



June 5, 2015

Chair Stanley Brezenoff
Members of the Board
New York City Board of Correction
51 Chambers Street
New York, NY 10007

Dear Chair Brezenoff and Members of the Board:

We write to urge you to reject the Department of Correction Petition for Rulemaking dated May 26, 2015. The petition includes requests for rule changes which are vague, not evidence-based, and reflect an approach to violence control that emphasizes punishing New Yorkers in city jails, their families, and their children, and which fails to address root causes of jail violence. Additionally, many of the proposals are identical or similar to proposed rules already rejected by the Board in January 2015. Finally, the Board should refrain from initiating the CAPA process because the time between the May 26, 2015 proposal and the June 9, 2015 meeting is too short for the community to thoroughly review and meaningfully comment. The proposed rules would have such a tremendous impact on the lives of incarcerated people and other marginalized New Yorkers that the Board has a responsibility to demand from the Department clarity, detail, evidence and responses to questions raised by the community – including in this letter, and letters from the Jails Action Coalition, the Legal Aid Society Prisoners' Rights Project, and others – before initiating rulemaking.

Moreover, we believe the Board should demand a commitment from the Department to uphold the reforms initiated in January, to study their impacts, and ensure compliance of their staff to all Minimum Standards before considering any rule changes that will profoundly impact the lives of people in city jails. The Department continues to willfully ignore the Minimum Standards including by sentencing adolescents to solitary confinement, enforcing a prohibition on packages with clothing from family members, imposing prolonged lockdowns, and subjecting young adults to non-contact visiting – all in clear violation of the law. After all, what is the purpose of rulemaking without accountability?

While we do not feel there is adequate time to comment in a holistic fashion on the proposed rules, we would like to take this opportunity to offer some limited comments on the proposal from the Department.

Punitive Segregation

In January of this year, the Board adopted rules making New York City a leader in reforming the use of Solitary Confinement. The Department's proposal would undo significant portions of these reforms. We urge you to maintain the courageous progress you are making, and reject a proposal that is regressive and harmful. The proposed rules would weaken limitations on length of stay in punitive segregation, and do away with the period of reprieve after 30 days in solitary for certain people. It is not hard to imagine the results should these changes be adopted – we only need to look back a year. The Department states that these changes are intended in part to “send a clear message to staff that the Department supports them.” We understand that staff needs support; however, public policy that has such profound impact on the lives of New Yorkers should be evidence-based. Permitting the Department to override limitations on solitary confinement has only one, all too familiar endgame – the long-term warehousing of human beings in torturous conditions.

We share the concern of the Department about the safety of staff and other people in the jails. It is our clients who suffer beatings, stabbings, slashings, and burnings. However, we know that placing people in solitary confinement will not keep our clients safe; in fact it will make them less safe. People in solitary confinement who are locked in cages 24 hours a day, who rely on officers that view them as less than human for their every need, predictably become desperate and despondent. Desperate people act out of desperation. Several of our clients have informed our Jail Services staff that requests for basic items like toilet tissue are routinely ignored. Instead, our clients tell us that in order to get attention one must act out by flooding the cell, holding the slot, or worse. As one client put it recently “These officers only respect violence.” The conditions created to purportedly respond to or deter violence are a breeding ground for the culture of violence the Department seeks to address. Looking back at decades of persistent and growing violence in our city jails the predominant response to violence has been long term solitary confinement. Clearly, this response does not work.

While it may be necessary to separate certain individuals from the general population due to violent behavior, these individuals need productive and therapeutic intervention in a setting that values their humanity and where acts of violence are not the primary means to procure basic needs.

The Department claims that prolonged solitary confinement would only be utilized in a small number of cases where an individual commits acts of violence in or shortly after release from punitive segregation. During the May 12, 2015 Board meeting, the Department presented that 50 of the 1031 people released from punitive segregation since adoption of reforms re-infracted, and that less than half of those infractions occurred within the first seven days of leaving punitive segregation. According to census reports obtained through a FOIL request, there were 44 vacant beds in the Enhanced Supervision Housing Units as of May 26, 2015 – the date of the Department's petition for rule-making. If not for this population, it is unclear for whom the Enhanced Supervision Housing Units were created.

The Department's own data presented to support rolling back limits on solitary confinement does *not*, in fact, support such a move. The Department's data shows that serious

violent assaults against staff have declined about 40 percent when comparing Fiscal Year 2015 To Date and the same time period in 2014.¹ This data suggests that reducing the use of punitive segregation may be related to reductions in serious violent assaults on staff, and that we should continue to pursue such reforms.

Visiting Restrictions

The proposed rule changes related to visiting eviscerate the rights of people in city jails to hold contact visits with their family members and people in their communities. The proposed rules would provide unwarranted discretion to the Department to deny or suspend visits. A similar set of restrictions on visiting was proposed for the population housed in Enhanced Supervision Housing and was rejected by the Board in January 2015. There is no reasonable justification to impose such restrictions on the *entire* jail population at this time. Under current Minimum Standards the Department is already empowered to limit contact visitation when a clear and defensible nexus is made between a visit and contraband or violence. Again, while we share the concern of the Department about violence in the jails, the evidence does not support the claim that visits are a primary source of contraband in the jails.

The BOC's April 27, 2015 report "*Violence in New York City Jails: Slashing and Stabbing Incidents*" found that nearly 80 percent of weapons recovered in 2014 were fashioned from items found or used in the jails, and only 10 percent were likely introduced from the outside. Moreover, the New York City Department of Investigation uncovered last year "that while visitors to city jails bring in some contraband, a large proportion of the illegal trafficking is carried out by uniformed guards and civilian employees." The Department of Correction reported 60 incidents of contraband discovery out of approximately 270,000 visits, only 16 of which were weapons. Data from every source suggests that visits are *not* a significant source of contraband contributing to jail violence. It is therefore entirely unjust to eliminate the right to contact visitation for tens of thousands of New Yorkers as a first measure in violence prevention.

"Contact" 1-09(f)

On May 6, 2015 the Board received a letter from 17 organizations who advocate for families in New York City, including Brooklyn Defender Services. This letter urges you to reject any proposal that limits meaningful contact between incarcerated people and their families. These organizations represent much of the expertise our city has to offer when considering the impact of public policy on families. They state clearly, "We are unable to find any evidence or data that supports non-contact visiting as a best practice."

While the Department claims that the proposed changes will bring them in line with other jurisdictions, they provide no evidence whatsoever that these jurisdictions have succeeded in reducing violence or controlling contraband, or that they have better outcomes in recidivism or other measures. Additionally, the Department claims that the proposed standards will bring New York City jails more in line with New York State Standards. This statement is misleading – while the state Commission on Corrections establishes a bare minimum for the quality of visits to be afforded to incarcerated people, the practice in New York State Prisons is to permit

¹ See May 26, 2015 Petition to BOC From DOC Commissioner Ponte, p4.

meaningful contact throughout a visit, and this practice is codified in NYS DOCCS policies and procedures.² In any case, it is relevant to note that this Board is responsible for establishing rules for a population primarily comprised of people who are pre-trial detainees and presumed innocent, and therefore should have particular protections of their liberty interests.

The Department's proposed rules attempt to redefine "contact visiting," by removing the requirement that contact be permitted "throughout" a visit and, we assume, to permit the installation of plexi-glass barriers between visitors and incarcerated people. While the language may appear benign, this limit on contact for an incarcerated person is profoundly impactful and may *exacerbate* violence. Judge Hammil recently described how damaging these barriers were for young people who were illegally subjected to these non-contact visits at GMDC, noting the sense of relief shared by young people who could finally be held by their mothers.

The Minimum Standards already permit the Department to place limitations on contact visiting when there is a clear and defensible nexus between a visit and a risk of violence or smuggling. That policy is sensible and, when the Minimum Standards are followed, provides a means for due process.

The visiting process is already incredibly cumbersome, time consuming, and invasive for visitors. Restricting contact for all loved ones who travel to Rikers Island may have one important and unforeseen impact – a dramatic reduction in the number of visitors who will no longer make the trip. These visitors are the helpful, loving community members who keep the jails calm with the contact and support they provide to their family and friends. They are the 269,940 visitors during the Department's reporting who brought only love and support to their visit. We fear the impact on jail violence should this calming influence be lost.

Limits on Visitors 1-09(h)(2)

The proposed rules would provide unfettered discretion to the Department to limit visits based on vague, overly inclusive and discriminatory criteria. The Department requires that a visitor demonstrate a family or "otherwise close or intimate relationship" with the incarcerated person. Who will decide if a relationship is adequately "close or intimate" and based on what measure? How can we assure our clients who are foster children that they can be visited by their families, who might not fit the Department's (or an officer's) definition of "family"?

The Department also wishes to consider current probation or parole status and criminal history to bar visitation rights. Such a policy would disproportionately impact poor communities of color who are more likely to have a criminal record or to be on probation or parole. Importantly, no evidence has been provided that to connect a criminal background with an increased likelihood to engage in contraband smuggling, violence during a visit, or violence by an incarcerated person after receiving a visit. Would any one of the 60 incidents of contraband smuggling cited by the Department have been prevented by such screening? How would criminal backgrounds for detained people and their visitors be evaluated, and by whom? Shall we advise our clients suffering from drug addiction that they may be denied visits because the Department is so certain their friends and family will smuggle drugs to them? Will the family members of

² Title 7, NYCRR 201.3

our immigrant clients face immigration consequences as a result of the Department's background checks, or refrain from even trying to visit out of fear?

The proposed rule also suggests that an individual's pending charges, for which they are *presumed innocent* until proven guilty, may be grounds for denial of visiting. The problems with such a standard are self-evident. In all of these proposed reasons for barring visits, it is unclear who will evaluate the history of narcotics, gang activity, weapons, or anything else the Department may perceive as threatening. It is also not clear when this evaluation will take place, or how long the Department may need to complete such an evaluation.

Even if an incarcerated person or visitor doesn't meet the broad standards laid out in proposed 1-09 (2), the Department's proposed rules would grant DOC yet more discretion to bar a visitor – based on the simple ground that it is “determined that such visitation would cause a threat to the safety, security, or good order of the facility.” Again, it is unclear who, and by what standard such a determination would be made, and we can only assume the term “good order” will be defined as convenient to Department staff. What is clear is that the proposal is so vague as to be capricious and is ripe for abuse.

Nexus to Visits 1-09(h)(3)

Current Minimum standards explicitly require the Department to demonstrate a clear nexus between an incarcerated person, their visitor, the act of visiting, and a serious threat to the facility before limiting visitation. The Department's proposed rules eliminate this requirement entirely from the Minimum Standards, permitting the Department to bar visits for essentially any reason.

Current standards describe a “serious” threat to the facility as part of the standard to limit contact visits. The Department's proposal removes the word “serious.” It is unclear what other descriptors might take its place: Perceived threats? Possible threats? Minor threats? Threats of legal action? Threats to report misconduct or abuse? Future threats? Past Threats? Any threats? Coupled with the elimination of requirements that the Department show a nexus between a serious threat and the act of visiting, this proposed standard would allow staff to deny visits at their whim.

Appeals 1-09(h)(6)

While the proposed rules provide for a limited appeal process for barred visitors, it is unclear what rubric the Department will use to evaluate appeals, who will conduct the evaluation, and how decisions will be handed down with any semblance of due process. Furthermore, a 14 day timeframe for appeals is problematic in a jail setting due to the short stays of an enormous portion of the population who may be barred from visitation for their entire period of incarceration. Those who stay longer will be precluded from receiving visits at the most important stage in their incarceration – just after arrest. We are also concerned that the Board does not have adequate staff to respond to appeals, particularly in light of the very limited budget increase allotted in the Mayor's current budget proposal.

In addition, a 14 day appeal window would make legal a blanket prohibition on visiting for a group of people, or for that matter all people in city jails, for two weeks pending review. While we do not believe this Commissioner would take such an action, any regulations adopted will outlast the present administration.

Packages

The Department's proposed limits on receipt of packages are discriminatory and inappropriate for a jail setting, and we request that the Board reject the proposed rules. A huge proportion of people in city jails are there during the pendency of their case simply because their families are too poor to pay bail. In light of this fact, it is wholly irresponsible and discriminatory to require these same poor families to purchase basic items for their incarcerated family members anew. The Department claims that the burden on families will be mitigated by the use of uniforms in the jail system. This claim ignores the need for undergarments, hygiene items and other basic necessities that people need *in addition* to any uniform provided.

In addition, the Department proposes introduction of language into the Minimum Standards that would permit them to also limit *outgoing* packages. The proposed criterion for barring outgoing mail from individuals in the jail is a "reasonable belief that limitation is necessary to protect public safety or maintain facility order and security." This language is familiarly vague, undefined, and again will allow an unnamed staff person to prohibit people in the jails from communicating to the outside world solely on a "belief." Written communications are an essential mode of communication for incarcerated people to remain connected with their families and communities. When taken together with restrictions on visiting, the proposed rules would allow the Department to completely isolate individuals they wish to punish from their loved ones.

Enhanced Supervision Housing

In its proposed rules, the Department seeks to remove due process protections for individuals released from Enhanced Supervision Housing. The proposed changes are not sensible, and the Department provides no meaningful justification for them. Under current Minimum Standards, individuals would be released from Enhanced Supervision Housing because their behavior indicates that they are safe to live among the general population. In light of that evaluation, any return to Enhanced Supervision Housing must be based on *present* factors, not any previous evaluation made *before* a period of good behavior and release from ESH. To remove due process protections is especially problematic in the context of ESH because the placement in the unit is indeterminate. An individual may spend months or years in ESH before being released back to population. The proposed rules would allow the Department to rely on the initial risk assessment that is outdated and has no bearing on present factors to place an individual back into ESH. The Board established due process when ESH was established for good reason; we request that you stand by your commitment to due process and reject the Department's proposal.

Conclusion

As we have seen in the past, the Department has submitted a proposal to the Board which would reduce oversight, and facilitate unfettered discretion to DOC to punish and further isolate New Yorkers in city jails. The proposals before you now are discriminatory, harmful and unsupported by any meaningful evidence. We ask you to reject the proposed rules and demand from the Department a commitment to reforms that truly engage with the task of reducing jail violence – increased programming, therapeutic interventions, and accountability for Department staff.

The resources of this Board are limited and should be dedicated to undertaking rulemaking around truly urgent and important matters. In this vein we encourage you to initiate rulemaking toward ending the horrific sexual violence plaguing our city's jails, as documented in the Public Advocate's petition and Legal Aid Society's recently filed litigation. We encourage you to question both DOC and DOHMH officials regarding the realities of sexual violence in the jails and what is being done in response. Our clients have direct experience with this issue and we are eager to work with the Board to address this urgent concern.

Thank you for your consideration of our comments, we are available to respond to inquiries and assist the Board in any way to protect the rights of our incarcerated clients. If you have any inquiries related to these concerns, please contact Riley Doyle Evans, Jail Services Coordinator at (718)-254-0700 x 225 or rdevans@bds.org.

Sincerely,



Lisa Schreibersdorf
Executive Director