TESTIMONY

The New York City Board of Correction

Public Hearing on Proposed Rule to

Amend the Minimum Standards

Limiting Visitation and Packages

Amending Due Process for Enhanced Supervision Housing

And

Creating Exceptions to the Limitations on the Use of Punitive Segregation

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New York, New York

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Introduction

Thank you for the opportunity to offer this testimony. We make these statements in opposition to the proposed amendments ("Proposed Amendments")[1] to the Board of Correction Minimum Standards for the City Jails. We submit this testimony on behalf of The Legal Aid Society, and thank Chair Stanley Brezenoff and the Members of the Board of Correction for this opportunity to be heard.

We think the Proposed Amendments should be voted down for the reasons stated below. But if the Board is not prepared to do that, then we think the Board must look carefully at the proposals, item by item, and assess both the necessity and the completeness of each proposal. After such careful consideration, the Board should vote on the proposals individually, accepting only those which improve conditions of confinement (or modifying them to ensure that they improve conditions), and provide mechanisms for the Board to monitor and report on the performance of the Department of Correction (DOC) in complying with the purpose and mandate of the new regulations. The Board must incorporate into any Standards amendments the necessary safeguards for incarcerated persons. Safeguards that protect the rights of incarcerated persons must be in the Standards and not just in DOC policy because DOC policy is subject to change and not subject to enforcement.

CAPA does not require that the Board adopt the Proposed Amendments in their current form. Section 1043d states that the "final rule may include revisions to the proposed rule, and such adoption of revisions based on the consideration of relevant agency or public comments shall not require further notice and comment pursuant to this section." We encourage the Board to reject or dramatically change the current Proposed Amendments. To those ends, however, we do not think that the Board should proceed to a final decision based on this hearing. The issues involved in the Proposed Amendments include reform of punitive segregation, changes to the visit standards and other areas of great concern to the public as demonstrated by the many written and oral statements provided. Given the importance of these subjects, we believe that the Board should give notice of its tentative conclusions and allow time for further public comment (and preferably for consultation with stakeholders and experts) on those proposals before reaching its final conclusions.

The Prisoners' Rights Project

The Prisoners' Rights Project ("PRP") of The Legal Aid Society has addressed problems in the New York City jails for more than 40 years. Through advocacy with the Department of Correction ("DOC") and the New York City Health and Hospitals Corporation (HHC) (formerly the Department of Health and Mental Hygiene), individual and class action lawsuits, PRP works to improve conditions of confinement in New York City jails including reform to the use of punitive segregation, increased access to medical and mental health care and to reform the systems for oversight of the use of force and reduce violence in the jails. Each week PRP receives and investigates numerous requests for assistance from individuals incarcerated in the City jails. Years of experience, including daily contact with inmates and their families, gives The

[1] "Proposed Amendments" and "Proposed Amendment" reference the current proposed rule revisions posted on the Board of Correction website for public comment at the hearing on October 16, 2015. Available at: http://www.nyc.gov/html/boc/downloads/pdf/Variance_Documents/20150914/BOC%20Proposed%20rule%20and%20Law%20Department%20Certification%20-%209-11-15.pdf.

Legal Aid Society a firsthand view of problems in the New York City jails. It is on this basis that we offer these comments on the proposed amendments to the Board Minimum Standards.

Role of the New York City Board of Correction

The City Charter grants the Board of Correction the authority to set Minimum Standards for conditions in the City jails. It is the Board's role to establish Minimum Standards for the care, custody, correction, treatment, supervision, and discipline of all persons held or confined under the jurisdiction of the DOC. It is not the Board's role to remove all Standards, to relinquish its independent authority over jail conditions or to provide carte blanche for the DOC, the Mayor and/or the Correction Officer's Benevolent Association to do as they will.[2] The Board is bound by state law but is not, as has been suggested, limited by an unnecessarily restrictive application of state law in the protections it can afford.[3] In fact, the Board's Minimum Standards can provide *greater* protections than state law and should do so when greater protections are appropriate or necessary to ensure the humane and safe function of our City jails. To fulfill its mission, the Board should create Minimum Standards which make sense and are tailored to meet the needs of our City jails. The Board must not eviscerate its Standards or its role as an independent agency by adopting the current Proposed Amendments to its Standards.

We do not believe the Board should amend the Standards on the subjects of visiting and packages when similar proposals were rejected by the Board earlier this year, 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 roll back the Standards recently adopted that limit the use of punitive segregation and establish due process rights for assignment to the ESH.

We say this both as a substantive matter and because there is a significant point here about the way the Board is to do business going forward. It cannot and should not be the practice that when the DOC proposes amendments, nothing is ever 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 on the issue of punitive segregation and ESH. DOC cannot and has not provided a compelling factual basis to support the proposed changes because the new rules have only been in effect for eight months. Showing a compelling factual basis for

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[2] Michael Schwirtz and Michael Winerip, *At Rikers, a Roadblock to Reform*, The New York Times, December 14, 2014, available at: http://www.nytimes.com/2014/12/15/nyregion/at-rikers-a-roadblock-to-reform.html?_r=0.

[3] See DOC Petition to the NYC Board of Correction, May 26, 2015 at p. 2 ("[t]hese changes would bring the Board's Minimum Standards closer in line with New York State standards governing visitation, as well as standards in place in other jurisdictions."), and Proposed Amendments, statement of Basis and Purpose at p. 3 ("[t]hese changes would be consistent with the requirements established by New York State standards governing visitation and largely consistent with standards in place in other jurisdictions"). These references suggest that the Board should lower the minimum standards to the most restrictive standard that has been accepted anywhere in the State. There is no requirement or benefit to such a practice and it confuses what *can* be consistent with state law with a *requirement* of state law. State regulations, as cited at p. 14 herein are expansive in protection of the right to contact visits for individuals housed in jails. 9 NYCRR § 7008.6. Moreover, the reference to "other jurisdictions," outside of New York, is wholly inappropriate as New York has a state constitutional right to contact visits that is at issue here.

reversing a recent decision requires a significant passage of time before any actual problems requiring reconsideration can be reliably identified and factually supported.[4]

Summary of Opposition to Proposed Amendments

Punitive Segregation: The Board should not pass the Proposed Amendments concerning punitive segregation which are unnecessary, ripe for abuse, and contrary to demonstrated need for reform of punitive segregation in our City jails:

- There has been no adequate investigation or development of evidentiary support for the proposals.
- Isolated confinement causes serious physical, psychological and developmental harm and does not correlate to a reduction in violence.
- The Proposed Amendments do not include necessary limits or *any* definitive limit to the period that a person can be held in the harmful setting of punitive segregation.
- The Board should investigate the current failure to exclude individuals with psychiatric disabilities from punitive segregation and consider steps to address this deficit in performance.
- The Board should maintain the limits set in the January Standards and carefully review the grant of overrides of the limit of 60 days in any 6 month period.

Enhanced Supervision Due Process: The Board should continue to require due process proceedings for all individuals who are placed into the restrictive ESH setting. An individual being returned to ESH should understand the basis for the return.

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[4] The information provided in the DOC request for an emergency variance dated June 12, 2015 was limited and selective. It alleged that 22 inmates over a 2 month period committed a violent infraction within 7 days of release from punitive segregation. However, there was no information about what the "violent" infractions were other than a description of 2 of the 22 inmates' offenses. For the rest of the inmates there was no description of the offenses at all. In fact, the letter did not state whether they were Grade 1 violent offenses or lesser offenses. On August 10, we received a response to our May 19, 2015 FOIL to the DOC requesting "the list of grade 1 offenses that are deemed to be 'violent' and result in placement into 23 hour per day confinement in punitive segregation pursuant to Board of Correction Standard § 1-17(e)." The list of "violent" offenses includes *many* that are very broad in definition and do not necessarily include serious physical contact with another person:

> Rule 103.11 - Make, possess, sell, give or exchange any amount of narcotic, narcotic paraphernalia or any other controlled substance.
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> Rule 103.12 - Possess any contraband with intent to sell or distribute such contraband - if contraband is weapon, drug, or escape contraband
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> Rule 106.10 - Shall not lead / attempt to lead or encourage others to participate in boycotts, work stoppages or other demonstrations
>
> Rule 109.10 - Shall not physically resist staff members
>
> Rule 123.10 - Smuggle weapons, drugs or drug-related products, alcohol or tobacco
>
> Rule 130.10 - Shall not refuse to provide a urine, hair, saliva or other sample
>
> Rule 131.00 - Shall not engage in acts of hate regarding such person's race, color, national origin, affiliation with any group, religious practice, age, gender, disability or sexual orientation

Visitation: The Proposed Amendments to visitation are not the strong, enforceable Standards necessary to protect the state constitutional right of individuals in our jails to have contact visits and other visitation. The Board should not pass the Proposed Amendments on visitation:

- There is no evidentiary support for the proposals.
- The Proposed Amendments inappropriately limit the New York state constitutional right to contact visits in jails.
- The Proposed Amendments are confusing, contradictory, and provide for intrusive inquiries by DOC, into personal information about any visitor to the jails, that appear to be unlimited in scope.
- The Proposed Amendments remove due process protections of notice, and the opportunity to be heard from individuals whose visitation rights are being challenged.
- The Proposed Amendments include unreasonable time periods for appeals of decisions revoking or restricting visitation and take the authority for direct appeals from the Board.
- The Proposed Amendments significantly weaken the Board Standards and their enforceability permitting DOC to make decisions to seriously restrict visiting rights, *ad hoc*, behind closed doors, with no right to notice or an opportunity to be heard until after the decision is made, and no transparency as to how the decision was reached.

Packages: The Board should not pass the Proposed Amendments concerning packages. The limitation of packages to those from an "approved vendor" is unfair to individuals and their families requiring them to purchase new items and possibly pay extra for delivery. Most individuals incarcerated in City jails are indigent and most of their families are poor, they should be permitted to purchase items at vendors of their choice and to deliver items that are already owned as well.

I. The Board should not adopt the proposed amendments to the Minimum Standards with respect to visiting, packages, enhanced supervision housing, and punitive segregation.

The Proposed Amendments on the subjects of visiting, packages, enhanced supervision housing (ESH), and punitive segregation, are similar to those that the Board rejected only eight months ago. Those earlier proposals applied only to the high-security ESH units. *A fortiori*, the current versions 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. Yet, there was no such factual showing in the DOC's petition.

Indeed, the Standards changes that *were* adopted in the earlier proceedings, adopted in January, 2015 ("January Standards"), have not even been fully implemented with new policies and procedures. 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.[5] The DOC has now 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 alternative measures. 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. For example, there were observations raised by Board members at the May, June and July Board meetings reporting about visit rooms that were functional, 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. The Board should not adopt Proposed Amendments that may be unnecessary given alternative remedies for the perceived problems.

<u>The Board Must Not Retreat From Reforms to Punitive Segregation</u>

It is well settled that the use of isolated confinement, called "punitive segregation" in our City jails, causes serious physical, psychological and developmental harm.[6] New York City has

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[5] *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.

[6] *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).

finally,[7] through the new Minimum Standards passed by the Board in January, 2015, joined in a national trend to reduce the harmful use of isolation.[8] Evidence supporting this needed reform was overwhelming.[9]

Per the Board Standards adopted in January, 2015 (January Standards), punitive segregation was limited to 30 days for any single infraction, and 30 consecutive days overall, with a mandatory 7 days out before the person may be returned to punitive segregation. January Standard § 1 - 17 (d)(1) & (2). (The Proposed Amendments weaken the language from the prior "must" be released to "shall" be released. Proposed Amendment § 1-17 (d)(2).) The January Standards set a cap on punitive segregation of no more than 60 days within any 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 (ESH). January Standard § 1-17(d)(3).[10] The

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[7] 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..

[8]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.

[9]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).

[10] In addition to the limits on sentences and 7 day respite period, people with grade 2 offenses and non-violent grade 1 offenses must get 7 hours out-of-cell a day while in punitive segregation. January Standard § 1-17 (e). And the practice of making individuals serve "owed time" from prior incarcerations was eliminated. January Standard § 1-17 (g). The January Standards also excluded from *both* punitive segregation and ESH: 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

current proposed rule amendments would decimate these reforms before they are given the opportunity to succeed.

The Proposed Amendments provide for exceptions to the 30 consecutive day cap on sentences to punitive segregation found in § 1-17 (d)(1) and § 1-17 (d)(2). If passed, the amended rules would permit the DOC to issue 30 day waivers to the 7 day period.

- DOC would be able to waive the 7 day period out of punitive segregation if an inmate "commits a violent infraction or multiple infractions that endanger inmates or staff, as defined by paragraph (4) of this subdivision, such that release from punitive segregation for seven (7) days would endanger inmates or staff." Proposed Amendment § 1-17 (d)(3)(i).
- Or, if during the 7 day period the individual "commits a violent infraction or multiple infractions that endanger inmates or staff, as defined by paragraph (4)," the individual who commits the infraction during the 7 days out of punitive segregation, can be returned to punitive segregation prior to the completion of the 7 days. Proposed Amendment § 1-17 (d)(3)(ii).

Proposed Amendment § 1-17 (d)(3)(ii) requires that the individual gets a disciplinary hearing before any additional time is added to their punitive segregation sentence. However, Proposed Amendment § 1-17 (d)(3)(i) makes no mention of due process for the new charges. Proposed Amendment § 1-17 (d)(4) (referenced in (d)(3)(i) & (ii)) limits the grant of a waiver to infractions that would qualify the individual for pre-hearing detention. Clearly both sections (§ 1-17 (d)(3)(i) & (ii)) should reference that nothing in this consideration of a "waiver" should interfere with the due process hearings provided when an individual is charged with breaking DOC rules. The rule must also state affirmatively that a finding of not guilty at a disciplinary hearing expunges the waiver immediately. As proposed, the language in these Proposed Amendments is insufficient to spell out the process clearly and must not be adopted in its present form. The current language of the Proposed Amendments may well result in individuals staying in punitive segregation on a "waiver" when they were found not guilty of the infractions that were the basis for the waiver. Such a result should be clearly prohibited.

Proposed Amendments § 1-17 (d)(5), (6) and (8) are also problematic in that they provide for possible extensive consecutive sentences to punitive segregation without relief.

- Proposed Amendments § 1-17 (d)(5) permits additional waivers to be issued by the DOC – up to 3 waivers for a single individual in any 4 month period.
- Proposed Amendment § 1-17 (d)(6) permits the Chief of Department (DOC) to approve an extension of a 60 day period in punitive segregation.[11]

(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. The new Standards are available at http://www.nyc.gov/html/boc/downloads/pdf/BOCRulesAmendment_20150113.pdf

[11] This section of the Proposed Amendments is problematic in the scheme of the increased availability of waivers and lengthy sentences to punitive segregation. The January Standards already included the ability of the Chief of Department to approve an extension of the 60 days in 6 months limitation based on persistent acts of violence.

- Proposed Amendment § 1-17 (d)(8) permits sentences of up to 60 days in punitive segregation for assaults on staff that cause staff to suffer a serious "Class A Use of Force" injury.

The Proposed Amendments create standards in which there is *no* definitive limit to the period of time that a person can be held in the harmful setting of punitive segregation. Consider the following examples:

- Example 1: Found guilty of infraction, sentenced to the maximum 30 days in punitive segregation. A waiver is granted because of a new infraction while in punitive segregation. A second 30 day sentence is imposed. A second waiver is granted after an assault on staff causing injury. A 60 day sentence is imposed for the assault and then the Chief of Department grants an extension (an override) of the 60 day period based on continued acts of violence based on persistent refusal to provide a urine sample to DOC staff.[12] The individual has now been in punitive segregation for 120 days and there is no guarantee that the person will ever be released under the Proposed Amendments if they continue to refuse to provide a urine sample.
- Example 2: Found guilty of infraction, sentenced to maximum 30 days in punitive segregation. A waiver is granted at the end of the 30 days because of a new infraction committed while in punitive segregation. Sentenced to a second period of 30 days. A second waiver is granted at the end of the 30 days because of a new infraction committed while in punitive segregation. Sentenced to a third period of 30 days. A third waiver is granted at the end of the 30 days because of a new infraction committed while in punitive segregation. Sentenced to a fourth period of 30 days. The result is 120 days in punitive segregation with no respite.

Although the language of the Proposed Amendments claims that it is a "highly exceptional circumstance" that would result in the grant of such waivers, there is simply no factual basis for this assertion. It is well known that prolonged placement in solitary confinement causes additional anti-social behaviors that can result in additional rule infractions. The way the Proposed Amendments are currently framed, this conduct could lead to indefinite placement in punitive segregation. Notably, the rules that DOC identifies as "violent" which could result in implementation of these exceptions include charges that simply do not reflect conduct which is of a sufficient safety and security concern to justify contemplating harmful lengthy placements in punitive segregation.[13]

January Standards § 1-17 (d)(3). The issuance of such extensions were referenced as "overrides" at the Board meeting held on October 13, 2015. The Board did add an appropriate requirement into the Proposed Amendments that each override is recorded in writing including "(1) the reasons why placement in a less restrictive setting has been deemed inappropriate or unavailable, and (2) why retaining the inmate in punitive segregation is necessary to ensure the safety of inmates or staff."

[12] See list of charges qualifying as "violent" in footnote 4 above. Failure to provide a urine sample is a violent offense which permits the placement of an individual into 23 hour per day punitive segregation. January Standards § 1-17 (e).

[13] *Id.*

The possibility of individuals becoming trapped in punitive segregation for harmful and lengthy periods is precisely the pattern observed repeatedly for individuals with psychiatric disabilities in this system and in others. One infraction leads to isolated confinement, and the person's inability to tolerate isolation leads to further deterioration and more infractions, leading to further time in isolation and further deterioration and misconduct. This misery-go-round was supposed to be ended with the adoption of the January Standards which restricted the use of punitive segregation for the vulnerable population of individuals who have serious psychiatric disabilities. January Standards § 1-17 (b0(1)(iii). At the time of the discussions of those rule changes the terminology of "serious psychiatric disabilities" was described as expansive – it was not limited by a set of diagnoses and would result in appropriate exclusions from harmful isolation that cause individuals with mental illness to decompensate.

The utter failure to achieve that goal (of exclusion from harmful isolation), or to attempt to achieve that goal, was demonstrated at the Board meeting on October 13, 2015. At the meeting, Dr. Venters reported that only individuals with serious mental illness (usually defined by specific diagnoses) are admitted to the Clinical Alternatives to Punitive Segregation (CAPS) unit. For all others with mental illness and serious psychiatric disabilities who have committed infractions, the placement remains punitive segregation. The complete failure to implement the January Standards in any meaningful manner was clear – it was reported that *all* 37 overrides of the 60 day limit to punitive segregation were for individuals with mental illness and that *all* of them are staying a long time in punitive segregation. Dr. Venters reported that more than half of the individuals in punitive segregation receive mental health services and there is still *no* setting in the jails for those individuals with psychiatric disabilities who continue to infract and are not eligible for CAPS. Most appalling in this presentation was the description of the mental health rounding done of individuals with mental illness held for long periods in punitive segregation. Dr. Venters reported that the clinicians are looking for "catatonia, psychosis, and disorganization."[14] Mental health clinicians should not be waiting until such severe symptoms appear in their patients to take action. Nor should they merely be 'rounding,' (looking in at individuals in their cells) to see whether they have reached severe levels of psychiatric deterioration. Far from the promise to identify individuals, exclude them from punitive segregation and protect them from harm, this describes *knowing of and permitting* an excessive risk to mental health by failing to provide necessary treatment (including out-of-cell mental health treatment) and housing options to accommodate serious mental health needs.[15] Such conduct describes what is needed for a finding of deliberate indifference to a serious health need.

[14] There is no question that Dr. Venters and HHC are well aware of the extreme risk of solitary confinement. They have identified and reported on the connection between solitary confinement and acts of self-harm in the City jails. See, 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). See also cases cited in footnote 6 and reports cited in footnote 7.

[15] *Harris v. Angelina County*, 31 F.3d 331, 335-36 (6th Cir. 1994); *Alberti v. Sheriff of Harris Cty, Tex.*, 978 F.2d 893, 894-95 (5th Cir. 1992), *cert. denied*, 509 U.S. 905 (1993); *El Tabech v. Gunter*, 922 F.Supp. 244, 252-54, 258-60 (D.Neb.), *aff'd*, 94 F.3d 1191 (8th Cir. 1996); *Madrid v. Gomez*, 889 F.Supp. 1146, 1198, 1214, 1226, 1251 (N.D. Cal. 1995) (all finding deliberate indifference by government agents in injunctive prison cases).

Officials may not house individuals with mental illness in isolated confinement if they know it will exacerbate their mental illnesses.[16]

The Proposed Amendments do not include *any* overall time limit to punitive segregation.[17] 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; but that is what the language permits and what is currently happening for some individuals already as described at the October 13, 2015 Board meeting. Rather than correcting ongoing harmful use of punitive segregation, the Proposed Amendments would reinstate cruelly high penalties to punitive segregation, as a part of a supposed anti-violence plan, contrary to data concerning the lack of correlation of such isolated confinement to controlling 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 January Standards) were at an all-time high."[18] 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 reflected any such evidence-based investigation.

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[16] Courts have held that mentally ill prisoners simply may not be held under 23-hour isolated confinement conditions. *Madrid v. Gomez*, 889 F.Supp. 1146, 1265 (N.D.Cal. 1995) (excluding individuals with mental illness from SHU confinement); *Casey v. Lewis*, 834 F.Supp. 1477, 1548-49 (D.Ariz. 1993) (condemning placement and retention of prisoners with mental illness in lockdown status); *Langley v. Coughlin*, 715 F.Supp. 522, 540 (S.D.N.Y. 1988) (holding that psychiatric evidence that prison officials fail to screen out from SHU "those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there" raises a triable Eighth Amendment issue); *Inmates of Occoquan v. Barry*, 717 F.Supp. 854, 868 (D.D.C. 1989) (holding that inmates with mental health problems must be placed in a separate area or a hospital and not in administrative/punitive segregation area). And see, *Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977) ("[w]hen systematic deficiencies in staffing, facilities or procedures make unnecessary suffering inevitable, a court will not hesitate to use its injunctive powers."); *accord*, *Eng v. Smith*, 849 F.2d 80, 82 (2d Cir. 1988) (granting preliminary injunction based on showing of "systematic deficiencies" in prison mental health care).

The Eighth Amendment's ban on cruel and unusual punishment arguably also forbids punishment of someone for conduct that he cannot appreciate or control. Prisoners with mental illness who are punished for the manifestations of their mental illness are equivalent to drug addicts who are punished for the fact of their addiction--a practice that the Supreme Court held violates the Eighth Amendment nearly four decades ago. *Robinson v. California*, 370 U.S. 660 (1962); see *Arnold on behalf of H.B. v. Lewis*, 803 F.Supp. 246, 256 (D.Ariz. 1992) (holding that lockdown as punishment for symptoms of mental illness violated the Eighth Amendment); *Cameron v. Tomes*, 783 F.Supp. 1511, 1524-25 (D.Mass. 1992) (applying standard disciplinary procedures to person in sex offender treatment program amounted to punishing him for his psychological problems), *aff'd as modified*, 990 F.2d 14, 21 (1st Cir. 1993).

[17] The failure to place a limit on time in punitive segregation significantly distances the Proposed Amendments from the UN Standard Minimum Rules on the Treatment of Prisoners which were recently updated and re-named the "Mandela Rules." Rule 43 of the Mandela Rules prohibits prolonged solitary confinement, Rule 44 defines prolonged solitary confinement as solitary time in excess of 15 consecutive days, and Rule 45 restricts the use of solitary confinement to "exceptional cases as a last resort for as short a time as possible." and prohibits its use "in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures." The Mandela Rules are available at: http://www.penalreform.org/wp-content/uploads/2015/05/MANDELA-RULES.pdf.

[18] *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.

Instead, the DOC referenced "serious assaults on staff – resulting in serious injury" in describing the incidents for which extended punitive segregation sentences would be allowed while requesting language that is now in these Proposed Amendments that can be interpreted broadly and arbitrarily by DOC staff. The January Standards already contain an exception for those who commit "persistent acts of violence." January Standard § 1-17 (d)(3).[19] The Board should not adopt the Proposed Amendments which are unnecessary, ripe for abuse, and contrary to demonstrated need for reform of punitive segregation in the City jails.

In its request for an emergency variance to the 7 day out provision, DOC claimed 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 referenced general population as though there was a bar to placing the person into ESH and that placement in ESH would in fact be inappropriate. This dismissal of ESH by the DOC as an option for the seven days out of punitive segregation was bizarre. When DOC petitioned the Board to create the ESH 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 ESH as necessary for individuals who had previously committed serious infractions and would be released from punitive segregation. October 22, 2014 DOC letter to the Board at p. 2. Yet, DOC stated that the ESH is not appropriate because it is "non-punitive" and there is "due process." DOC also stated that the rehabilitative purpose and programming in the ESH make 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 ESH has programs directed at addressing the root causes of violence and minimizing idleness is precisely why ESH should be an appropriate placement – DOC is allegedly identifying individuals ***most*** in need of having their violence addressed through programming. But DOC, having persuaded the Board to agree to ESH to help control violent individuals, now says that the 7 day out individuals should not go into ESH because they are violent!

The DOC dismissal of the ESH as an option was convoluted and included using the language of the January Standards in a uniquely disingenuous manner. DOC suggested 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 ESH 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 ESH is not appropriate to address root causes of violence through its programs and to 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 was inadequate. DOC asserted that 3.8% of individuals released from punitive segregation between March and April had a violent infraction[20] within the 7 day period. DOC has not identified what infractions were committed and failed to describe all of the incidents that involved only "approximately" 22

[19] The language of Proposed Amendment § 1-17 (d)(6) more clearly states requirements of the Chief of Department than was included in the January Standard § 1-17 (d)(3). We would not object to the addition of the language at the end of the Proposed Amendment setting out the content of the written explanation of security concerns.

[20] See list of charges qualifying as "violent" in footnote 4 above.

inmates. DOC did 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. In fact, only 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 was provided), and one inmate assaulted a captain on his way to main intake. The Board should not rely on two examples to grant a request that decimates the Standards, rejects development of appropriate programming use within the ESH, and substitutes language in the Board Standards that may be interpreted broadly and arbitrarily by DOC staff. Moreover, 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 failed to show that other means were tried and failed, *e.g.*, assignment of additional staff, implementation of separation orders, adding additional ESH units (there are currently less than 100 ESH beds out of the permitted 250).

The Board should not pass the Proposed Amendments to the January Standards on punitive segregation. There has been no adequate investigation or development of evidentiary support for the proposals. The DOJ called for DOC to conduct an investigation of the disciplinary system 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."[21] This investigation has not been done. Until such steps are taken, the Board should not be providing DOC the discretion to mete out extended harmful punitive segregation sentences as set out in the Proposed Amendments.

The Board Must Not Limit Due Process for Placement into the ESH

Included in the Proposed Amendments is the elimination of due process protections before placing someone released from the ESH back into the ESH within 45 days of their release. Proposed Amendment § 1-16 (1)(g) & (7). In its petition to the Board, the DOC provided no valid basis for eliminating these due process protections from the January Standards. DOC stated the purpose was "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 ESH understand the reasons for their placement and the basis of any additional restrictions placed on them in the ESH. There was no valid reason given for an inability to hold a due process hearing for an individual who is returned to the ESH 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,[22] contain no indication that the due process procedures are burdensome to the DOC. Rather, the reports suggest that the

[21] 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.

[22] Reports available at: http://www.nyc.gov/html/boc/html/Reports/board_reports.shtml.

ESH 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) – not limited.

The Board should continue to require that due process proceedings be held for all individuals who are placed into the restrictive ESH setting. An individual being returned to ESH after release from the restrictive setting should understand the basis for the return to ESH and the basis of any new restrictions that may be placed on him/her in the ESH. As with the need to establish the integrity of the disciplinary system asserted by the DOJ, the Board should be requiring that DOC follow the due process requirements in the January Standards thereby providing consistency, communication and accountability to the individual and to the ESH placement process.

The Proposed Limitations to Visitation are Overly Restrictive and Harmful

The Board must have strong Standards that protect the New York State constitutional right of individuals in our jails to have contact visits and other visitation. The Standards must not permit interference with those rights. The Standards concerning the important rights to visitation should be rational, understandable, and enforceable by the Board. The Proposed Amendments which seek to limit the physical contact incarcerated individuals may have with visitors, and broaden the criteria for denying, revoking, and limiting visitation and restricting visitors, do not meet any of these criteria.

The Proposed Amendments to § 1-09 (a) seeks to change the prior simple policy statement that read in its entirety: "Prisoners are entitled to receive personal visits of sufficient length and number." The changes in the Proposed Amendments include positive statements about the importance of maintaining personal connections and the assertion that the Department should encourage and facilitate visitation. However, by making qualitative statements about "positive social connections" and the emphasis on a broad definition of "family" this Proposed Amendment raises questions about how a personal visit is being defined and who will make the determination about a visitor's suitability as a "positive social relationship." It is possible that this Proposed Amendment is not objectionable absent the other Proposed Amendments to this section. However, because of the concerns raised by, for example, § 1-09 (h)(2), this language suggests that DOC is claiming broad authority to investigate and determine whom people associate with and that it is appropriate for the DOC to evaluate the *value* of their specific associations.

The Proposed Amendment to § 1-09 (f) imposes substantial limitations on contact visits. In New York, pre-trial detainees have a state constitutional right to contact visits, subject to reasonable security precautions, and 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).[23] The provision of contact visits absent an *individualized* determination is required by

[23] *Cooper* held *inter alia* that incarcerated persons could not be deprived of contact visits based on the number of days they had been incarcerated, but it stated its holding broadly: "The point is that the detainees and their families are individuals whose cases must be individually considered. There may be reason in an individual case for not permitting contact for a short period, but any rule that fixes an arbitrary number of days during which contact

the New York State Constitution. 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.
>
> (b) Prisoners and their visitors shall be required to conduct themselves in a manner consistent with reasonable standards of decency.

Proposed Amendment § 1-09 (f) provides an extremely limited definition of permitted physical contact:

> Permitted physical contact shall include a brief embrace and kiss between the inmate and visitor at both the beginning and end of the visitation period and holding children ages nine (9) and younger in the inmate's family throughout the visitation period. Additionally, inmates shall be permitted to hold hands with their visitors throughout the visitation period, which the Department may limit to holding hands over a partition that is no greater than six (6) inches.

The Board standards should be protective of the right to contact visit that are "consistent with reasonable standards of decency" and should provide for flexibility in the exercise of this right. Instead, the Proposed Amendment provides for *maximum* limitation regardless of circumstance. This is wholly inappropriate for the protection of the exercise of a constitutional right. Any limitation on contact should be based on individualized consideration. This Proposed Amendment does not appear to be a "minimum" standard at all.

The Statement of Basis and Purpose for the Proposed Amendments claims that this revision will conform "the Board's definition of "permitted contact" to the definition provided under New York State law" and that the revision "would expand the State law definition of permissible contact" by permitting children under the age of 9 to be held during visits and permitting hand holding throughout visits. This is disingenuous. State law, as cited above, permits restrictions on contact that are reasonable security cautions. While similar restrictions, as those in the Proposed Amendments, may have been upheld in some state court decision as reasonable security precautions in a particular situation (or particular institution), these restrictions are not defined in state law. State law does not *require* such substantial limitations on contact visits and does not *define permissible contact* in such a limited fashion. This inflexible and very limited definition of permissible contact is inadequate to guarantee individuals in our City jails their right to contact visits and is *not* a Standard protecting those rights.[24]

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visitation can be proscribed solely on the ground of administrative convenience is in our view arbitrary and, therefore, unconstitutional." *Cooper*, *id.*

[24] The current Proposed Amendment is more restrictive than the contact permitted in our state prisons. The NYSDOCCS Directive 4403 permits:

1. "At a minimum, a visitor and inmate may embrace and kiss at the beginning and at the end of any contact visit. Brief kisses and embraces are permitted during the course of the contact visit, However, prolonged kissing and what is commonly considered "necking" or "petting" is not permitted"
2. A visitor and an inmate may hold hands, as long as the hands are in plain view of others.
3. Inmates and visitors sitting next to one another may also rest their hands upon each others' shoulders or around each others' waists. Resting one's head on another's shoulder is also permitted when the inmate and visitor are sitting next to one another.

Proposed Amendment § 1-09 (h)(1) states that visitation rights shall not be denied, revoked, limited or interfered with based upon an inmate's or a prospective visitor's: criminal record, pending criminal or civil case or lack of family relationship "except as provided by paragraph (2) of this subdivision." The new paragraph (2) states that each of those factors *may* be utilized in a determination to deny, revoke or limit an inmate's or a prospective visitor's visitation rights although it may not be used as the "sole basis for the Department's final determination." If every visitor is going to be subject to the "determination" defined in paragraph (2), then the protection in paragraph (1) is illusory and these two sections are contradictory.

Proposed Amendment § 1-09 (h)(2) lists factor that may be considered during a determination to deny, revoke or limit an inmate's or a prospective visitor's visitation rights pursuant to paragraphs (3) and (4). This appears to require that no determination to limit visitation will ever come into play unless there is a prior determination either that "such visitation would cause a threat to the safety, security, or good order of the facility, or the safety, security or health of inmates" (Proposed Amendment § 1-09 (h)(3)) or "such visits constitute a threat to the safety, security or good order of a facility" (Proposed Amendment 1-09(h)(4)). If this is correct, then the factors in Proposed Amendment § 1-09 (h)(2) will be utilized to determine *how* to deny, revoke or limit visitation rights.

The language in Proposed Amendment § 1-09 (h)(2) which suggests that not every visit will be subject to the process described in paragraph (2) is not at all clear from the language of the Proposed Amendments *or* from numerous presentations and discussions with the DOC. Discussions with DOC have suggested that the factors in Proposed Amendment § 1-09 (h)(2) could provide the *basis* for making the determination to deny, revoke, or limit visitation so long as they don't rely on only one factor. This interpretation is contrary to the current language of the Proposed Amendments and suggests that the DOC intends to make inquiries into visitors, into *any* visitor, to the City jails without any necessity of a basis or reasonable suspicion to engage in an intrusive inquiry into each of the factors outlined in Proposed Amendment § 1-09 (h)(2). Such intrusive inquiry absent a basis for the inquiry cannot be countenanced by the Board and is beyond the authority of DOC. Proposed Amendment §1-09 (h)(2) lists the following five factors:

(i) The lack of a family relationship or otherwise close or intimate relationship between the inmate and the prospective visitor;

(ii) The prospective visitor's current probation or parole status;

(iii) The nature of the inmate's or the prospective visitor's felony convictions or persistent narcotics- or weapons-related misdemeanor convictions, if any, within the past seven (7) years;

(iv) The nature of any conviction for which the prospective visitor has been released from incarceration within the past year; and

(v) The inmate's or the prospective visitor's pending criminal charges involving narcotics, weapons, gang activity, or violations of correction facility rules, if any.

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4. In general, kissing, embracing, and touching are allowed as long as they would be acceptable in a public place and do not offend other inmates and visitors or aid in the introduction of contraband or escape attempts.

Directive 4403, page 6, available on line at: http://www.doccs.ny.gov/Directives/4403.pdf.

The DOC should not be investigating the family relationships or otherwise close or intimate relationship between a person in the jail and a prospective visitor. It is not for the DOC to determine whom people associate with or the value of their associations and is well beyond their authority. Moreover, if the DOC is permitted to investigate each visitor on these factors, the protections against investigating the criminal record, pending cases and lack of family relationship seemingly granted by Standard § 1-09 (h)(1) are indeed illusory.

The language in Proposed Amendment §1-09 (h)(3) provides that visitation rights "may be denied, revoked or limited only when it is determined that such visitation would cause a threat to the safety, security or good order of the facility, or the safety, security or health of inmates." The amendments reduce the level of a threat from a "serious threat" to a "threat" and add in "good order." The Proposed Amendment removes the requirement that there be specific acts committed by the visitor during a prior visit as the basis for the limitation on visitation rights, removes the requirement of written notification about the proceedings before there is a determination and removes the requirement of the opportunity to be heard (to respond to allegations). The Proposed Amendment significantly weakens the Board standards and their enforceability. There is no definition of "threat," "security" or of "good order" and these broad categories are not limited by any definition of the conduct that would subject a visitor to limitations on their rights. The language in Proposed Amendment and §1-09 (h)(4) similarly broadens the imposition of limitations on contact visit stating without definition that "contact visits may be denied, revoked, or limited only when it is determined that such visits constitute a threat to the safety, security or good order of a facility" and similarly removes the protections of notice and an opportunity to be heard *before* there is an adverse finding limiting visitation rights.

Proposed Amendments § 1-09 (h)(3) & (4) reference a "determination" of the threat to the safety, security or good order. Proposed Amendment § 1-09 (2) discusses making a "determination" to deny, revoke or limit visitation "pursuant to paragraphs (3) and (4)". Nothing in the Proposed Amendments adequately describes and properly sets out an order and process for these determinations (e.g., whether they are separate proceedings and how they should be limited). The implication seems to be that DOC will be making decisions to seriously restrict visiting rights *ad hoc* behind closed doors with no right to be heard until after the decision is made and no transparency as to how the decision is reached.

The Proposed Amendments to visitation appeals are equally troubling and must be rejected by the Board. Proposed Amendment § 1-09 (h)(6) creates an appeal process within DOC for an appeal of a decision to limit visitation with 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. The Proposed Amendments include the Board in the appeal process only after the appeal decision by DOC. The Board then has a subsequent 14 business day time period *after* the DOC 14 days (plus the time it takes to give notice of the appeal to the Board and the Department).

The Board should not adopt such unreasonable time periods for appeals of decisions revoking or restricting visitation. 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.[25] The rules are widely disregarded as revealed by the pattern of complaints we receive[26] and as partially corroborated by DOC's own data obtained through FOIL.[27] 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 request for a year's worth of documentation of that process and received many appeals but not a single decision. There is no reason to believe that a visiting appeal process that is under the Department's control will function any more reliably or consistently with its rules.

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 Proposed Amendments to visitation are confusing, contradictory, and provide for intrusive inquiries by DOC into personal information about any visitor to the jails that appear to

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[25] 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

[26] 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.

[27]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.

be unlimited.[28] The Proposed Amendments are not the strong, enforceable Standards necessary to protect the state constitutional right of individuals in our jails to have contact visits and other visitation. As stated at the outset of this section, the Standards concerning the important rights to visitation should be rational, understandable, and enforceable by the Board. These Proposed Amendments, which seek to limit the physical contact incarcerated individuals may have with visitors, broaden the criteria for denying, revoking, and limiting visitation and restricting visitors, and deny individuals notice, opportunity to be heard and a timely appeal process, do not meet any of these criteria.

Eight months ago the Board of Correction rejected limits on visiting proposed for individuals placed in the new Enhanced Security Housing Units.[29] 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.[30] It was clearly expressed, and supported by data, that individuals who maintain personal connections with individuals in the community are less likely 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:[31]

> 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,[32] contributing both to a safe and more rehabilitative atmosphere in the facility. Second, individuals who maintain

[28] The collection of personal information by DOC raises concerns about how this information will be used or shared, and whether the DOC will maintain the information securely and with due consideration to privacy rights of individuals.

[29] *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.

[30] 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.

[31] 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_l.authcheckdam.pdf . This letter was written in support of allowing contact visits in the District of Columbia jails in addition to video contact.

[32] *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).

> relationships have more successful transitions back to society than those who do not.[33] 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.[34] 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.[35]

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,[36] 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.[37] 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.[38]

As it did eight months ago, the Board must reject the Proposed Amendments on the subject of visiting. The poorly constructed provisions of the Proposed Amendments should not

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

[34] *See* Minnesota Dept. of Corr., *The Effects of Prison Visitation on Offender Recidivism* (Nov. 2011), pp. 18-21.

[35] *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).

[36] 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).

[37] *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).

[38] 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_Prisoners.authcheckdam.pdf, p. 259.

be approved and the Board must not adopt standards that lack enforceability and permit DOC unlimited authority to implement restrictions on protected rights to visitation.

Assurances by DOC of its benign intentions in implementing its proposals cannot be credited: the issue is its performance and not its intent. 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. Our challenge to the restriction languished in writ court while 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.

These examples, wherein DOC violated Board Standards and its own written policies, make particularly clear why the Standards must 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 Amendments do 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 Board was correct to reject earlier attempts to limit and restrict visits and should not adopt these Proposed Amendments. 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."[39] 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 the Proposed Amendments.

[39] 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 .

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). Improving 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.[40]

<u>The Proposed Limitations on Receiving Packages are Overly Restrictive and Harmful</u>

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 Proposed Amendment would require individuals or their families to purchase items new (and often pay extra 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 ESH, 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)).

[40] 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 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.

This is a strawman argument. 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. It must also acknowledge that the contraband problem is not always—or, it appears, even mostly—a problem arising from incarcerated persons' families. We note the recent, October 10, 2015, arrest of a Correction Officer carrying a razor into a City jail and the report by City officials that he is the seventh correction employee arrested in the last five weeks on charges that contribute to violence and disorder at the jail,[41] the May arrests of a Corizon employee and a 20 year veteran Correction Officer for contraband smuggling,[42] 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.[43] It appears that the solution to contraband in the jails is not to apply financially onerous requirements to oppressively restrict incarcerated individuals, but to require staff to do their jobs properly.[44]

II. The Board should adopt the Proposed Amendments regarding classification and recreation.

Proposed Amendment to § 1-02 on classification allows commingling of detainees and city-sentenced persons in adolescent cell housing areas, housing areas designated for 18- to 21-year-olds, and areas for pregnant women. These proposals serve commendable safety and programmatic purposes.

Proposed Amendment to § 1-06 on recreation provides for in-cell recreation to persons confined for medical reasons in the contagious disease units, which is appropriate given the presence of contagious disease.

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[41] This arrest was reported by NY1 on October 13, 2015. The article is available at: http://www.ny1.com/nyc/all-boroughs/criminal-justice/2015/10/12/city-correction-officer-accused-of-trying-to-smuggle-sharp-tool-into-rikers-island.html.

[42] 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

[43] 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-inquiry.html?hp&action=click&pgtype=Homepage&module=second-column-region&region=top-news&WT.nav=top-news. 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.

[44] 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.

CONCLUSION

As detailed herein, the Board should reject the Proposed Amendments to its Jail Minimum Standards other than those regarding classification and recreation.

The Proposed Amendments to standards on punitive segregation are unnecessary, ripe for abuse, dangerous to individuals housed in our City jails and contrary to demonstrated need for reform. The Board should maintain the important limits on punitive segregation set in the January Standards, and require DOC to abide by those limits on this harmful practice including excluding individuals with serious psychiatric disabilities who have symptoms that are worsened in isolation. The Board should continue to require due process for all individuals placed into ESH and should monitor ESH hearings for consistency, communication and accountability to the individuals being placed into this restrictive setting. The Proposed Amendments to visitation are confusing, contradictory, and would permit intrusive and unlimited inquiries by DOC into personal information about any visitor to the jails. The Board must not make these changes which weaken the Board standards and their enforceability by permitting DOC to make decisions severely restricting visiting rights *ad hoc*, behind closed doors, with no notice or right to be heard until after the decision is made, and no transparency as to how the decision was reached. The Proposed Amendments on packages should be rejected because they create an unfair hardship to individuals and their families who are indigent or poor.

DOC has a long-standing, fundamentally punitive attitude towards incarcerated individuals and a deep reluctance to address their conduct with anything other than punishment and increased restrictions. This attitude is well known to the Board and to anyone familiar with the agency – as is its reluctance to act to require reduction in the use of force by staff. This ongoing predilection to heap on punitive measures and restrict privileges must be recognized as failed policy lacking evidentiary basis. Instead, DOC must look closely at its own operations and the conduct of its staff, however politically difficult that task may be. DOC must stop its efforts to make the jails even more oppressive for incarcerated persons and their families, and the Board must refuse to enable this conduct and reject the Proposed Amendments to the Standards that are before it today.

Very truly yours,

SARAH KERR
Staff Attorney
JOHN BOSTON
Project Director

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