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July 13, 2015

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Re: Department of Correction Petition for Rulemaking &  
Request for Emergency Variance from § 1-17(d)(2)

Dear Chair Brezenoff and Members of the Board:

We write in response to the pending petition for rulemaking submitted by the Department of Correction (DOC), and their recent request for an emergency variance to the required 7 days out of punitive segregation found in the new rules at § 1-17(d)(2). It is our understanding that both of these are on the agenda to be considered at the July 14, 2015 Board meeting.

We appreciate the Board's adjourning its consideration of the DOC's rulemaking petition from June to July to allow more time for comment and to provide DOC with an opportunity to amend its petition. At the May and June Board meetings it was suggested that the proposal in the petition should be amended. In June, the Chair referred to the petition as "a work in progress." At the June meeting we learned of a newly forming "visit workgroup" and this group has begun to meet. Unfortunately, no amendments to the petition have been forthcoming.<sup>1</sup>

In addition to the "work in progress" petition for rulemaking, DOC has made a separate request for an "emergency variance" to alter the newly amended rules concerning punitive segregation. This request for an emergency variance is very troubling. An emergency variance is supposed to provide the DOC with a 30 day time period to bring itself into compliance with the Board Standards. However, it is clear that the DOC has no

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<sup>1</sup> Concerns were expressed at the Board's May meeting including by Member Jones Austin who observed at that time that the DOC would be well advised to consider the things that were said at the meeting in formulating their petition – a recommendation that was ignored completely prior to the June meeting and remains unheeded. See video of the Board's May 12, 2015 meeting, at time 1:09:10 available at: <https://www.youtube.com/watch?v=gODXKSqD6Ck&feature=youtu.be>.

intent to utilize the variance to come into compliance. Rather, the DOC is requesting a 30 day emergency variance in order to *ignore* the Board Standard until it is changed: “pending the Boards’ consideration of the DOC’s petition for rule changes to the minimum standards.” Even if the Board decides to move forward on the petition, the Board Standard will not be changed within a 30 day time frame. The rulemaking process requires notice and an opportunity for public comment and, even after a vote, a changed rule is not immediately in effect. Clearly there is nothing in the so-called emergency variance request that will be resolved within 30 days. Moreover, a grant of the so-called emergency variance will eliminate any ability to measure the effectiveness of the current rule.

We do not believe the Board should initiate rulemaking on the subjects of visiting, packages, enhanced supervision housing (ESH), and punitive segregation, since the DOC’s proposals are similar to those that the Board rejected only six months ago, as applied to the high-security ESH units. *A fortiori*, they should not be approved as to the entire jail population, as we argue below. Similarly, we do not believe that the Board should grant the “emergency variance” request to suspend the obligation of DOC to comply with current standards while it attempts to change those standards.

There is also a significant point here about the way the Board is to do business going forward. It cannot and should not be the practice that nothing is settled until the DOC gets what it wants. If the Board’s decisions under its City Charter-granted powers are to mean anything, they must stand until and unless a petitioner shows a compelling factual basis for revisiting them. In this case the DOC is acting precipitously and cannot provide a compelling factual basis because the new rules have only been in effect for a few months. Making such a showing requires a significant passage of time before any actual problems requiring reconsideration can be reliably identified and factually supported. The same is true for the current attempt to initiate an “emergency variance.” The DOC should not be granted a temporary reprieve based on a misuse of the emergency variance procedures while lacking factual basis to boot.<sup>2</sup>

Because the DOC has not provided revisions to its rulemaking petition and because the DOC’s request for an “emergency variance” is a misnomer for an attempt to immediately amend the rules without process, the Board should not vote to proceed with rulemaking or to grant the proposed variance at its July meeting.

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<sup>2</sup> The information provided in the request for an emergency variance is limited and selective. It alleges 22 inmates over a 2 month period who committed a violent infraction within 7 days of release from punitive segregation. However, there is no information about what the “violent” infractions were other than a description of 2 of the 22 inmates. Notably, our February 19, 2015, letter to the Board suggested limitations on the Grade 1 offenses that would qualify for 23 hour punitive segregation and our May 19, 2015, FOIL to the DOC and to the Board requested “the list of grade 1 offenses that are deemed to be “violent” and result in placement into punitive segregation pursuant to Board of Correction Standard § 1-17(e), yet no list of offenses has been provided by DOC to the public or apparently to the Board.

**I. The Board should not initiate rulemaking with respect to visiting, packages, enhanced supervision housing, and punitive segregation.**

The DOC's proposals on the subjects of visiting, packages, enhanced supervision housing (ESH), and punitive segregation, are similar to those that the Board rejected only six months ago, as applied to the high-security ESH units. *A fortiori*, they should not be approved as to the entire jail population. The Board's decisions under its City Charter-granted powers as determined in January 2015 must stand until and unless a petitioner shows a compelling factual basis for revisiting them. There is no such factual showing in the DOC's application.

Indeed, the Standards changes that *were* adopted in the earlier proceedings have not even been fully implemented with new policies and procedures. For example, the DOC has issued no revised disciplinary policy to reflect the Standards amendment prohibiting 16 and 17-year-olds from placement in punitive segregation, at the time of an infraction or later.<sup>3</sup> Without guidance, DOC hearing officers were sentencing youth to punitive segregation and holding the sentences in abeyance until they turned 18. This practice came to the attention of a Board member who contacted higher level officials at DOC. In response, DOC is no longer sentencing 16 and 17 year-olds to punitive segregation. However, no alternative disciplinary process for 16 and 17 year-olds has been developed. Further, the Board has reported in each of its ESH reports that many of the ESH requirements are not being recorded by DOC staff, preventing adequate oversight and leaving unanswered whether the relevant Standard is actually being carried out.<sup>4</sup> We have requested through FOIL on May 19, 2015 "the list of grade 1 offenses that are deemed to be "violent" and result in placement into punitive segregation pursuant to Board of Correction Standard § 1-17(e), yet no list of offenses has been provided by DOC. The DOC has received the necessary funding to provide staffing and programming to eliminate the use of punitive segregation for persons aged 18 through 21 as indicated in the new Standards § 1-17(b)(1)(ii). Yet the current petition for rulemaking seeks to roll back the new punitive segregation Standards instead of reporting on efforts to develop and implement this programming and thereby determine how that programming may best serve to reduce the punitive segregation population and reduce violence in the jails.

In addition to the lack of factual demonstration of the need to revisit these issues and the lack of full implementation and time to measure results of recent changes to the Standards, the DOC has not implemented alternative recommendations or investigated such

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<sup>3</sup> The amendments prohibit youth "from being sentenced to punitive segregation"; "[a]n inmate excluded from punitive segregation for any of these reasons at the time of an infraction may not be placed in punitive segregation at a later date for the same infraction, even if the inmate's age or health status have since changed." Statement of Basis and Purpose Amended Rule Adopted January 13, 2015, pp. 2 and 4, and amended Standard § 1-17 (b)(3), available at: [http://www.nyc.gov/html/boc/downloads/pdf/BOCRulesAmendment\\_20150113.pdf](http://www.nyc.gov/html/boc/downloads/pdf/BOCRulesAmendment_20150113.pdf).

<sup>4</sup> See Preliminary report on DOC's implementation of Enhanced Supervision Housing as of March 3, 2015, and Follow-up report on enhanced supervision Housing as of April 30, 2015, available at: [http://www.nyc.gov/html/boc/html/Reports/board\\_reports.shtml](http://www.nyc.gov/html/boc/html/Reports/board_reports.shtml).

alternative measures. For example, there were observations about visit rooms that were functional and had good sight lines for staff and good equipment for contact visits that limited the risk of contraband. There were also observations about visit rooms that were not functional, they had poor sight lines and lacked appropriate tables to limit the risk of contraband. And, notably, the non-contact visit areas were reportedly very poor, lacking good vision and communication capabilities for visits.

In the course of proceedings before this Board there has been discussion of ways to address the DOC's asserted security concerns that are less harsh and less damaging to the existing Standards rights of incarcerated persons. Yet, there is no indication that the DOC has seriously investigated such measures. Issues raised at the May and June Board meetings included: the lack of nexus between visits and contraband, the lack of nexus between visits and violence, the need for steady correction staff assigned to visits, overuse of the package room (pat frisks, storage), lack of filled K9 positions, broken machinery used to detect contraband, restrictions on contact visits in violation of Board Standards, and an alarming increase in the use of lockdowns in violation of Board Standards (and that lockdowns are being used as a management tool). It was noted at the June Board meeting that lockdowns of the adult population at RNDC also resulted in the adolescent population being subjected to the same lockdown as the adults, interrupting education and other programming and placing these children in otherwise prohibited confinement. Overall the Board reported that lockdowns increased (doubled in the last 6 months), visits are discouraged and that there is no effect on the level of violence.

### The Board Must Not Retreat From Reforms to Punitive Segregation

It is well settled that the use of isolated confinement, called "punitive segregation" in our City jails, causes serious physical, psychological and developmental harm.<sup>5</sup> New

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<sup>5</sup>*Jones'El v. Berge*, 164 F.Supp.2d 1096, 1101 (W.D. Wisc. 2001) (isolated confinement is "known to cause severe psychiatric morbidity, disability, suffering and mortality [even among those] who have no history of serious mental illness and who are not prone to psychiatric decompensation."); *Koch v. Lewis*, 216 F.Supp.2d 994, 1001 (D. Ariz. 2001) (experts agreed that extended isolation causes "heightened psychological stressors and creates a risk for mental deterioration"); *Ruiz v. Johnson*, 37 F.Supp.2d 855, 907 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154 F.Supp.2d 975 (S.D. Tex. 2001) (the court described administrative segregation units as "incubators of psychoses-seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities"); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1988) (citing expert's affidavit regarding effects of SHU placement on individuals with mental disorders); *Baraldini v. Meese*, 691 F. Supp. 432, 446-47 (D.D.C. 1988) (citing expert testimony on sensory disturbance, perceptual distortions, and other psychological effects of segregation), *rev'd on other grounds sub nom. Baraldini v. Thornburgh*, 884 F.2d 615 (D.C. Cir. 1989); *Bono v. Saxbe*, 450 F. Supp. 934, 946 ("Plaintiffs' uncontroverted evidence showed the debilitating mental effect on those inmates confined to the control unit."), *aff'd in part and remanded in part on other grounds*, 620 F.2d 609 (7th Cir. 1980); *Madrid v. Gomez*, 889 F. Supp. 1146, 1235 (N.D. Cal. 1995) (concluding, after hearing testimony from experts in corrections and mental health, that "many, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in the SHU") *rev'd in part on other grounds*, 190 F.3d 990 (9th Cir. 1999).

York City has finally,<sup>6</sup> through the new Minimum Standards passed by the Board in January, 2015, joined in a national trend to reduce the harmful use of isolation.<sup>7</sup> Evidence supporting this needed reform was overwhelming.<sup>8</sup>

Per the newly adopted Board standards, punitive segregation is now limited to 30 days for any single infraction, and 30 consecutive days overall, with 7 days out before the person may be returned to punitive segregation. No one can be held in punitive segregation for more than 60 days within a six-month period unless the person continues to engage in “persistent acts of violence” that can’t be addressed by placement in an enhanced supervision housing unit (ESHU). Minimum Standard § 1-17(d)(3). People with grade 2

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<sup>6</sup> DOC expanded its punitive segregation capacity by 27% in 2011, and another 44% in 2012. resulting in more punitive segregation cells than it had in the 1990’s when DOC housed many thousands more people than it does today. The Board report “*Comparison of Historical Rates of Violence Between Inmates and Rates of Staff Use of Force on Inmates*” showed that the increase in the use of punitive segregation did not reduce inmate-on-inmate violence system-wide and did not reduce use of force by staff against individuals housed in the jails..

<sup>7</sup>Prior to the Board amendments, DOHMH and DOC did institute some reforms in the creation of Clinical Alternative to Punitive Segregation (CAPS) units for individuals with serious mental illness and Restricted Housing Units (RHU) for individuals with “non-serious” mental illness who have broken DOC rules. The CAPS unit provides a therapeutic setting with enhanced treatment services and appears to be succeeding at housing individuals who were unable to adapt to general population or Mental Observation (MO) housing. The RHU continued to be extremely punitive in nature and was not providing a respite to long terms of isolation for the individuals with mental illness housed in them. It remains unclear whether the RHU will be more successful now after the changes in the Board Standards.

<sup>8</sup>According to information gathered by DOHMH, incarcerated individuals with mental illness were more likely than others to be injured while in custody and more likely to end up in punitive segregation. Andrea Lewis to Homer Venters, Memorandum, March 14, 2012, “Medical Informatics, New York City Department of Health and Mental Hygiene and Correctional Health Services.” In September 2013, a report to the New York City Board of Correction by their mental health experts, Drs. James Gilligan and Bandy Lee, recommended that no individuals with mental illness should be placed in solitary confinement, that *no individuals at all* should be subjected to the prolonged solitary confinement in use in the City jails because “*it is inherently pathogenic – it is a form of causing mental illness.*” Gilligan, Lee, *Report to the New York Board of Correction (Sept. 2013)*. at p. 16, available at:

<http://www.nycjac.org/storage/Gilligan%20Lee%20Report%20%20Final.pdf>. The Department of Justice (“DOJ”) issued a report concerning adolescent males on Rikers Island in August 2014. In the report, DOJ identified and reported on the dangerous over-utilization of punitive segregation in the City jails stating that “the DOC relies far too heavily on punitive segregation as a disciplinary measure, placing adolescent inmates – many of whom are mentally ill – in what amounts to solitary confinement at an alarming rate and for excessive periods of time.” (DOJ 8/4/2014 Report , p. 3) The DOJ cautioned that its “focus on the adolescent population should not be interpreted as an exoneration of DOC practices in the jails housing adult inmates. Indeed, while we did not specifically investigate the use of force against the adult inmate population, our investigation suggests that the systemic deficiencies identified in this report may exist in equal measure at the other jails on Rikers.” *Id.* The report is available at <http://www.justice.gov/usao/nys/pressreleases/August14/RikersReportPR/SDNY%20Rikers%20Report.pdf>. See also Kaba, Lewis, Glowa-Kollisch, Hadler, Lee, Alper, Selling, MacDonald, Solimo, Parsons & Venters, *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 Am.J. Public Health 442, 445 (2014) (study conducted by employees of DOHMH makes numerous findings that illustrate that solitary confinement is a dangerous and self-defeating practice and indicates a need to reconsider the use of solitary confinement as punishment in jails).

offenses and non-violent grade 1 offenses must get 7 hours out-of-cell a day in punitive segregation. And the practice of making individuals serve “owed time” from prior incarcerations is eliminated. The new Board standards also exclude from *both* punitive segregation and ESHU: young people – all 16 and 17-year-olds are excluded and this should be expanding to include “young adults” 18-21-year-olds by January 1, 2016 (the City has provided the funding, over \$20 million to expand the reduction in punitive segregation as noted at the June Board meeting), and individuals with disabilities – anyone with serious mental or serious physical disabilities or conditions.<sup>9</sup>

In its petition, DOC has proposed to decimate these reforms before they are given the opportunity to succeed. If adopted, the DOC petition would permit sentences of 60 days per infraction, and permit 90 consecutive days in punitive segregation without respite from this harsh confinement (possibly longer considering the ability to obtain 3 waivers of the 7 day out provision). The proposed DOC rulemaking petition does not include *any* overall time limit to punitive segregation and it is not clear whether the intent of the changes is to permit the DOC to maintain individuals in punitive segregation indefinitely based on the proposed increase in sentences and the proposed ability to waive the 7 days out provision. The DOC thus proposes to reinstate cruelly high penalties to punitive segregation, as a part of an anti-violence plan, contrary to data concerning its correlation to violence in the jails. The Board reported in 2014 that “the increase in the use of punitive segregation did not reduce inmate-on-inmate violence system-wide” and reported “rates of use of force by correction officers on inmates at the end of 2014 [prior to the new rules adopted in January, 2015] were at an all-time high.”<sup>10</sup> In that report, the Board wisely called for “an evidence-based investigation of the root cause of this crisis” “so that appropriate remedies and reductions in injuries to inmates might be achieved.” Yet nothing in the DOC rulemaking petition or the emergency variance request reflects any such evidence-based investigation. Instead, the DOC references “serious assaults on staff – resulting in serious injury” in describing the incidents for which extended punitive segregation sentences would be allowed while requesting language in the Board Standards that may be interpreted broadly and arbitrarily by DOC staff. The current exception in the Standards, cited above, for those who commit “persistent acts of violence” make this proposed change both unnecessary and ripe for abuse.

In its request for an emergency variance to the 7 day out provision, DOC now claims that they need greater flexibility in what to do when a person commits a violent act in the 7 days out of cell. In its letter, DOC references general population as though there is a bar to placing the person into ESHU and that placement in ESHU would in fact be inappropriate. This dismissal of ESHU by the DOC as an option for the seven days out of

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<sup>9</sup> The new Standards are available at [http://www.nyc.gov/html/boc/downloads/pdf/BOCRulesAmendment\\_20150113.pdf](http://www.nyc.gov/html/boc/downloads/pdf/BOCRulesAmendment_20150113.pdf)

<sup>10</sup> See Board staff report “*Comparison of Historical Rates of Violence Between Inmates and Rates of Staff Use of Force on Inmates*” (2014), available at: <http://www.nyc.gov/html/boc/downloads/pdf/reports/Report%20on%20Violence%20Trends%202014%20Update.pdf>.

punitive segregation is bizarre. When DOC petitioned the Board to create the ESHU they stated its very purpose as a means “to control the activities of the most violent inmates.” DOC was clear in its intent “to use enhanced supervision for the inmate posing the most direct security threats” and presented the ESHU as necessary for individuals who had previously committed serious infractions and would be released from punitive segregation. October 22, 2014 DOC letter to the BOC at p. 2. Yet, DOC now states that the ESHU is not appropriate because it is “non-punitive” and there is “due process.” DOC also now states that the rehabilitative purpose and programming in the ESHU makes it an inappropriate placement for these allegedly violent individuals. None of this makes any sense. *Everything* other than punitive segregation is “non-punitive” and placement into punitive segregation requires due process as well. The fact that ESHU has programs directed at addressing the root causes of violence and minimizing idleness is precisely why ESHU should be an appropriate placement – DOC is allegedly identifying individuals *most* in need of having their violence addressed through programming.

The DOC dismissal of the ESHU as an option is convoluted and includes using the language of the new rules in a uniquely disingenuous manner. DOC suggests that the language in the Standards that is supposed to identify the most extraordinary exception – when a person can be held in punitive segregation over 60 days in 6 months – means that ESHU should not be considered for an individual who commits a violent infraction in the 7 days out of punitive segregation. This language is meant to severely limit the use of punitive segregation for more than 60 days in 6 months. It is *not* language designed to state that ESHU is not appropriate to address root causes of violence through its programs and serve as a placement for individuals receiving the requisite 7 days out of punitive segregation..

The factual information in the DOC request for an emergency variance is inadequate. DOC asserts that 3.8% of individuals released from punitive segregation between March and April had a violent infraction within the 7 day period. DOC has not identified what infractions are considered violent and fails in the letter to describe all of the incidents that involved only “approximately” 22 inmates. DOC does not indicate where these individuals were placed after release from punitive segregation, where they are currently housed or whether there were additional problems after the incidents that occurred during the 7 day period. Two individuals are described: one inmate slashed an inmate on one day and then assaulted and injured an officer the next day (no information about his current placement is provided), and one inmate assaulted a captain on his way to main intake. The BOC should not rely on two examples to grant a request that decimates the Standards, rejects development of appropriate programming use within the ESHU and which substitutes language in the Board Standards that may be interpreted broadly and arbitrarily by DOC staff. The DOC has failed to mention any facts about what other security measures were or were not in place. They do not mention red ID status or whether the individuals were in CMC Max or other high security housing areas. The requests to change the Standards fail to show that other means were tried and failed, *e.g.*, assignment of

additional staff, implementation of separation orders, adding additional ESHU units (there are currently only 51 ESHU beds out of the permitted 250).

The Board should not consider the DOC proposals to change the disciplinary process without an investigation and evidentiary support for its proposals. The DOJ called for DOC to take these steps in August 2014 “based on the volume of infractions, the pattern and practice of false use of force reporting, and inmate reports of staff pressuring them not to report incidents, we believe the DOC should take steps to ensure the integrity of the disciplinary process.”<sup>11</sup> Until such steps are taken, the Board should not be providing DOC the discretion to mete out extended harmful punitive segregation sentences as they currently propose in their petition and in their emergency variance request.

#### The Board Must Not Limit Due Process for Placement into the ESHU

Included in the DOC petition for rulemaking is the request to be able to place someone removed from the ESHU back into the ESHU within 45 days without a due process hearing. The DOC provides no valid basis for eliminating the due process protections in the Standards. DOC states the purpose as “flexibility to determine appropriate housing placement and incentivize good behavior through step-down programs to transition inmates out of ESH.” Due process is not inconsistent with those goals. Nor do flexibility in housing and implementation of good programming replace notice, the ability to be heard or the requirement that individuals in ESHU understand the reasons for their placement and the basis of any additional restrictions placed on them in the ESHU. There is no valid reason given for an inability to hold a due process hearing for an individual who is returned to the ESHU within 45 days of removal. The Board’s Preliminary report on DOC’s implementation of Enhanced Supervision Housing as of March 3, 2015, and Follow-up report on Enhanced Supervision Housing as of April 30, 2015,<sup>12</sup> contain no indication that the due process procedures are burdensome to the DOC. Rather, the reports suggest that the ESHU due process hearings and retention hearings require greater consistency and need to be improved by DOC (including tracking program participation for use at hearings and providing individuals with the bases of additional restrictions imposed on them at the hearings).

The Board should continue to require that due process proceedings be held for all individuals who are placed into the restrictive ESHU setting. As with the need to establish the integrity of the disciplinary system asserted by the DOJ, the Board should be requiring that DOC consistently follow the due process requirements in the Standards.

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<sup>11</sup> U.S. Dep’t of Justice, CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island fn 45, p. 49 (2014) available at: <http://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf>. The DOJ also cautioned that its “focus on the adolescent population should not be interpreted as an exoneration of DOC practices in the jails housing adult inmates. Indeed, ... our investigation suggests the systemic deficiencies identified in this report may exist in equal measure at the other jails on Rikers.” Id at p. 3.

<sup>12</sup> Reports available at: [http://www.nyc.gov/html/boc/html/Reports/board\\_reports.shtml](http://www.nyc.gov/html/boc/html/Reports/board_reports.shtml).

The Proposed Limitations to Visitation are Overly Restrictive and Harmful

The DOC petition seeks to limit the physical contact incarcerated individuals may have with visitors, broaden the criteria for restricting visitors, and establish a visitor registry. A few months ago the Board of Correction rejected such limits on visiting proposed for individuals placed in the new Enhanced Security Housing Units.<sup>13</sup> The Board heard a chorus of disapproval from the public and advocates in their testimony at the December 19, 2014 hearing on the proposals to limit visitation.<sup>14</sup> It was clearly expressed, and supported by data, that individuals who maintain close family ties are less like to be repeat offenders, and that the jail system should not be taking action to interfere with family relations by limiting visiting or making it more difficult or unpleasant. According to the American Bar Association:<sup>15</sup>

Maintaining personal connections through contact visits improves the lives of incarcerated individuals, their families, and the community in three important ways. First, people who receive visits from and maintain relationships with friends and family while incarcerated have improved behavior during their time in custody,<sup>16</sup> contributing both to a safe and more rehabilitative atmosphere in the facility. Second, individuals who maintain relationships have more successful transitions back to society than those who do not.<sup>17</sup>

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<sup>13</sup> See New York City Board of Correction, Notice of Adoption of Rules, approved January 13, 2015, at 9. DOC requested the denial of contact visits to all persons held in the newly authorized Enhanced Supervision Housing (ESH), but the Board approved the deprivation of contact visits only based on an individualized finding at a hearing. The Board also rejected proposals to limit visits to individuals in ESH to a pre-approved list (*i.e.*, a visitor registry) and to limit those persons who can visit. The DOC is repeating its failed request and asking for the restrictions to be applied to *all* individuals in the jails even though it was rejected for people housed in the ESH.

<sup>14</sup> The hearing transcript, written testimony and tapes from the hearing are on the Board of Correction website at [http://www.nyc.gov/html/boc/html/meetings/RuleChanges\\_2015.shtml](http://www.nyc.gov/html/boc/html/meetings/RuleChanges_2015.shtml).

<sup>15</sup> Letter, American Bar Ass'n Governmental Affairs Office to Chairperson, Committee on the Judiciary and Public Safety, Council of the District of Columbia (June 19, 2013), pp. 2-3, available at [http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013june19\\_dcvisitation\\_1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013june19_dcvisitation_1.authcheckdam.pdf). This letter was written in support of allowing contact visits in the District of Columbia jails in addition to video contact.

<sup>16</sup> See ABA Standards for Criminal Justice: Treatment of Prisoners, Standard 23-8.5 cmt. at 260. See also Virginia Hutchinson et al, U.S. Dep't of Justice, Nat'l Inst. of Corr., *Inmate Behavior Management: The Keys to a Safe and Secure Jail*, 8 (August 2009) (noting that maintaining contact with family and friends (including visitation) is integral to behavior management in the jail setting and that a failure to meet this important social need can lead to depression and inappropriate behavior in the under-custody population); Karen Casey-Acevedo & Tim Bakken, *The Effects of Visitation on Women in Prison*, 25 Int'l J. Comp. & App. Crim. Just. 48 (2001); Richard Tewksbury & Matthew DeMichele, *Going to Prison: A Prison Visitation Program*, 85 Prison J. 292 (2005); John D. Wooldredge, *Inmate Experiences and Psychological Well-Being*, 26 Crim. J. & Behav. 235 (1999).

<sup>17</sup> See Jeremy Travis et al, Urban Institute, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry* 39 (June 2001) ("Studies comparing the outcomes of prisoners who maintained family

For example, the Minnesota DOC of Corrections found that prisoners who were visited were 13 percent less likely to be reconvicted of a felony and 25 percent less likely to return to prison on parole violation.<sup>18</sup> Third, families and children that are able to visit their relatives in jail benefit greatly from maintaining family ties during a time that can often cause family trauma.<sup>19</sup>

The ABA's conclusions are consistent with those of other research finding that people who maintain family ties during incarceration and benefit from the support of family after release have better reentry outcomes than those who are unable to do so,<sup>20</sup> and that maintaining family ties with a parent who is in custody also has significant, salutary effects on the child's well-being, including possibly improving the child's chances of staying out of the criminal justice system.<sup>21</sup> Against this background, and with specific reference to contact visits, the ABA has stated in its Criminal Justice Standards for Treatment of Prisoners (emphasis supplied):

For prisoners whose confinement extends more than [30 days], correctional authorities should allow contact visits between prisoners and their visitors, especially minor children, absent an individualized determination that a contact visit between a particular prisoner and a particular visitor poses a danger to a criminal investigation or trial, institutional security, or the safety of any person.<sup>22</sup>

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connections during prison through letters and personal visits with those who did not suggest that maintaining family ties reduces recidivism rates.”) (internal citation omitted).

<sup>18</sup> See Minnesota Dept. of Corr., *The Effects of Prison Visitation on Offender Recidivism* (Nov. 2011), pp. 18-21.

<sup>19</sup> See Hairston, C.F. *Family Ties During Imprisonment: Important to Whom and for What?* 18 *Journal of Sociology and Social Welfare* 87-104 (Mar. 1991) (literature review of research showing maintenance of family ties improves mental health of inmates' children and increases likelihood of family reunification after release).

<sup>20</sup> Travis et. al., *Families Left Behind: The Hidden Costs of Incarceration and Reentry*, 6 (Urban Institute 2005) (“Studies comparing the outcomes of prisoners who maintained family connections during prison through letters and personal visits with those who did not suggest that maintaining family ties reduces recidivism rates”) (internal citation omitted).

<sup>21</sup> See Allard & Greene, *Justice Strategies: Children on the Outside*, 22-23 (Justice Strategies 2012) (noting that self-worth and connectedness impact risk of criminal justice involvement and recommends facilitating prison visits to boost those feelings); Nickel et. al., *Children of Incarcerated Parents: An Action Plan for Federal Policy Makers*, 13 (Council of State Governments 2011) (“Strong parent-child relationships may aid in children's adjustment to their parents' incarceration and help to mitigate many of the negative outcomes for children that are associated with parental incarceration”) (citation omitted).

<sup>22</sup> ABA, *Criminal Justice Standards for Treatment of Prisoners*, Standard 23-8.5(e) (Visiting), available at [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/Treatment\\_of\\_Prisoner\\_s.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoner_s.authcheckdam.pdf), p. 259.

The provision of contact visits absent an individualized determination is also required by the state Constitution. The New York Court of Appeals has held that pre-trial detainees have a state constitutional right to contact visits, subject to reasonable security precautions, and that any denial of contact visits must be done based on individualized consideration, not meted out in wholesale lots. *Cooper v. Morin*, 49 N.Y.2d 69, 81 n.6 (1979). This right is embodied in the State Commission of Correction Minimum Standards at 9 NYCRR § 7008.6 (a) (“Physical contact shall be permitted between a prisoner and his visitors.”).

To our direct knowledge, the DOC has violated the current visit standards on several recent occasions – imposing booth visits absent justification under the rules which require a nexus between some conduct and the visitation process. Minimum Standards § 1-09(h)(2, 3). In one such case, the DOC restricted a client’s visits to booth visits *and* failed to provide the Legal Aid Society with the paperwork for several months. DOC reported that the decision was “under review by DOC.” When the paperwork was finally provided it was clear that the booth visit restriction was in violation of DOC rules but we were informed that the restriction would continue. This was particularly outrageous in that the delay in providing documentation robbed our client of the ability to use the writ process to obtain relief before the scheduled end of the visit restriction. In two other cases booth visits were imposed after individuals were found with weapons even though there was no nexus between the weapon and a visit, as required by the Board Standards, and in another case booth visits were imposed after an assault on a Captain that had no nexus to visits. Given the all too frequent failure by DOC to follow Board Standards and its own policies, the attempt to increase restrictions on visits should not be considered.

These examples, wherein DOC violated Board Standards and its own written policies, make particularly clear why the rules should not make DOC the arbiter of factors which will be weighed in determining visitation rights (*e.g.* whether the visitor is a “family member” or has a “close or intimate relationship” with the incarcerated individual). DOC’s inability to follow specific requirements is already a problem. Changing the Standards to add vague factors that lack defined parameters for application will not improve the rights of people to visit with their incarcerated loved ones. For example, the proposed language does not make it clear who can visit, what misdemeanor weapon charges may qualify for visit restriction (*e.g.* a seven year old misdemeanor for having an otherwise legal gravity knife) or what convictions within the year will qualify for exclusion from visitation. Nor should DOC be permitted to limit visitation based on vague and undefined terms: any “threat” to “security” and “good order.” Does any “threat” whether serious or not now result in visit restrictions? Consider a “threat” to take legal action or contact a City officeholder or agency such as the Board. The proposed language is inappropriate for the Board’s Standards.

The DOC proposals for deciding visitation appeals are equally troubling and must be rejected. The DOC proposes to supplant the Board as the body for an appeal of a decision to limit visitation and also proposes a 14 business day time frame for the appeals decision. Fourteen business days is an unreasonably long time period for a jail setting

where time in custody may be short in duration. Moreover, there is substantial reason for concern that DOC is not capable of providing a timely and appropriate review of its own decision. The failure of DOC to follow its grievance policy exemplifies that existing remedies within DOC already do not function. The DOC grievance system is a source of numerous complaints by our clients to Legal Aid, and by Legal Aid to the Department of Correction, with no apparent improvement. The most basic problem is that DOC staff do not follow the rules in processing grievances and DOC does not make them do so.<sup>23</sup> The rules are widely disregarded as revealed by the pattern of complaints we receive<sup>24</sup> and as partially corroborated by DOC's own data obtained through FOIL.<sup>25</sup> We have found a similar pattern of nonfeasance with respect to administrative appeals in disciplinary convictions, which many prisoners told us were never answered. We submitted a FOIL

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<sup>23</sup> There is an elaborate written grievance procedure, see DOC Directive 3376, available at [http://www.nyc.gov/html/doc/downloads/pdf/Directive\\_3376\\_Inmate\\_Grievance\\_Request\\_Program.pdf](http://www.nyc.gov/html/doc/downloads/pdf/Directive_3376_Inmate_Grievance_Request_Program.pdf)

<sup>24</sup> Grievance complaints in a nutshell, our clients complain that:

- (a) They are unable to file grievances, because grievances are not picked up from the grievance boxes used in some jails. In other jails, where individuals are expected to file grievances in person at the grievance office, some individuals report that they cannot get to that office, and others report that when they do get to the office, the staff member assigned refuses to take certain grievances even though the subject of the grievance is "grievable" (appropriate for the grievance process)
- (b) They file grievances but never receive a response. We see many court decisions in which individuals report such non-response, in addition to the complaints we receive directly.
- (c) If grievants receive a response and are not satisfied with it, the next step is to request a hearing. But at most jails, there are literally never hearings, individuals are told that is the case, and therefore, no one requests them. Many court decisions dismiss cases for non-exhaustion of administrative remedies because the individual did not request a hearing. The failure to provide hearings is circumstantially corroborated by the extremely low number of hearings reported in DOC's own data.
- (d) If grievants try to proceed past the hearing (or non-hearing) stage by appealing to the Warden and then to the Central Office Review Committee, they receive no response. This failure to respond is circumstantially corroborated by the negligible number of decisions at the Warden's and the Central Office level.

<sup>25</sup>Records for the first half of FY 2015 obtained through FOIL show that out of a total of 3062 grievances processed, 3056 were "informally resolved" at the facility level. Only 3 grievances were "formally resolved" (*i.e.* disposed of after a hearing). Only 3 were resolved by the Warden, and these were limited to three jails: GRVC, OBCC CPSU and RNDC. *No* grievances were resolved at the Central Office level in the first half of 2015.

Records for FY 2014 obtained through FOIL showed that out of a total of 5079 grievances processed, 5048 were "informally resolved" at the facility level. Only 6 grievances were "formally resolved." Only 21 were resolved by the Warden, and these were limited to one jail, OBCC. Only 5 grievances were resolved at the Central Office.

The tiny numbers of hearings, Warden's decisions, and Central Office decisions each year lead inescapably to the conclusion that these aspects of the grievance system are mostly illusory (combined, only .2% of the total of 3056 for the first half of FY 2015, only .6% of the total of 5079 in FY 2014). Otherwise, it would be necessary to believe that over 99% of the grievants in the City jails are satisfied with the facility decisions of their grievances and do not wish to pursue them further. The complaints we receive from our jailed clients make clear that is not the case.

request for a year's worth of documentation of that process and received many appeals but not a single decision.

The appeals of visitation restrictions should continue to be heard by the independent Board which has made timely reviews of visitation restrictions in the past. The recent staffing shortage at the Board interrupted this process but will be resolved shortly and the timely resolution of these important appeals should continue without interference or a change in the Standards.

The Board was correct to reject earlier attempts to limit and restrict visits and should not entertain rule-making on this topic now. There is a lack of a connection between visit restrictions, violence reduction and reduction in contraband in the jails. A recent Board of Correction report found that "the vast majority of weapons are found in areas other than intake and visits and that the majority of weapons found in the jails are inmate-made or fashioned from materials already inside the jails."<sup>26</sup> The data collected by the Board suggests that further restricting the already heavily supervised visiting process will not be of much help in reducing the prevalence of weapons in the jails, and the human cost of restricting visits will be great. DOC has provided no substantial data to support its proposals is lacking.

The Board raised issues at its May meeting concerning the lack of nexus between visits and contraband and the lack of nexus between visits and violence. Observations by the Board's Ad Hoc Committee on Violence indicated that there are many ways to improve the visit process and improve safety *without* limiting contact visits: there is a need for steady correction staff to be assigned to visits, a need for better space for pat frisks, a need to staff open positions in the K9 unit, a need to fix and replace broken machinery used to detect contraband, and a need to make all of the visit rooms functional (good sight lines and furniture designed to permit contact without the risk of contraband exchanges). Fixing staff, supervision and physical plant issues should be a priority first, *before* any consideration of limitations on contact visits and access to visits.

Moreover, the current visit process can be excessively intimidating and lengthy. For example, the recent use of dozens of ESU officers with K9 dogs to meet the public buses on Rikers is overly intimidating and excessive. Useful amendments to the Standards would streamline the process and make visitation more accessible. For example, an appropriate amendment would be to set a one hour time limit for visits to begin after a visitor arrives at the Rikers Visitor Center or at a borough jail.<sup>27</sup>

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<sup>26</sup> New York City Board of Corrections, *Violence in New York City Jails: Stabbing and Slashing Incidents*, at p. 7 (April 22, 2015), available at [http://www.nyc.gov/html/boc/downloads/pdf/reports/Slashings\\_stabbings\\_CRP\\_2015\\_04\\_27\\_FINAL.pdf](http://www.nyc.gov/html/boc/downloads/pdf/reports/Slashings_stabbings_CRP_2015_04_27_FINAL.pdf).

<sup>27</sup> This goal was imposed and was met at a time when the DOC population was vastly greater than at present. In Legal Aid's *Benjamin* litigation, we obtained an agreed order containing a one-hour limit for waiting time between visitors' arrival on Rikers Island and the commencement of their visits. *Benjamin v. Abate* and consolidated cases, No. 75 Civ. 3073, Partial Stipulation and Order for Promulgation of Uniform Visiting

The Proposed Limitations on Receiving Packages are Overly Restrictive and Harmful

The limitation of packages to those received from an “approved vendor” is a substantial deprivation to incarcerated persons and their families. Most individuals incarcerated in City jails are indigent and most of their families are poor. Yet the DOC proposed rule would require individuals or their families to purchase items new (and often pay for delivery) even if they own perfectly serviceable items at home, or if family members are able to obtain them cheaper at local vendors. For people living on the economic edge—or over it, as are many individuals in our jails—this is an unnecessary and onerous economic barrier. In addition, the proposed rules also contain a 3 business day time frame for delivering packages in the jails. This is a substantial added delay (in addition to the time to place the order and for it to be packaged and delivered) for a jail setting where time in custody may be unpredictably short in duration. The ability to bring packages directly to incarcerated individuals should not be altered.

In support, the basis is stated to eliminate “the potential for receipt of contraband concealed in such items.” In its prior request for a variance requiring this same restriction for individuals in the ESHU, DOC asserted that “It simply is not realistic to expect that the DOC can detect *every* miniscule scalpel which may be secreted within a hard-cover book, every strip of suboxone which may be inserted into a magazine, or every small parcel of cocaine which can be hidden within a pair of sneakers.” (Variance request, Oct. 22, 2014, at p. 3) (emphasis supplied)).

No human activity can be 100% successful, without exception. However, the careful searching of items both visually, with a metal detector and use of the K9 unit, should uncover contraband with very few exceptions. DOC must assign and supervise sufficient staff to complete careful searches. We note the recent arrest of a Corizon employee and a 20 year veteran correction officer on contraband smuggling,<sup>28</sup> and the Department of Investigation report demonstrating a massive failure by jail staff to perform proper searches of staff entering the jails, one of whom—actually a DOI investigator—had his pants stuffed full of contraband drugs and weapons.<sup>29</sup> It appears that the solution to contraband in the

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Procedures for Rikers Island Visitor Access (July 1, 1992). DOC did not immediately comply, but after a few years and at least one threat of contempt proceedings, it attained reasonably substantial compliance with the one-hour limit. That order is no longer in effect, having been terminated under the Prison Litigation Reform Act in the early 2000s. Since then, the Department’s performance in managing the visiting process has deteriorated badly.

<sup>28</sup> These arrests were reported by the *New York Times* on May 15, 2015. The article is available at: [http://www.nytimes.com/2015/05/16/nyregion/2-arrested-on-smuggling-charges-at-new-york-city-jails.html?\\_r=0](http://www.nytimes.com/2015/05/16/nyregion/2-arrested-on-smuggling-charges-at-new-york-city-jails.html?_r=0)

<sup>29</sup> This incident was reported by the *New York Times* on November 6, 2014. A Department of Investigations report indicated that visitors to city jails may be the source of some contraband, but that a large proportion of the illegal trafficking *is carried out by uniformed staff* and civilian employees: “‘Given the extent of smuggling that we know goes on and given what we know about what’s coming in from visitors, a lot of stuff has to be coming in from guards and employees because this stuff doesn’t magically appear,’ said Mark Peters, the Department of Investigation commissioner.” The article is available at: <http://www.nytimes.com/2014/11/07/nyregion/rikers-island-undercover-investigator-contraband->

jails is not to apply financially onerous requirements to oppressively restrict incarcerated individuals, it is to require staff to do their jobs properly.<sup>30</sup>

The restriction on publications is unwarranted. The right to obtain and read published material is protected by the First Amendment. And the right to receive printed material that is available to the public from “any source, including but not limited to family, friends or publishers” is embodied in the State Commission of Correction Minimum Standards at 9 NYCRR § 7026.1 (a). Individuals in our jails who will be restricted from receiving written material from their families and friends will often not be able to afford to buy them from “approved vendors” and *the City jails do not have libraries other than the law libraries*.<sup>31</sup> Individuals in our jails should have access to reading material and any Board Standard on this issue should encourage rather than restrict such access. One of the biggest problems of correctional management is mitigating idleness and its consequences—especially in jails, which have many fewer programs and activities than do prisons. It is a terrible mistake to limit reading, the cheapest and most cost-effective means of giving people in jail something worthwhile to do.

DOC may make adjustments to the property regime. For example, if it is the practice that families and friends bring in very large stacks of books and magazines, a reasonable limit on the number that could be delivered at one time may be appropriate. But this Board should not be adopting as a minimum standard an across-the-board denial of the only access to reading matter that some people can afford. The Board should not amend Section 1-13 and should put DOC on notice that its intent to impose this to the entire jail population regardless of any actual risk, will not be countenanced.

## **II. The Board should initiate rulemaking for the purpose of ratifying long-standing variances as amendments, with some modifications.**

We are pleased that the Board and the DOC are taking steps to cease using the variance process for purposes that actually require Standards amendments. As to the particular proposals at issue:

Standard § 1-02, Classification of Prisoners: We support the proposals to allow commingling of detainees and city-sentenced persons in adolescent cell housing areas,

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[http://www.nyc.gov/html/doi/downloads/pdf/2014/Nov14/pr26rikers\\_110614.pdf](http://www.nyc.gov/html/doi/downloads/pdf/2014/Nov14/pr26rikers_110614.pdf). The Report of the NYC Department of Investigation, *New York City Department of Investigation Report on Security Failures at City Department of Correction Facilities* (November, 2014) is available at: [http://www.nyc.gov/html/doi/downloads/pdf/2014/Nov14/pr26rikers\\_110614.pdf](http://www.nyc.gov/html/doi/downloads/pdf/2014/Nov14/pr26rikers_110614.pdf).

<sup>30</sup> A FOIL request issued to the DOC in November, 2014 included a request for evidence of the need to restrict packages based on the DOC variance request submitted to the Board that month. No material was provided in response in time for the December hearing and there has *still* been no response as of June 3, 2015.

<sup>31</sup> Even the Supreme Court decision that upheld a “publisher only” rule—which restricted only hardcover books, not softcover books and magazines—did so for a jail that was conceded to have a “relatively large” library for its population. *Bell v. Wolfish*, 441 U.S. 520, 552 & n.33 (1979).

housing areas designated for 18- to 21-year-olds, and areas for pregnant women. These proposals serve commendable safety and programmatic purposes.

Standard § 1-06, Recreation: We support the proposal for in-cell recreation to persons confined for medical reasons in the contagious disease units, since it is appropriate given the presence of contagious disease.

Standard § 1-03, Personal Hygiene: We agree that the Board should initiate rule-making with respect to suicide prevention. However, we believe that it should approach the subject much more broadly and should update and expand the relevant Standards to reflect current knowledge concerning suicide prevention. We also believe DOC's proposal on this subject is seriously deficient even within its own limited scope. Because of the importance of this subject, we and some of our colleagues in other organizations are addressing this Standard in a separate letter to be submitted by The Legal Aid Society.

We recommend that the Board reject the current DOC petition for rule-making and request for an emergency variance as untimely. The Board should initiate rulemaking for the purpose of ratifying long-standing variances as amendments, with some modifications.

Very truly yours,



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