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June 7, 2015

New York City Board of Correction
51 Chambers Street
New York, N.Y. 10007
SENT VIA EMAIL

Re: Department of Correction (DOC) Petition for Rulemaking

To the Members of the Board of Correction:

The New York Civil Liberties Union respectfully submits this letter to the Board of Correction regarding changes to the minimum standards sought by the Department of Correction.¹ The proposed changes have the potential to impair fundamental constitutional and human rights for individuals incarcerated on Rikers Island. They also have the potential to work counter to the City's ongoing efforts to improve rehabilitative outcomes and reduce the use and impact of incarceration. Under any circumstances, the Board should hold the Department to a high standard for justifying such amendments. With regard to this proposal the burden should be higher still, for the reasons explained in this letter. The NYCLU urges the Board to decline to initiate rule-making at this time, in order for the Board to ensure the Department has publicly provided information regarding the rationale for these changes, an evidence-based analysis of their likely impact, and clear plans to prevent and detect any misuse by staff.

First, the Department proposes to amend recently enacted limits to punitive segregation—limits meant to better protect individuals from the severe harms of solitary confinement—to permit waivers to those limits for individuals who have engaged in violent behavior. The existing rules, however, provide the Department with flexibility to exceed punitive segregation limits for “persistently violent individuals.”² Absent further explanation from the Department, it is not clear why the current exemption is inadequate. Furthermore, there is reason for concern and a need for additional explanation regarding how this existing exemption is being used.³ Adding

¹ NYC Department of Correction. Petition to the NYC Board of Correction for Rulemaking Pursuant to the City Administrative Procedure Act. May 26, 2015. *Available at*: <http://www.nyc.gov/html/boc/downloads/pdf/DOC%20Petition%20to%20the%20NYC%20Board%20of%20Correction%20for%20Rulemaking.pdf>

² NYC Board of Correction. Notice of Adoption of Rules. January 13, 2015. § 1-17 (d)(3) “An inmate may not be held in punitive segregation for more than a total of sixty (60) days within any six (6) month period, unless, upon completion of the sixty (60) days, the inmate continues to engage in persistent acts of violence, other than self-harm, such that placement in enhanced supervision housing, provided for in section 1-16 of this chapter, would endanger inmates or staff.” *Available at*: http://www.nyc.gov/html/boc/downloads/pdf/BOCRulesAmendment_20150113.pdf

³ NYC Board of Correction. Report on the status of punitive segregation reform. May 8, 2015. The Board reported that it did not receive “any override notices from DOC for the 53 inmates who exceeded the 60-day limit. These inmates have served an average of 178 days in punitive segregation, far exceeding the limit that was imposed to

another exception to the minimum standards permitting staff to waive protections from lengthy solitary confinement invites the potential for confusion and additional misuse, particularly before the newly enacted rules have been given the time, attention and oversight necessary to succeed.

To the extent the Department articulates a distinct need for both the current exception and the proposed waiver, before initiating any rule-making process the Board should be confident about the scope of that need and how many individuals the Department expects will be adversely impacted by the waivers. The Department's commitment to transparency in reporting the number of waivers is significant and laudable, but the Board's ability to ensure meaningful accountability will be far from complete if there is no initial metric against which the Board can measure the Departments' stated goals. At the same time, if analysis shows the estimated size of the population targeted by the Department for these waivers is very small, and/or that a need for the waivers is temporary, that may suggest a far more limited course of action is appropriate, as opposed to permanently amending the broadly applicable minimum standards.

Second, the "Enhanced Supervision Housing" unit was recently created for what appears to be the same cohort of individuals now targeted for the waivers. The concept behind ESH was that it would be a less restrictive setting than punitive segregation for violent individuals that would—unlike punitive segregation—provide programming to actually address the underlying causes of problematic behavior. The Department has encountered significant difficulties in implementing ESH as intended.⁴ It is not clear why the response to those challenges, however, should be extending the time individuals are subjected to solitary confinement, as opposed to separating them into a less restrictive unit, including but not limited to ESH, and at the same time focusing attention on operating ESH as originally conceived. The appropriate and most effective approach is doing the difficult work of responding in a humane and safe manner to violent behavior in a therapeutically-oriented unit. Simply extending time in degrading and harmful conditions of solitary confinement is counterproductive to long-term rehabilitative goals and ultimately may result in more violence within the facilities.⁵

Third, the Department also seeks to relax standards that protect the ability to visit incarcerated New Yorkers. The Board recently considered and rejected a similar proposal by the Department.⁶ The existing rules already provide an avenue for individualized visitation restrictions, including what appears to be the possibility of proactive restrictions.⁷ More information is warranted if

protect an inmate's physical and psychological health." p. 5. *Available at:*
<http://www.nyc.gov/html/boc/downloads/pdf/reports/Punitive%20Segregation%20Report.050815.pdf>

⁴ NYC Board of Correction. Follow-up report on Enhanced Supervision Housing as of April 30, 2015. *Available at:*
http://www.nyc.gov/html/boc/downloads/pdf/reports/ESH_2nd_report_final.pdf

⁵ VERA Institute of Justice. Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives. May 2015. *Available at:* http://www.vera.org/sites/default/files/resources/downloads/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf

⁶ NYC Board of Correction Notice of Public Hearing and Proposed Rule, Section 105 §5(e). November 17, 2014. *Available at:*
http://www.nyc.gov/html/boc/downloads/pdf/Variance_Documents/BOC%20Proposed%20Rule%20November%2018%202014.pdf

⁷ In its rule-making petition, the Department states the current rule permits only "reactive" restrictions on visitations. *See* NYC Department of Correction Petition to the NYC Board of Correction for Rulemaking Pursuant to the City

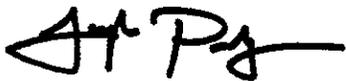
circumstances have changed in a manner that warrants reconsideration of the Board's previous rejection of these proposed changes.

There is no doubt that violence and other issues identified by the Department in its rulemaking petition are urgent and real, and that the Department deserves to be supported in its efforts trying to address them. Existing rules, policies and programs, however, must be given the time and attention necessary to be successfully implemented. Moving forward with additional, potentially duplicative or contradictory efforts to address these complex challenges may succeed, if at all, only in the short term and can come at significant cost for incarcerated individuals and at the expense of lasting reform.

Effective solutions must be carefully designed as part of a comprehensive long-term reform strategy, backed by evidence-based analysis, and in accord with the City's obligation to respect human and constitutional rights. Furthermore, given the longstanding cultural dysfunction that is proving so resistant to change,⁸ any proposal allowing staff to depart from minimum standards should be considered, if at all, only in conjunction with clear written plans by the Department for rigorous high-level oversight and accountability that will help effectuate culture change from within by preventing and detecting efforts by staff to misuse the type of changes contemplated in these amendments.

The information thus far publicly submitted by the Department to the Board is inadequate to determine whether the current petition meets these standards. The prudent approach is to postpone consideration of the petition in order to solicit this information and permit adequate time for careful review by the Board and the public before rulemaking, if any, begins. We would welcome the opportunity to provide comment on the petition at the next Board meeting, and respectfully request that time be set aside for public comment before any vote on the petition.

Sincerely,



Taylor Pendergrass
Senior Staff Attorney



Deandra Khan
Organizer

cc: Commissioner Joseph Ponte

Administrative Procedure Act, p. 3. The current rule, however, does appear to permit proactive, prospective restrictions based on whether "such visits constitute a serious threat to the safety or security of a facility." See § 1-09(h)(3) of the BOC Minimum Standards.

⁸ See: Schwirtz, M. & Winerip, M. Correction Commissioner Calls Overhauling Rikers a 'Long, Heavy Lift.' New York Times. June 4, 2015. Available at: http://www.nytimes.com/2015/06/05/nyregion/with-new-commissioner-a-slow-turning-in-efforts-to-remake-rikers.html?_r=0