New York City Jails Action Coalition
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July 10, 2015

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

Re: Department of Correction Petition for Rulemaking

Dear Chair Brezenoff and Members of the Board:

The New York City Jails Action Coalition (JAC) encourages the Board to reject the May 26, 2015 Department of Correction (Department or DOC) petition for rulemaking. We appreciate that the Board delayed considering the petition and did not vote to commence rulemaking at the June meeting, allowing additional time for public comment.

Enclosed is our June 4, 2015 letter submitted in response to the petition. We are disappointed that the Department has not withdrawn its petition or modified its proposed rules to address concerns raised by Board members and advocates. We submit this letter to supplement our initial response to the petition.

We reiterate our position that the Board should concentrate on expanding educational and vocational programming and linkages to community services, improving access to medical and mental health treatment, and increasing the ability of individuals in the jails to maintain family ties through visits and other means. In addition to monitoring the punitive segregation limits adopted in January and implementation of the Enhance Supervision Housing Unit (ESHU) requirements, the Board should be actively involved in designing metrics and gathering real data that can inform future rulemaking and DOC policy initiatives.

Proposed Rollback of Recent Punitive Segregation Reform

We unequivocally oppose any amendment to the rules that results in longer solitary confinement sentences. The Board must stand firm in its repudiation of solitary confinement and should support the Department in eliminating its use all together. The most needed amendment to the rules is a maximum limit on the amount of time that any individual can spend in solitary confinement.

▪ **Exception to Seven-Day Release Period**

In proposing exceptions to § 1-17(d), the Department overlooks the fact that the Board agreed to continuous confinement for twice as long as the United Nations limit and that the seven days out of solitary confinement was mandated to ameliorate the harmful effects of isolation. No one should be excluded from this protection. It must not be eliminated without the addition of some other safeguard. Reducing the period of daily confinement in punitive segregation from 23 hours and adding out-of-cell programming to punitive segregation units could reduce the harmful effects and the potential for increased aggressiveness that frequently results from extreme isolation.

The Board should not accept DOC's claim that individuals released from punitive segregation for seven days cannot be housed in ESHU. With the Board's approval of ESHU, the Department created the restrictive housing units that it claimed would "control the activities of the most violent inmates."[1] Recognizing that punitive segregation sentences are time limited, DOC proposed ESHU to contain individuals who were "persistently violent" and affirmatively stated that the units would house individuals released from an extensive period of punitive segregation following a serious assault. The Board allowed for significantly reduced lockout time in these units as part of the DOC plan to reduce violence. The Board's May 6, 2015 report indicates that the Department has not even tried using ESHU for this purpose as only five individuals released from punitive segregation have been placed there.[2] To prevent violent conduct, the Department may need to incentivize good behavior during the seven-day release period in ESHU by extending it for those who follow all rules during that period.

The Board should not accept the Department's claim that the exception will be used in only a small number of cases considering that the Department has not been forthcoming about individuals held in punitive segregation beyond the 30- and 60-day limits. The Board's May 8, 2015 report documented that 100 individuals were held beyond the punitive segregation time restrictions,[3] 53[4] exceeded the 60-day limit without any notice from DOC as required by § 1-17(d)(3).

The individuals who may be subjected to extensive periods in isolation are likely those whose behavior is a reaction to the repressive conditions of isolation, such as those who splash officers or start fires in their cells. Individuals who find solitary confinement so painful as to resort to these actions should not have their misery extended without any break from the isolation.

Programming for individuals who engage in violent conduct and placement in small housing units is purportedly effective in ESHU. There is no reason that DOC cannot develop units for safely housing individuals during the seven-day release period.

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[1] October 22, 2014 DOC letter to the BOC.

[2] Follow-up Report on Enhanced Supervision Housing as of April 30, 2015, p. 3. Three had been in ESHU since it opened. None were returned to punitive segregation.

[3] Report on the Status of Punitive Segregation Reform, p. 1.

[4] Forty-nine percent were on the mental health caseload. *Id.* at p. 4.

▪ Increased Sentences for Assaults on Staff

The Department provides information that the number of serious assaults on staff has dropped significantly from the number in the same period in FY 2014 – a reduction of more than 40% (from 27 to 46). This data does not support the need to increase punishment for these assaults.

DOC endorses adopting the extremely harsh penalty of 60 days of continuous confinement – twice the current limit – as necessary to support staff. If the Department wants to have lengthier punitive segregation sentences for assaults on staff, it could reduce the sentences for all other violations. Thirty days in solitary confinement is much more than a "meaningful consequence"; according to the United Nations, it constitutes torture.

The Board should not support DOC's persistence in relying on solitary confinement as a sanction for misconduct. Instead, the Board should support the Department in developing a humane disciplinary system. Staff need to be given other methods for promoting good behavior and training in de-escalation techniques so that violence can be avoided altogether. If properly enacted, the reforms to be instituted as a result of the *Nunez* settlement will improve safety in the jails. The Board should give these new procedures time to work rather than rolling back recently enacted reforms.

<u>Reduced Due Process Rights for Individuals Returned to ESHU</u>

The Department has failed to provide any justification for its request for an exception to the due process requirements for those who are removed from ESHU and then returned within 45 days. The Department does not explain why eliminating due process is necessary to allow the Department to determine appropriate housing placements and incentivize good behavior. While it may be *easier* for the Department to eliminate the hearing requirements, DOC administrative convenience is not a legitimate reason to deny individuals returned to ESHU of due process. If an individual meets the criteria for placement in ESHU, it should not be difficult for DOC to establish that in an administrative hearing, and if the individual has a defense to being returned to ESHU, he should have the opportunity to be heard.

Information in the Board's May 6, 2015 report and the Department's presentation at the June Board meeting suggests that DOC needs to dedicate its attention to developing objective criteria for determining whether an individual should be released from ESHU at the 45-day review, documenting program participation, keeping records of lock-out times, and ensuring that programming occurs on all units. The Department should focus on operating the unit as required and measuring its effectiveness rather than reducing procedural protections.

We urge the Board to reject DOC's proposal to weaken the recently adopted rules and encourage continued monitoring of ESHU to determine whether it is functioning to achieve its stated goals.

<u>Deprivation of Visit Rights</u>

Before permitting any wholesale limitations on visitors' contact with their family members – and certainly before completely excluding some individuals from being allowed to visit – the Board must require DOC to take all steps within its control to achieve its stated goal of stemming the

flow of contraband. The Department has not taken basic measures to prevent contraband from entering the jails. As reported at the May 12, 2015 Board meeting, in some facilities visit rooms are not fully staffed and sight lines are obstructed. Also, as we know, the vast majority of weapons are fashioned from material found in jail, yet DOC staff ignore damage to the physical plant, such as broken tiles in housing areas.

The Board should not enact drastic rule changes based on the limited scope of the problem documented by DOC. The data the Department provides in support of its rulemaking petition includes the number of visitors arrested and contraband left in the visit box. This information suggests that current procedures to keep contraband from entering the jails are actually working. The amount of contraband discovered in post-visit searches (27 in FY14 and 23 in FY15) is miniscule when considered in the context of the total number of daily visits (257,101 in FY14 and175,167 in FY15). Even if the contraband which enters the facility is ten times more than what is detected, only 0.1% of the visits in FY14 would have caused drugs or weapons to enter the jails. Extreme deprivations of the rights of incarcerated individuals, especially pre-trial detainees, should not be permitted where the overwhelming majority of visits pose no security risk and are beneficial for maintaining emotional health, family and community ties, and housing, education and job opportunities upon release

▪ Restrictions to Contact Visits – Amendments to § 1-09(f)

The proposed amendments to § 1-09(f) fundamentally redefine contact visits to impose an across-the-board restriction on all incarcerated individuals and their visitors. This limitation will not only be a hardship to incarcerated individuals and visitors, but it will likely result in increased hostility between incarcerated individuals, visitors, and DOC staff as staff attempt to police all manner of contact. The amendments also introduce questions about who is considered a "young child," what constitutes a "brief embrace," and how family is defined and by whom. The changes allow more discretion for visiting room staff, which may be abused and result in an even more unpleasant visiting environment than currently exists.

▪ Limitations on Visiting Rights – Amendments to § 1-09(h)

We are disappointed that the Department has not heeded the Board's suggestion that it tailor its petition to address the concerns expressed during the last two Board meetings. DOC has not clearly defined the visits it seeks to limit or how it will apply the proposed rules to make those determinations. Instead, the Department requests sweeping changes to the rules that are not narrowly tailored to achieve the stated purpose and provide for wide discretion in their implementation.

For example, the proposed amendment to the rule sets forth factors to be considered but does not state how they will be weighed, other than to say that the factors alone will not provide the sole basis for the determination. DOC does not state what types of felony convictions will be prohibited. The proposed rule would also allow DOC to consider "persistent narcotics- or weapons-related misdemeanor convictions within the past seven years" but includes no definition of what is persistent. It is unclear why individuals on probation or parole are

particularly singled out as these individuals are monitored to ensure that they do not violate the law and have much more to lose if detected bringing in contraband.
DOC also does not provide the Board with any information about how it will obtain the facts on which to base its determination. For instance, how will DOC determine a "lack of a family or otherwise close or intimate relationship"? How will DOC determine the existence of visitors' prior convictions? While visitors can be finger-imaged by DOC, DOC claims that this process is not mandatory.

The lack of specificity in how DOC will weigh SRG status, visit patterns and trends, prior convictions, and current charges means that the Department will be able to exclude any visitor who has any previous felony conviction of a person with SRG status. Such far-reaching discretionary decision-making is likely to lead to more frustration and conflict within the jails and potentially to more violent incidents. The current requirement of a specific act on which the visit restriction is based avoids the broad discretion permitted by the DOC proposal. Even if the Board accepts that some amendment to the standard is needed, it should not consider a rule that is not narrowly tailored to meet its need.

The proposed amendments to §§ 1-09(h)(2) and (3), which delete the word "serious" and insert the words "good order" without any definition of good order, contribute to our concern that the rules will be broadly construed. The amendment also eliminates the provision that visiting rights "may be denied only if revoking the right to contact visits would not suffice to reduce the serious threat." The existing rule is well-balanced to allow for some denial or limitation of visiting rights, but only if it jeopardizes safety and if less restrictive means are not effective. The Board should not accept the proposed amendments to these subsections.

The Department should not have such immense discretion to exclude visitors. Incarcerated individuals and their visitors should be able to determine from the rules whether their visits will be restricted to non-contact or not be permitted at all.

The Department has not been forthcoming in providing the Board with information about how it uses its current discretion to lock down facilities, operate administrative segregation units, and extend punitive segregation sentences. The Board regularly learns of DOC practices that violate its rules from outside advocates. DOC already imposes non-contact visits and excludes visitors in a manner that does not comport with the current visit standards. The Board should not trust the Department to apply the proposed rules in a manner that restricts only a very limited number of visits.

The Department has put forward no legitimate reason for adding an extra step to the appeal process which will only serve to delay review of DOC's determination to restrict visit rights. DOC administration should be involved in the first instance in any decision to deny or limit visits; adding an internal appeal process is unnecessary. The Department grievance system is ineffective at formally resolving the vast majority of complaints; there is no reason to believe that an internal visit appeal process will be any less futile. The Board must reject this amendment.

The hardships of visiting and the importance of visits must not be overlooked. The proposed changes to the rules would deny, delay, and reduce the quality of visiting, and risk *exacerbating* violence by further isolating people from their loved ones in the community. Instead of limiting visit rights, the Board should work with DOC to *improve* the visit process and reduce obstacles that discourage visitors. The improvement of the visitation process will enable individuals in the jails (who may not yet know when they might be released from jail, or whether they will be convicted or acquitted) to better cope with time inside and prepare for release.

Prohibition on Packages

The Board should refuse to consider any rule change regarding packages. The Board rejected this change when proposed for the 250 people whom DOC considers the most violent and appropriate for housing in ESHU. The amendment should not be entertained now. The City recognizes that many people are incarcerated because they lack the resources to post bail. It is ridiculous to place yet another burden on their families.

DOC does not provide any evidence supporting the need for this change. While it would certainly be more convenient for DOC, the Board should not approve a change that would be so burdensome to families.

DOC provides absolutely no justification for allowing additional time to deliver a package to an incarcerated person. This proposal is yet another example of the Department requesting a rule changes for administrative convenience. The Board should not weaken the minimal protections of incarcerated people for such a reason.

Changes to Classification

If the Board decides to initiate rulemaking on this standard, it should eliminate § 1-02(b)(1)(iv) "close custody housing areas."

The condition on which the original variance allowing for the commingling of detained and sentence adolescents was granted should be incorporated into the amended rule. Weekday Sentenced/Detention Housing Reports from RNDC detailing where each category of City-sentenced adolescent is housed should be forwarded to the Board.

The Board has not previously allowed commingling of sentenced and detained individuals who are 19 to 21 years old. The Board should consider whether there is any rationale for doing so now. While the benefits of having the relatively small number of adolescents together at RNDC may be worthwhile, the justification for not separating the 18- to 21-year-old detained individuals from those who are sentenced has not been established.

The provision requiring that sentenced youth be treated the same as detainees for all purposes other than housing should be extended to sentenced women in the pregnant housing areas.

Amendments to Personal Hygiene Standard

Any change to this standard should incorporate the conditions that were part of the variance and include additional provisions that improve suicide watch procedures. We believe that a more considered review of the mental health standards as a whole would be a better approach to amending the standards, but if the Board decides to engage in rulemaking on this issue, it should strengthen the requirements for suicide watch.

Amendment to Recreation Standard

The proposed change to the recreation standard is not consistent with the variance that has been granted. The variance required that DOC provide appropriate outdoor recreation equipment and materials for in-cell recreation. The DOC proposal states that the Department "may" do so. Also, the variance specifically identified passive games and arts and crafts as recreation material to be provided.

Conclusion

Thank you for considering our comments regarding the petition for rulemaking. We encourage you to vote against initiating rulemaking at this time.

Sincerely,

NYC Jails Action Coalition

cc: Martha King, Executive Director