2(h)(1), (3), (7) (2023).

<sup>158</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.2(h)(4) (2023).

<sup>159</sup> N.Y. COMP. CODES R. & REGS. tit. 7, § 1904.(2)(h)(5)–(6) (2023).

<sup>160</sup> *Friedl v. City of New York*, 210 F.3d 79, 84–85 (2d Cir. 2000) (noting that the due process requirements of *Morrissey v. Brewer* have been extended to revocation of probation and loss of good-time credits and therefore should be extended to work release revocation (citing *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972))); *Kroemer v. Joy*, 2 Misc. 3d 265, 268, 769 N.Y.S.2d 357, 360 (Sup. Ct. Yates County 2003) (applying the procedural due process requirements of *Morrissey*, including the right to confront adverse witnesses, to a Temporary Release Program revocation hearing).

<sup>161</sup> *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484, 499 (1972).

<sup>162</sup> *See Roucchio v. Coughlin*, 29 F. Supp. 2d 72, 79–80 (E.D.N.Y. 1998) (holding that a due process claim for damages was not valid when the incarcerated person failed to show that his removal from the work release program was invalidated).



Article 78 of the C.P.L.R.) in New York state courts or (2) 42 U.S.C. § 1983 (called Section 1983) in *either* state or federal court. Both of these statutes will be explained in further detail below.

(i) *Article 78 of the C.P.L.R.*

If you think that prison officials used either improper procedures or obviously incorrect information in deciding your case, you should bring a state court proceeding under Article 78 of the New York Civil Practice Law and Rules. A proceeding is a courtroom or related matter that occurs during a dispute or lawsuit, or any individual courtroom or related event that takes place during the course of the dispute or lawsuit. Bringing a state court action can have advantages over a federal action. It is easier for a state court judge to order a state agency to correct its actions than it is for a federal court judge to do the same. A state court action is the most common and best way to fight to get reinstated in a temporary release program. If you choose to proceed under Article 78, however, you will not be awarded money damages. Money damages refers to the money awarded by a court to a person who has suffered loss, injury, or harm, either to the person's body or to property. Something else to keep in mind is that Article 78 claims are less complicated than federal Section 1983 claims. If you are going to file *pro se* (without a lawyer), Article 78 proceedings will be much easier for you to file than a Section 1983 claim. It will be easier to file Article 78 proceedings because of the complicated federal court procedure needed for Section 1983 claims. For more information on Article 78 proceedings, see *JLM*, Chapter 22, "How to Challenge Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules." If you are not in New York, you should research any similar statutes in your state.

(ii) *Section 1983*<sup>163</sup>

Your second option is to bring a claim under 42 U.S.C. § 1983 ("Section 1983"). This claim can only be used if an officer or agent of the government violates one of your rights protected by the Constitution or violates a federal statute.<sup>164</sup> Section 1983 allows you to receive monetary damages if you win your case. You must try the prison's administrative remedies before using Section 1983.<sup>165</sup> You can only use Section 1983 if you are not asking to be released completely from prison. Even if you are on temporary release, you are still considered to be in prison. For more information, see *JLM* Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law," and Chapter 14, "The Prison Reform Litigation Act." The TRC is given substantial discretion to remove "unsuitable" incarcerated people from the temporary release program. As long as the TRC follows procedural due process guidelines (as outlined in *Friedl*<sup>166</sup>) and its decision is found to be rational, the courts will not overturn its decision.

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<sup>163</sup> If you would like to file a 42 U.S.C. § 1983 claim, read Chapter 14 of the *JLM*, Chapter 14, "The Prison Litigation Reform Act." Under the Prison Litigation Reform Act ("PLRA"), prisoners must satisfy certain requirements before filing § 1983 actions in federal court. For more information about § 1983 claims, see *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law."

<sup>164</sup> Please note that some officials cannot be sued under 42 U.S.C. § 1983. See *JLM*, Chapter 16, "Using 42 U.S.C. § 1983 to Obtain Relief from Violations of Federal Law" for more information.

<sup>165</sup> 42 U.S.C. § 1997e(a) (requiring exhaustion of all available administrative remedies before bringing a § 1983 claim); see also *Ross v. Blake*, 578 U.S. 632, 642–644, 136 S. Ct. 1850, 1858–1860, 195 L.Ed.2d 117, 126–128 (2016) (holding that courts can't create their own exceptions to the exhaustion requirement but noting three narrow categories of situations in which remedies are "unavailable" and do not need to be exhausted).

<sup>166</sup> See *Friedl v. City of New York*, 210 F.3d 79, 84–85 (2d Cir. 2000) (applying the due process requirements of *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)); see also *Wolff v. McDonnell*, 418 U.S. 539, 563–566, 94 S. Ct. 2963, 2978–2980, 41 L. Ed. 2d 935, 955–957 (1974).

## F. The Second Chance Act of 2007 and Federal Bureau of Prisons Temporary Release Programs

The Second Chance Act of 2007<sup>167</sup> made some important changes to temporary release programs. It expanded the types of opportunities available to incarcerated people upon release. It also improved existing programs in prisons and modified how incarcerated people can serve sentences in community facilities. It allows government agencies and nonprofit groups to receive grants of money from the federal government in order “to assist offenders reentering the community from incarceration to establish a self-sustaining and law-abiding life by providing sufficient transitional services.”<sup>168</sup> However, these agencies and groups must apply for the money to receive it. They must also comply with certain requirements to receive the grant money.<sup>169</sup> This section will discuss, as established by the Second Chance Act, (1) the Federal Prisoner Reentry Program and Services, (2) Drug Treatment Programs, and (3) Alternatives to Incarceration.

### 1. Federal Prisoner Reentry Program and Services

The Second Chance Act created a federal prisoner reentry program under the Bureau of Prisons to help you adjust to life outside prison.<sup>170</sup> This program is meant to provide you with information regarding health and nutrition, employment, literacy and education, personal finance and consumer skills, community resources, personal growth and development, as well as release requirements and procedures.<sup>171</sup> Once you are released, the Reentry Courts at the state and local level will monitor you and help you access support programs. Such programs include drug and health counseling, case management, and “any other service or support needed for reentry” after your release.<sup>172</sup> Nonprofit organizations may also provide programs to help you after your release. There may also be mentoring and transitional services programs run by nonprofit organizations (as opposed to the state or the Bureau of Prisons itself) available to you during your incarceration.<sup>173</sup> These mentoring programs can help you transition to life after your release. Transitional services programs offer education, literacy, and job training.<sup>174</sup> These services take place during incarceration and post-release.<sup>175</sup> The Second Chance Act requires that the Bureau of Prisons allow anyone who provided you with mentoring services during your incarceration to continue those services after your release.<sup>176</sup> Remember, it is not yet clear which nonprofit organizations or government agencies will be receiving grant money and how the programs will function.

Before you leave prison, the Bureau of Prisons is required to help you prepare for your release. The Bureau of Prisons is required to ensure your eligibility for state and federal benefits such as Social Security, Medicare, Medicaid, and Veterans benefits, and is required to support parent-child relationships. Where the law permits, the Bureau must also help you secure those benefits you are eligible for before release.<sup>177</sup> For the three years before you are released from prison, you may have

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<sup>167</sup> Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (codified at 34 U.S.C. § 60501).

<sup>168</sup> 34 U.S.C. § 60501.

<sup>169</sup> 34 U.S.C. § 10631.

<sup>170</sup> 34 U.S.C. § 60541.

<sup>171</sup> 18 U.S.C. § 4042(a).

<sup>172</sup> 34 U.S.C. § 10631(f)(3)(C).

<sup>173</sup> 34 U.S.C. § 60531.

<sup>174</sup> 34 U.S.C. § 60531(b)(2).

<sup>175</sup> 34 U.S.C. § 60531(b).

<sup>176</sup> 34 U.S.C. § 60533(a).

<sup>177</sup> 18 U.S.C. § 4042(a)(6).

access to programs that would train you for jobs and careers.<sup>178</sup> Earlier in your incarceration, the Bureau of Prisons is required, if it has enough funding, to offer a program to assess your skill level in various areas. It also is required to help you to improve in certain areas, including academic, health, and interpersonal skills.<sup>179</sup> It will determine whether you have any special reentry needs and help you maintain relationships with your family and children during your imprisonment.<sup>180</sup> This program will also help you obtain an official form of photo identification (such as a driver's license), a social security card, and a birth certificate as your release nears.<sup>181</sup>

## 2. Drug Treatment Programs

The First Step Act allows state and local prosecutors to set up full drug treatment programs during your time in prison or jail, as well as while you are on parole or under court supervision.<sup>182</sup> Depending on what state you are in, there may be drug treatment programs where you can get treatment for drug dependence or addiction.<sup>183</sup> If you are in a community confinement center rather than a regular prison, the Bureau of Prisons is required to ensure that you have any necessary medical care, mental health care, and medicine.<sup>184</sup>

The Second Chance Act provides for Prison-Based Family Treatment Programs.<sup>185</sup> To be eligible for a Prison-Based Family Treatment Program, you must be pregnant or have a child under 18 years of age, and you must have been convicted of a nonviolent drug-related felony.<sup>186</sup> These programs require that you serve your term in prison, and they provide substance abuse treatment, child early intervention services, family counseling, legal services, medical care, mental health services, nursery and preschool, parenting skills training, pediatric care, physical therapy, prenatal care, sexual abuse therapy, relapse prevention, transportation, and vocational or GED training.<sup>187</sup> The Second Chance Act also changed the Residential Substance Abuse Treatment for State Offenders Program ("RSAT"), which provides drug treatment in a facility set apart from the general prison population.<sup>188</sup> If you are involved in an RSAT program, the state may be required to give you a wide range of support services after your release from prison. This may include case management services.<sup>189</sup>

## 3. Alternatives to Incarceration

Though you do not have an absolute right to do so, you may be able to spend some or all of the last twelve months of your sentence in a community confinement facility or under other conditions that help you adjust to release.<sup>190</sup> You also may be able to spend six months or ten percent of your sentence (whichever is shorter) in home confinement.<sup>191</sup> Courts, however, are not allowed to require or

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<sup>178</sup> 34 U.S.C. § 60511(b).

<sup>179</sup> 34 U.S.C. § 60541(a).

<sup>180</sup> 34 U.S.C. § 60541(a)(1)(F).

<sup>181</sup> 34 U.S.C. § 60541(b)(1).

<sup>182</sup> 34 U.S.C. § 60521(a).

<sup>183</sup> 34 U.S.C. § 60521.

<sup>184</sup> 18 U.S.C. § 3621(i).

<sup>185</sup> 34 U.S.C. § 10591.

<sup>186</sup> 34 U.S.C. § 10596.

<sup>187</sup> 34 U.S.C. § 10596.

<sup>188</sup> 18 U.S.C. § 3621(e)(1)–(6).

<sup>189</sup> 18 U.S.C. § 3621(e)(1)–(6).

<sup>190</sup> 18 U.S.C. § 3624(c)(1).

<sup>191</sup> 18 U.S.C. § 3624(c)(2).

guarantee that your sentence be served in a civil confinement facility. Therefore, only the Bureau of Prisons can make this decision.<sup>192</sup> Again, it is unclear how this will work in practice.

### G. Conclusion

Each temporary release program has its own eligibility requirements and many different rules for participating. The law treats participation in these programs as a privilege, not a right. The Department of Corrections and Community Supervision is not required to create release programs, and the eligibility and approval rules are strict. The Constitution protects you against discrimination or an unfair denial of access to temporary release. This protection does not mean that you *must* be allowed to participate. Instead, it means that the temporary release officials must show that they have a good reason for not allowing you to participate or for removing you from participation. The officials must also follow the standards of due process, which the New York courts have ordered them to provide.<sup>193</sup> However, because your participation is deemed a privilege and not a right, it is very difficult to successfully appeal a decision regarding a temporary release program.

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<sup>192</sup> See 18 U.S.C. § 3621(b) (“The Bureau of Prisons shall designate the place of the prisoner’s imprisonment.”).

<sup>193</sup> See *Roman v. Ternullo*, 81 Misc. 2d 1023, 1025, 367 N.Y.S.2d 197, 198–199 (Sup. Ct. Dutchess County 1975).