TZEDEK
ASSOCIATION
Save A Life, Save A World

Statement of
Rabbi Moshe Margaretten
President of the Tzedek Association

before the
SENATE COMMITTEE ON THE JUDICIARY

April 15, 2021

Chairman Durbin, Ranking Member Grassley and members of the Senate Committee on the Judiciary, thank you for this opportunity to address this honorable committee for this important hearing titled "Oversight of the Federal Bureau of Prisons".

With this statement, I hope to address two important matters:

1) Issues related to COVID-19 in the Federal Bureau of Prison (BOP) institutions.

2) Recommendations and requests that the Department of Justice (DOJ) under this new administration review, revise, and expand policies and rules put in place by the DOJ under the previous administration as it pertains to implementation of the First Step Act (FSA).

I. COVID-19 IN BOP FACILITIES

As this committee is well aware, the CARES Act added a provision that expanded home confinement for incarcerated individuals who are vulnerable to COVID-19. While generally this has been a very successful program, there have been several concerns as it pertains to its implementation which I would like to address here.

Internally, DOJ under Attorney General Barr established with the BOP restrictive criteria that greatly limited which individuals can benefit from this critical program. For example, that they need to have served 50% of their sentence, or they must be assessed as "Minimum Risk" to recidivate under BOP's PATTERN scoring, or even if they have only a minor infraction they are

automatically excluded. On March 12, 2021, 32 prominent organizations signed a letter to Attorney General Garland—led by Tzedek Association and NACDL—asking that he rescind or relax these criteria because this is a life-and-death issue.[1] There is a surge in many parts of the country, and I know from firsthand information from those inside that there is a surge in many federal prisons. More than 50% of staff have refused to be vaccinated[2] and so BOP facilities will never reach herd immunity. These staff are going in and out of the prison system to the outside and that makes an extremely dangerous situation in a closed environment. Only about a third of incarcerated individuals have been vaccinated and it will take many months to vaccinate the rest during which many can die, G-d forbid.

As the DOJ has already done, with other issues, it is completely up to the discretion of the DOJ under this new administration to rescind previous memos and take on new positions, positions more in line with humanitarian concerns. And so, this DOJ should rescind these restrictive criteria as well.

The other critical issue is that the Office of Legislative Counsel (OLC) of the DOJ put out an erroneous memo only five days before the end of the last administration saying that everyone out on home confinement must go back to prison after the pandemic.[3] No one I have spoken to agrees with this OLC memo. This DOJ should rescind this memo as well. This is not a binding memo. Instead of moving forward, putting people out on home confinement back into prison would be going backwards. It simply does not make sense. These are elderly individuals, and people with serious health issues. They have re-established themselves in their communities, going to college, have jobs and have been reunited with their families. They are safe. They are low risk to recidivate[4] and so society is safe. It would be devastating to them and their families to reincarcerate them into prison. Imagine how their children would feel? Keep in mind that home confinement is a true restriction, with strong supervision and accountability.

Please see enclosed the 25-organization signed letter decrying this issue as well.[5]

Many believe the OLC memo is wrong as a matter of law. I know the OLC is supposed to be nonpartisan, and these are career attorneys (probably chosen by AG Barr), but I find it suspicious that the memo was put out just 5 days before the inauguration, and the author left the OLC/DOJ shortly after January 20th.

We have much harder issues we are excited for the DOJ to accomplish when it comes to criminal justice reform, and if they are hesitating to do something as simple as this what's that to say

---

[1] https://img1.wsimg.com/blobby/go/e92afdcc-9a38-4bb1-a4e7-44c54975c6b9/downloads/CARES%20Act%20Organization%20Sign%20On%20Letter.pdf?ver=1616014451973

[2] https://appropriations.house.gov/events/hearings/management-performance-challenges-and-covid-response-at-the-department-of-justice

[3] https://www.reuters.com/article/us-health-coronavirus-usa-justice-idUSKBN2BY0AU

[4] Id.

[5] https://famm.org/wp-content/uploads/Letter-to-Attorney-General-Garland-re-OLC-Memo.pdf

about the bigger issues that we hope the DOJ will accomplish as it pertains to criminal justice reform? The White House sent out an incredible proclamation for Second Chance Month. However, respectfully, we need this administration to not just talk to talk but walk the walk.

RESOURCES

I believe this committee will find these recent studies and articles helpful:

1) Four new academic studies highlight how easily the coronavirus has spread in prisons.

https://www.cidrap.umn.edu/news-perspective/2021/04/studies-detail-large-covid-outbreaks-us-prisons-jails

2) BOP Data:

49,393 out of 126,061 federally incarcerated individuals in BOP-managed institutions have so far been vaccinated. That is only 39% of the inmate population. Not sure if this includes just the first dose or both doses.

17,206 BOP staff out of about 36,000 have so far been vaccinated. (I think the rest have refused to be vaccinated.) That is less than half of the staff population, about 47.8%.

https://www.bop.gov/coronavirus/

3) Fewer than 20% of federal and state prisoners have received a COVID-19 shot, tally by Marshall Project reveals:

https://www.themarshallproject.org/2021/04/06/as-states-expand-vaccine-eligibility-many-people-in-prison-still-wait-for-shots?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20210406-2408

4) Case Rates for U.S. Prisoners Have Been Triple Those of Other Americans:

https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html?referringSource=articleShare

CONCLUSION

In conclusion, I cannot begin to express how sad this issue is when we all know that every day people are suffering in prison from COVID-19. The advocacy community, as well as thousands of families of federally incarcerated individuals, remain extremely concerned about this. Fixing this would assuage our concerns and truly lift our spirits. Most importantly, it would save lives.

II. FIRST STEP ACT IMPLEMENTATION

With much fanfare, the FSA was signed into law on December 20, 2018.[6] Backers correctly hailed this historic legislation as a milestone that marked a "meaningful break from decades of failed policies that led to mass incarceration."[7] This position was adopted by the DOJ along with a press release on its website announcing, "Beginning today, inmates will have even greater incentive to participate in evidence-based programs that prepare them for productive lives after incarceration. This is what Congress intended with this bipartisan bill. The First Step Act is an important reform to our criminal justice system, and the Department of Justice is committed to implementing the Act fully and fairly."[8]

The main goal of the FSA is straightforward: reduce recidivism by providing incarcerated individuals the tools they need to successfully reenter society. One of the major incentives introduced are the "earned time credits," whereby one can earn early transfer to Prerelease Custody through successful participation in Evidence Based Recidivism Reduction Programming (EBRRP) and Productive Activities. And while time credits can be applied to an early transfer to supervised release, the FSA caps early access to supervised release at 12 months.

One of the most reliable guarantors of success after incarceration is education. Indeed, the Independent Review Committee (IRC), which was created by the FSA, noted in a recent report that correctional education for incarcerated adults reduces the risk of post-release re-incarceration by 13%. The IRC added: "These conclusions are consistent with the Pew Charitable Trusts' 2011 national estimate: 43.3 percent of releasees who did not receive correctional education are re-incarcerated within three years, compared to 30.4 percent of those who did receive correctional education in prison."[9] In addition, a recent meta-analysis found that other in-prison programming correlated with an 11% reduction in recidivism.[10]

The DOJ and BOP are tasked by law to implement the FSA. Accordingly, DOJ interpretations of the FSA and the policies DOJ adopts in implementing the law dictate how robustly and faithfully the goals will be achieved. This memo highlights several examples of how the DOJ, under the previous administration, took a very narrow—and often erroneous—approach in interpreting many of the FSA's provisions. These interpretations threaten to undermine the spirit of this bill if not redressed. We ask and strongly recommend that the current DOJ review the issues identified

---

[6] See P.L. 115-391 (Dec. 2018).

[7] See Marie Gottschalk, Did You Really Think Trump was Going to Help End the Carceral State?, Jacobin Mag., Mar. 12. 2019, quoting Sen. Cory Booker.

[8] U.S. Dep't of Justice, Department of Justice Announces Enhancements to the Risk Assessment System and Updates on First Step Act Implementation, Jan. 15, 2020, available online, https://www.justice.gov/opa/pr/department-justice-announces-enhancements-risk-assessment-system-and-updates-first-step-act

[9] See James M. Byrne, The Effectiveness of Prison Programming: A Review of the Research Literature, published December 2019 by the First Step Act Independent Review Committee, at 14, available online, https://firststepact-irc.org/wp-content/uploads/2019/12/IRC-Effectiveness-of-Prison-Programming.pdf

[10] Id.

here and adopt a more expansive and broader interpretation of the FSA that allows for full and *proper* implementation. We need to set up incarcerated individuals for success, not the opposite.

Furthermore, the timing of the pandemic could not have been worse, hampering many programming efforts and incentives that were well underway throughout the BOP, and causing delays in further adoption of new programming. In light of the delays, several incarcerated individuals instead turned to the courts, yielding several milestone-wins that offer glimmers of hope to those who have genuinely applied themselves toward self-betterment and personal growth. This process, however, which entails filing a *habeas* case, is extremely daunting. In fact, most incarcerated individuals do not have the resources, education, and tools necessary to win (let alone even file) such a judgment. They also often fear retaliation. For these reasons, it is important that the DOJ send an updated memo to the BOP and establish strong policies enforcing proper and broad implementation of the FSA in all BOP facilities throughout the country.

Specifically, we recommend that the DOJ make the following policy changes:

ISSUE ONE: PROGRAMMING ELIGIBILITY

A BOP Memorandum dated November 25, 2020 ("BOP Memo")[11] lists the extensive range of qualifying EBRRP and Productive Activities set forth in the law.

§ 3535 (3) states: "**The term Evidence based Recidivism Reduction Programming** means either a group or individual activity that—

Has been shown by empirical evidence to reduce recidivism or is based on research indicating that its likely to be effective in reducing recidivism;
Is designed to help prisoners succeed in their communities upon release from prison; and
may include:
(iv) academic classes
(vii) substance abuse treatment
(viii) vocational training
(ix) faith-based classes or services
(xi) a prison job, including through a prison work program."

Unfortunately, many programs that fall directly under and are clearly referenced by the above subsection are absent from the November 25, 2020 memorandum which embodies the BOP's proposed implementation rules and standards, based on defining guidance provided by the DOJ under the previous administration.

Take for instance faith-based classes or services. The BOP Memo makes no mention of faith-based classes or services being eligible for earned time credits, yet the First Step Act clearly lists "§3535(3)(ix) faith-based classes or services" as being a conforming programming category. In addition, on the publicly available BOP website, https://www.bop.gov/inmates/fsa/faq.jsp#fsa_time_credits, the FAQ section asks: "Can religious

[11] https://www.federalregister.gov/documents/2020/11/25/2020-25597/fsa-time-credits

programs be considered as evidence-based recidivism reduction programs and taken to earn time credits?" and the answer posted is clear: "Yes, under the FSA, 'faith-based classes or services' that otherwise meet the criteria for evidence-based recidivism reduction programming will qualify for time credits as approved by BOP in the same manner as other approved non-faith based programming."

In addition, § 3535 (a)(5)(B) provides explicitly for "the ability for faith-based organizations to function as a provider of educational evidence-based programs ***outside*** of the religious classes and services provided through the chaplaincy." Hence, the statement in the memorandum that all eligible programs must be BOP approved is inaccurate and directly contradicts this subsection. Here, an individual may participate in programming provided by outside faith-based organizations regardless of affiliation with the BOP and its chaplaincy program.

Productive Activities under the FSA differ from EBRRP in that they need not be 'assigned' to an incarcerated individual. EBRRP, outlined in §3532(a)(3), requires BOP to "determine the type and amount of evidence-based recidivism reduction programming that is appropriate for each prisoner and assign each prisoner to such programming accordingly, and based on the prisoner's specific criminogenic needs." Productive Activities simply requires "a group or individual activity that is designed to allow prisoners determined as having a minimum or low risk of recidivating to remain productive and thereby maintain a minimum or low risk of recidivating, and may include the delivery of the programs described in paragraph (1) to other prisoners."

Accordingly, regarding Productive Activities, there is no assignment or recommendation required and any programming described in paragraph (1) (see above) will constitute eligible programming for earned time credits. The reason for this is simple: once an individual is a minimum and even a low, for many, this will be the lowest risk assessment score they can achieve. At this point, Productive Activities plays its role to "maintain a minimum or low risk of recidivating" versus *lowering* the risk of recidivism should one be scored as medium or high risk of recidivating.

Currently, as it pertains to Productive Activities, the FSA is not being implemented properly. This is because the BOP has chosen to only grant certain programs approval as Productive Activities. Furthermore, prisoners are very limited in their choice of programming and as to what constitutes a Productive Activity. For example, the DOJ under the previous administration refused to include religious services and work assignments as Productive Activities, even though these are clearly activities that are productive in nature.

Reference is made to two recent *habeas* decisions in *Goodman v. Ortiz*[12] and *Hare v. Ortiz*,[13] both decided in the District of New Jersey, which took an expansive but accurate view of the programming for which First Step Act credit should be received. In *Goodman*, the petitioner sought credit for a variety of salutary activities in which he participated while in prison, including not only BOP-sponsored education and prison jobs but also religious study and prayer. The court noted that "[a]gencies exercise discretion only in the interstices created by statutory

[12] 2020 WL 5015613 (D.N.J. Aug. 25, 2020)

[13] 2021 WL 391280 (D.N.J. Feb. 4, 2021)

silence or ambiguity; they must always 'give effect to the unambiguously expressed intent of Congress," and that the Congressional intent of the First Step Act includes the opportunity for "every prisoner… to participate in and complete *the type and amount* of evidence-based recidivism reduction programs or productive activities *they need*" (emphasis added) – i.e., that the scope of available programs should center on the prisoner's needs, not the BOP's. Needs may be physical, educational, moral or spiritual, and the spectrum of human needs militates against restricting credit-earning activities to a narrow list.

Indeed, we note that in *Goodman*, the BOP did not even dispute that Goodman should earn credit for his religious activities, arguing only that such activities should not accrue credit until the end of a three-year phase-in period. The BOP's 180-degree turn on this subject is truly inexplicable, all the more so in light of the *Goodman* court's emphasis on the BOP's broad remedial scope and Congress' intent that credit-accruing programs and activities should suit inmates' individual needs.

In *Hare*, likewise, the petitioner sought credit for his work as a cook and his participation in 26 programs and activities. The court observed, as in *Goodman*, that "the FSA requires the BOP to determine the type and amount of EBRR programming that is appropriate for each prisoner based on their specific criminogenic needs," and to reassess and reassign each individual periodically. Again, the mandate for need-tailored programming is not best achieved by restricting the qualifying activities to a narrow list or even restricting them to activities administered by the BOP, which has limited resources and cannot meet all prisoners' needs on its own (and which, indeed, should best leave such things as spiritual development and care to the religious professionals who know them best and can provide them while maintaining separation of church and state).

We are aware of the need for the BOP to retain some control and discretion over what constitutes EBRRP and Productive Activities. Incarcerated individuals have a strong motivation to leave prison, and we are aware that other programs with similar incentives, such as RDAP, have been vulnerable to fraud. But the solution to this is not to exclude genuine, and genuinely effective, programming from eligibility for First Step Act credits, which would be contrary to both the letter and spirit of this important law. Instead, the BOP should establish a central office to vet programs and activities for which participants wish to obtain credit, and to approve for credit all programs and activities that are bona fide and administered according to professional standards.

Recommendations 1-3:

1. *All* bona fide programming covered under § 3535 (3) that an individual participated in should be counted towards his or her "earned time credits" accrual, regardless of whether the programming is administered by the BOP. The BOP should maintain a central office to which incarcerated individuals may submit for review any program in which they are participating, and only those programs which are not bona fide and/or which are not administered according to professional standards should be disapproved for credit. All requests for review submitted to the central office should be approved or disapproved within a reasonable time not to exceed 60 days.

2. For individuals at minimum or low risk of recidivism, any Productive Activities should be counted without requiring prior assignment, as the law clearly states. Simply by participating, individuals will earn time credits.

3. Productive Activities should include religious services and BOP work assignments assigned to incarcerated individuals.

ISSUE TWO: LENGTH REQUIREMENTS FOR SUCCESSFUL PARTICIPATION

§3632(d)(4) makes it abundantly clear that those incarcerated individuals who successfully participate in evidence-based recidivism reduction programming or productive activities are entitled to earn time credits as follows:

"(i) A prisoner shall earn 10 days of time credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities.

(ii) A prisoner determined by the Bureau of Prisons to be at a minimum or low risk for recidivating, who, over two consecutive assessments, has not increased their risk of recidivism, shall earn an additional 5 days of time credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities."

The law does not specifically define the term "day." But the BOP defined the requirement in its BOP Memo as requiring 240 hours of programming, which is equivalent to eight hours every day for an entire month, or *30 full workdays* of programming. That is not a reasonable way to interpret the term "30 days of successful participation." Rather, to define successful participation, one need not look further than the many federal and state courts nationwide that have mandated participation in many programs including drug and alcohol treatment, job training, anger management, victim impact panels, sexual offender therapy, and other similar endeavors. In these programs, **a "day" is not eight hours – it is a single day's session, however long that session may be.**

§3632 makes no mention of hours of participation, nor does it require that a program take up an entire working day in order to count toward FSA credits; rather, the legislators chose "30 days of successful participation" as the metric of compliance that yields time credits, indicating that successful participation in a session of programming on any given day should count. The following are examples of jurisdictions that have defined the terms "successful participation" in various programs.

Maryland:

"What does the program consist of: A minimum of a year of ***participation***, including regular and frequent testing, treatment, frequent court attendance, Recovery Support meeting attendance, obtaining employment and appropriate housing, and continued abstinence, leading to graduation from the program."[14]

[14] https://www.stmarysmd.com/sao/substance-abuse-recovery/

New York:

"Commencement: Successful ***participants*** will complete Drug Court after finishing Phase III, remaining drug and alcohol free for 12 continuous months, and finishing treatment (including satisfying outstanding financial obligations). In addition, he/she must have obtained meaningful employment or be engaged in a course of study or training to achieve that goal. Prior to commencement, all potential graduates will be required to fill out a graduation application and attend a graduation review panel. Participants must also resolve all pending cases and pay all outstanding fines, surcharges, and restitution prior to commencement. The presiding judge will have final say regarding satisfaction of program requirements and participants' readiness to graduate. The Drug Court Program consists of three phases, each lasting a minimum of 12-24 weeks…"[15]

Santa Clara County, California:

Drug Court: "In this program, new participants attend intensive orientation sessions to familiarize themselves with program requirements during their first thirty days of ***participation*** in the program. These "jump starts" may be very helpful in orienting the new participant to program regulations."

Participation is defined as: "participate in individual and group counseling, participate in drug education, participate in educational or vocational counseling where appropriate, subscribe to drug testing, and successfully complete any additional requirements that the court believes will be helpful to the offender. [S]eek and/or maintain employment, attend school, dress appropriately for court, submit to drug testing, meet regularly with a probation officer, and satisfy any other requirements that the court believes would be beneficial."

Residential Drug Abuse Treatment Program (RDAP):

RDAP provides intensive drug abuse treatment to incarcerated individuals who have been diagnosed with a substance abuse disorder. This program has proven to be a great success. Individuals in the residential program are housed together in a treatment unit that is set apart from the general population. However, the total time in the program depends on the individual's progress in treatment. Importantly, there is *no minimum of hours* needed to be considered as successful participation.

Bureau of Prisons – Federal Correctional Complex, Petersburg, Virginia:

"The Residential Drug Abuse Program (RDAP) is an evidenced-based residential treatment program…RDAP participants are expected…to **fully participate** in all treatment activities in the unit…**To successfully complete the RDAP, inmates are required to participate** in the

---

[15] http://ww2.nycourts.gov/courts/6jd/broome/binghamton/drug/reqs.shtml

Community Transition Drug Abuse Treatment component of the program…Treatment is provided for a minimum of nine months."

It is clear from the above that participation does **not** mean 24 hours a day or even 8 hours a day, nor does any court measure terms of participation by how many hours of each day are programmed. Rather, so long as the individual is participating in accordance with the schedule and within the requirements of that particular program, the participation counts. Therefore, 30 days of successful participation means an individual's participation over a given 30-day time period, including attending all scheduled meetings and participating in a meaningful way that demonstrates positive growth.

In addition, requiring that an individual program for 8 hours per day for 30 days, totaling 240 hours per month, is not practical, is not reasonable, and even more to the point, is generally unavailable. Even when an individual works in Unicor Prison Industries (a BOP program that consumes the most hours per day), the maximum they can participate (aside from occasional overtime) is 6.25 hours per day, and even that is only on weekdays (as most Unicor jobs are closed on weekends and holidays) and providing that there are no scheduling conflicts or off-nominal prison operations (lockdowns etc). This equates to only 125 hours per month, significantly less than the memorandum's 240-hour requirement.

The FSA goes a step further and Sec 103(3) mandates that an audit be conducted to ensure "whether the Bureau of Prisons is offering the type, amount, and intensity of recidivism reduction programs and productive activities for prisoners to **earn the maximum amount of time credits** for which they are eligible." The FSA makes it clear that every individual must be afforded a meaningful opportunity to maximize the time credits accrual for which they are eligible. The interpretation set forth in the BOP Memo, on the contrary, makes it impossible to ever maximize time credits for individuals by placing hourly thresholds that are totally out of reach.

Recommendation 4:

Revise the guidance to clarify that in order to earn credit for successful participation in a specified program, an individual must maintain acceptable attendance and meaningful participation in full compliance with required meetings and activities, and that one day of participation in a program consists of successful participation in one day's session however long that may be. The policy that a day is defined as 8 hours of participation should be rescinded.

ISSUE THREE: COMPLETION vs. SUCCESSFUL PARTICIPATION

The key word used by the FSA is not "completion," rather than "successful participation," which clearly illustrates the legislative intent. As set forth in full above, §3632(d)(4) makes it very clear that **participation** and *not* completion was the benchmark of choice to earn time credits.

A core reason behind choosing "participation" as opposed to "completion" is that there are many instances in which completion is not possible. For example, how would the BOP go about

gauging an individual who successfully completed a religious prayer as a program? Religion is a lifelong journey, and an individual's ongoing and regular successful participation, healthy practice, and pursuit are strongly encouraged and celebrated by chaplains and religious leaders alike. *Participation* makes sense here in this instance. In addition, what if an individual has earned enough time credits to be transferred to prerelease custody, but is still in the middle of a program? In this instance, the individual would be transferred to prerelease custody to complete the programming outside of the confines of the prison walls, which the FSA strongly supports.

In *Goodman v. Ortiz*, discussed above, Mr. Goodman's affidavit stating that he prayed and studied daily went unchallenged by the BOP, and the *habeas* petition was granted in its entirety by Judge Bumb of the U.S. District Court of the District of New Jersey. There was no mention of program completion; rather, successful participation. And the *Hare* court went still further and found that the statute *required* credit for programs completed after the effective date of the First Step Act – i.e., December 21, 2018 – even if those programs were assigned before that date or if the individual began participating before that date. We submit that the *Hare* court's holding is consistent with both the letter and spirit of the statute, in that it provides maximal recognition to incarcerated individuals' efforts to rehabilitate and improve themselves according to their individual needs.

Recommendation 5:

Earned time credits should be accrued upon successful participation, as the FSA states, and participation should not be interpreted to require program completion. Whether an individual's participation in any given program or activity is "successful" shall be determined based on evaluations by the director and/or supervisor of the program, and may be evaluated periodically, for instance once a week or once a month.

ISSUE FOUR: DATE WHEN INDIVIDUALS MAY START EARNING TIME CREDITS

With regard to when an individual can start earning time credits, the FSA makes a clear distinction between EBRRP and Productive Activities.

Evidence-Based Recidivism Reduction Programming:

The FSA states in §3632(d)(4)(B) "A prisoner may not earn time credits under this paragraph for an **evidence-based recidivism reduction program** that the prisoner successfully completed- (i) prior to the date of enactment of this subchapter." The "date of enactment of this subchapter" has been confirmed in case law as **December 21, 2018**.

Productive Activities:

Please note that §3632(d)(4)(B) only excludes time credits earned prior to the enactment of this Subchapter for evidence-based recidivism reduction programming. There is no similar provision with regard to participation in Productive Activities. This deliberate and unambiguous distinction means all inmate participation in Productive Activities from the inception of incarceration is

eligible. In clear terms, this places no restrictions on the look-back period an individual can apply all Productive Activities in which they successfully participated from the beginning of incarceration.

Recommendations 6-7:

6. All **Evidence Based Recidivism Reduction Programming** in which an individual participated from December 21, 2018 forward should count towards earned time credits. Individuals are being told that the BOP has not yet started to phase in the FSA.

7. All **Productive Activities** in which an individual participated from inception of incarceration, regardless of the date (even prior to December 21, 2018), should count towards earned time credits. This is because the FSA makes no mention of a retroactive look-back limitation regarding Productive Activities. At the very least, Productive Activity participation should count from December 21, 2018.

ISSUE FIVE: PHONE CREDITS

As it currently stands, every incarcerated individual under BOP is provided a limit of 300 minutes a month of phone time.[16] During certain times, such as before holidays, or during this COVID-19 pandemic,[17] the limit of phone time may be increased. FSA gives "up to 510 minutes per month" as an incentive for successful participation in the recidivism reduction programs. Specifically, the law states:

"EVIDENCE-BASED RECIDIVISM REDUCTION PROGRAM INCENTIVES AND PRODUCTIVE ACTIVITIES REWARDS.—The System shall provide incentives and rewards for prisoners to participate in and complete evidence-based recidivism reduction programs as follows:

(1) PHONE AND VISITATION PRIVILEGES.—A prisoner who is successfully participating in an evidence-based recidivism reduction program shall receive—

(A) phone privileges, or, if available, video conferencing privileges, for up to 30 minutes per day, and up to 510 minutes per month".

It is clear from the law that the "up to 510 minutes per month" reward should be *in addition* to the regular minutes individuals already receive, whether the regular minutes are 300 minutes,

[16] https://oig.justice.gov/sites/default/files/archive/special/9908/callsp4.htm -- see footnote 22 -- this rule of 300 minutes has been in place since 1997.

[17] "During modified operations in response to COVID-19, the BOP suspended social visitation, however, inmates were afforded 500 (vs. 300) telephone minutes per month at no charge to help compensate for the suspension of social visits." https://www.bop.gov/coronavirus/covid19_status.jsp

500 minutes, or any other amount of time.[18] Otherwise it would not be much of an incentive. Indeed, therefore it is called a "reward". In fact, the law clearly terms this addition of 510 minutes as "incentives and rewards" so as to encourage "prisoners to participate" in programming.

Moreover, additional telephone time is a valuable aid to rehabilitation in of itself, given that it enables the individual to have more contact with supportive friends and family members and to exercise parenting responsibilities, (especially since in-person visitation is still restricted due to pandemic conditions). This goal toward rehabilitation was surely the underlining intent of Congress in adding this provision in the FSA as an incentive for participation in recidivism reduction programming.

Recommendation 8:

This DOJ should create a policy in implementing the FSA that the (up to 510) extra minutes earned by individuals who successfully participate in EBRRP or Productive Activities should be *in addition to* the regular phone time provided to all incarcerated individuals each month, in line with the letter and spirit of the FSA.

RECOMMENDATION SIX: RELATION TO OTHER INCENTIVE PROGRAMS

The FSA states under "(6) RELATION TO OTHER INCENTIVE PROGRAMS":

"The incentives described in this subsection shall be *in addition to* any other rewards or incentives for which a prisoner may be eligible." (emphasis added)

Additionally, in Section 602 of the FSA, it states:

"The Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph."

With Section 602, a "shall" rule, the intent of Congress is clear: to mandate BOP to give the full amount of home confinement available to lower-risk individuals, i.e., 6 months or 10% of the sentence. Prior to the FSA, BOP would periodically give incarcerated individuals *less than* the maximum home confinement for which they qualified by law. In Section 602, Congress sought to end this practice. The full amount of home confinement is now a mandated reward and incentive for which lower-risk prisoners are eligible.

[18] Also, given that it is 2021, isn't it about time incarcerated individuals be provided cell phones to speak to close family and friends? Technology now permits cell phone usage to be fully monitored and enables calls to be restricted to an approved list of contacts, just as would be the case on the facility phones, and permitting cell phones would reduce the incidence of conflicts over facility phone time. See Hannah Riley, *Just Let People Have Cellphones in Prison*, Slate, February 15, 2021, https://slate.com/news-and-politics/2021/02/cellphones-in-prisons.html.

Recommendation 9:

Credits an individual earns through participation in recidivism reduction programs and productive activities should be *in addition to* the home confinement that they earn in accordance with Section 602 of the FSA. This should be implemented in policy by the DOJ. Indeed, this would align with the spirit of the FSA, which is to maximize as much as possible the reentry prospects of federally incarcerated individuals. Since participation in recidivism reduction programs have been shown to improve recidivism, it stands to reason providing greater incentives to participate will improve reentry and reduce recidivism.

CONCLUSION

It is our sincere hope that the DOJ and BOP will adopt the above recommendations into a revised memorandum with revised policy. This will set the stage for the FSA to truly have the full impact this bipartisan legislation has the potential to have, in accordance with the intent of Congress in passing this monumental law. In addition, it will place the very incentives the FSA was meant to have well within the reach of the target individuals, thereby triggering a culture of hope and fostering a safer society.

The goal of the FSA is to profoundly reduce recidivism and alleviate overcrowded prisons, improving outcomes for individuals and society and saving millions in taxpayer dollars. The FSA has the capability to change lives for the better and dramatically improve our justice system, but only if fully and properly implemented. Hence, the bolder it is, and the more individuals can participate, the greater the results.

We would welcome the opportunity to meet and discuss these matters further. Please feel free to reach out to rabbimoshe@tzedekassociation.org.

Sincerely,

Rabbi Moshe Margaretten
President
Tzedek Association