October 11, 2016

Martha King, Executive Director
Chair Stanley Brezenoff
Board Members
New York City Board of Correction
1 Centre Street
New York, NY 10007

RE: Request for Variance

Dear Ms. King, Chair Brezenoff, and Members of the Board,

Brooklyn Defender Services has serious concerns about the ever-increasing number of restrictive units sprouting up throughout the Department, many of which we suspect violate the Board's Minimum Standards. Our suspicions were sadly confirmed in the Board's September 29, 2016 letter to the Department, which describes an ad-hoc solitary confinement unit at West Facility. Time and again the Department has come before the Board seeking leave to create yet another restrictive unit - purportedly to house the most challenging people in the system. We were told Enhanced Supervision was the necessary tool to reduce solitary confinement and house the most difficult to manage individuals. Then we were told that ESH wasn't good enough, and overrides to limits on solitary confinement were a must for some people. Then for young people, a new Secure Unit was the cure. Then we learned that Administrative Segregation units had been established and were often locked down. All that on top of traditional solitary confinement in the Bing and very restrictive conditions in Enhanced Restraints units. Now, here we are again having the same conversation. Even worse, this time the Department didn't even engage the Board from the beginning - they had to be issued a violation to begin this conversation again. We urge the Board to more closely monitor existing restrictive units, regularly report on conditions and due process, and to be proactive in enforcing the Minimum Standards throughout the system. The Board should **not** grant any Variances permitting continued expansion of restrictive units around the system.

West Facility

We are disturbed that the Department has publicly celebrated and taken credit for reductions in solitary confinement while flouting city law by running ad hoc solitary confinement units in what was intended to be a contagious disease isolation unit. Even worse, the Board's September 29, 2016 letter describes that people are placed in the unit without due process. According to the letter, some people have been subjected to 23 hour isolation purportedly as a means of protection, and it is noted that people with serious mental illness (SMI) have been isolated there. As noted in the Board's letter, conditions for people housed in these units are in direct violation

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of the Board's Minimum Standards.

We applaud the Board for issuing the Department a Notice of Violation related to conditions in West Facility, and for doing so publicly. In your letter, you recommend that the Department review each individual's placement on the unit and alternative housing options, and the establishment of due process for placement in the unit. We urge the Board to go much further.

The Board should reject the Department's request for a Continuing Variance that would allow them to isolate individuals indefinitely in solitary confinement and deny them essential services and meaningful human interaction. Although the Department claims in its request that people will not be housed in 23 hour isolation at West Facility, this is contrary to the findings reported in the Board's letter, and asserted without evidence or details about how much lock-out they receive or their access to meaningful interaction with other people. We believe it is imperative that there be transparency in what we are talking about – indefinite solitary confinement.

The Variance request is dated October 7, 2016, however; once again, interested parties did not receive the Variance until the weekend preceding the meeting. The use of these Variances that allow the Department to effectively do whatever they want without engaging with the Board through rule-making has resulted in an oversight process that is, in a word, farcical.

The unit(s) should be closed immediately and the people housed in isolation at West (for reasons outside of infectious disease precautions) should be rehoused in other housing areas in compliance with Minimum Standards. It is unacceptable that people are housed in isolation without due process, and it is patently unconstitutional that they are denied access to law library and congregate religious services as described in the letter. It is particularly urgent that young people, people with safety concerns, and people with serious mental illness be removed from the unit at once, and precluded from placement in any future unit of similar character. These exclusions exist in the minimum standards for well-documented reasons and should be maintained regardless of the name or location of any unit that resembles solitary confinement.

The Department's October 7, 2016 letter acknowledges that under Minimum Standard 1-07 any denial of congregate religious services must be "based on specific acts committed by the prisoner during the exercise of his or her religion." However, the Department doesn't claim that this is the case for each individual they have isolated at West - to whom they have denied this constitutionally-protected right. Instead, they simply assert that they believe they are unable to provide these services without "risking the safety and security of the facility." This explanation simply does not meet the standard, which is narrowly tailored for good reason, and which should be enforced.

Although the Department claims that people in West Facility will be provided constitutionally-protected access to law library materials through kiosks, it does not say *when* access will be ensured. Considerations like this one are exactly the reason for the rule-making process – to ensure that people's fundamental rights will not be violated in a unit *before* they are placed there. It is contrary to foundational notions of justice to deprive the accused access to the law. No one in custody, particularly pre-trial detainees, should be denied such crucial resources even for one day, which may happen to be a crucial one for the trajectory of their case.

The Department writes of religious and law library services, "Rather than eliminate those services, the Department is committed to providing them in a safer, more secure setting." This suggests that the Department may have misconceptions about its constitutional obligations to the people in its custody – it is our position that such fundamental rights cannot simply be "eliminated." The Board must do everything in its power to ensure adequate access to congregate religious services and law library, including by evaluating the use of kiosks elsewhere in the system.

Finally, the due process procedure the Department states it intends to develop is woefully inadequate. The Department states that it needs 60 days to develop a procedure and proper forms. We again point to the rule-making process as the appropriate setting and timeframe to undertake this effort with input from the community and the Board. We support provision of written notice and an in person hearing as part of any due process, however, the Department provides no information about what would be required to justify placement except for "his/her safety or the safety of others." Also missing is an appeal process following any finding at a hearing. Placement reviews every 90 days with the option to be present only every other review, is truly a staggering interval. Three months in solitary confinement is more than six times the period that isolation is permitted under international human rights standards (cite Mandela Rules). While the overall population in solitary confinement has dropped, it would be an astounding reversal to establish an indeterminate solitary confinement unit - even if only to house a small number of people.

In the case of individuals with reported safety concerns, the Department's request is also vague. It is unclear on what basis a determination would be made to isolate an individual for their own safety. Nothing in the Department's Variance Request indicates that placement in the unit is consensual for someone with safety issues. In other jurisdictions, similar "isolation for protection" schemes have led to disproportionate long term isolation among LGBT and gender nonconforming individuals, people with disabilities and others. Evidence in the context of PREA suggests that individuals reports about their own perceived safety are one of the best indicators of their actual safety and should guide housing determinations. BDS opposes any attempt to isolate people over their objection based on a claim that it is for their own protection.

If the Department wishes to create new restrictive units that violate existing Minimum Standards, they are required to seek changes in the Minimum Standards. These changes should be requested via rule-making and not Variances after the fact. The Board's September 29, 2016 letter references a "proposal" apparently from the Department which may describe this new unit in greater detail, but no such document has been circulated. Until such a time as the rulemaking process has been completed with input from the community and people in the jails, units that violate the law should not be permitted to operate and people must be rehoused and afforded the Minimum Standards. We would appreciate if the Board publicly clarified what corrective action has been taken to ensure that the rights of individuals presently and previously housed in such units are not being violated.

Young Adult Plan

The proliferation of restrictive units impacts young adults in particularly significant ways. While the Department celebrates what they describe as an end to solitary confinement for 18-21 year old young adults, we instead feel concerned by the dizzying array of units left in it's place. The Department may now place young adults in the Secure Unit, the Transitional Restorative Unit (TRU), the Second Chance Housing Unit (SCHU); are seeking extension of Enhanced Supervision Housing (ESH) placements; and have established yet another solitary-like unit - situated in a former solitary confinement block - for "assessing" young adults. This last unit appears to have been borne out of the Board's conditions for continuing solitary confinement.

Under the present arrangement a young people who have difficulty in the jails are entangled in an endless web of restrictive units. A in one conservative scenario a young person involved in an incident would spend at least 28 days in the "assessment unit," then be transferred to the secure unit for 28 days in each of it's three phases, and then on to an indeterminate stay in ESH. Even if, as we advocate, ESH placements were ended for this group, this individual would have spent a *minimum* of 4 months in restrictive units.

We urge the Board to enforce the Minimum Standards and prevent the Department from creating yet another unit with less than 14 hours per day of lockout, limited due process and lengthy stays. Similarly, the Board should reject the Department's request to extend the Variance permitting young people to be placed in ESH. Young people were expressly excluded from this setting because the Board recognized the possible harm that such extended time in-cell has on adolescent brain development. The Department initially requested the option to utilize ESH as an option while they opened Secure. Secure is now operational and as such there is no further basis for the Department's failure to comply with existing Minimum Standards which preclude young adults from this setting.

If any extension of the Variance is granted the Board should also extend the various conditions that were adopted with the Variance when it was initially granted in July. In addition, we urge the Board to take specific action regarding the needs of any young people who are housed in the unit, and generally to more closely monitor conditions in the unit.

The last report on ESH issued by the Board was published in April 2015, and since that time advocates and others have raised concerns time and again about a range of issues. Placements in ESH appear to be indeterminate – the last report from the Department regarding ESH shows that not a single person was released following an evaluation during the period. (http://www1.nyc.gov/assets/boc/downloads/pdf/BOC-60-Day-Report-on-ESH-6-1-16-to-7-31-16.pdf). Due process must be meaningful and substantive, and should be monitored.

Similarly, it appears that there additional limitations on people's visits while in ESH are being imposed as a matter of course rather than on the basis of individualized assessments as required under the Minimum Standards.

BDS and others have also raised concerns repeatedly about the lockout schedule in ESH – the rotating am/pm schedule results in 24 hour lock-ins every other day. This amounts to solitary confinement, should be stopped, and would be a relatively straightforward operational change.

For young adults in ESH specifically, we are concerned about reports that time in school is being deducted from out of cell time. This practice is exactly contrary to the mission the Department has claimed it is pursuing – to engage young people in healthy programming and improve behavioral outcomes. If a young person is interested in attending school, they should be encouraged to do so, and should not be forced to sacrifice social engagement, recreation, and other programming if they choose to pursue their education. Whatever language the Department uses, there is no hiding that any other approach is simply punitive, and is destined to fail. We must move beyond the continuum of punitive responses that limit access to books in children's cells, or holds their drive against them.

Thank you for your consideration of these comments; we look forward to working with the Board and Department.

Sincerely,

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Jail Services Social Worker