TESTIMONY OF:

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BROOKLYN DEFENDER SERVICES

Submitted to:

The New York City Board of Corrections

Hearing Regarding Proposed Changes to Minimum Standards

October 16, 2015

Thank you for the opportunity to testify regarding proposed rules relating to visitation, packages, solitary confinement and Enhanced Supervision Housing in New York City Jails. Brooklyn Defender Services represents about 40,000 people per year in Brooklyn during their criminal proceedings. Of those, approximately 6,000 pass through the city jail system. We have grave concerns about the proposed rule changes and their consequences for our clients, their families and communities.

The initial petition for rulemaking by the New York City Department of Correction (hereafter "the Department" or "DOC") was received several months ago. The Department's proposal garnered many questions from community members, advocates, public defenders, attorneys, incarcerated New Yorkers and their families. During your June meeting, Board members acknowledged that many important questions had been raised, contributed their own additional questions and concerns, and expressed an expectation that the Department address these concerns before rule changes would be considered.

During the Board's July meeting, the Department delivered a presentation which did not respond to requests for empirical evidence demonstrating the need for rule changes, and did not clarify the serious concerns about vague language and procedural issues in the proposed rules. The Department has failed in its obligation to provide evidence as to why the proposed changes are necessary, they have not demonstrated any effort to achieve the purported goals of the rule changes through less intrusive means, and there is no clear plan for implementation of the rule

changes should they be adopted. The proposed rules under consideration now appear nearly identical to those proposed several months ago.

Solitary Confinement

The proposed rule changes related to solitary confinement are fundamentally about the Department's ability to punish and isolate people in the jails without meaningful oversight or accountability, rolling back reforms limiting the use of torturous isolation in New York City. It is astonishing that the Board has initiated rulemaking to effectively undo thoughtfully drafted rules adopted less than a year ago after an arduous process involving countless hours of work and diverse contributions from experts and stakeholders – without any compelling, documented evidence that the changes are necessary. The Board adopted limits to solitary confinement with the express mission to reduce the harm caused by solitary confinement upon New Yorkers in city jails. Unless there is new evidence that certain people are somehow not affected by this harm, the Board would contradict its own mission if any expansion of solitary confinement is permitted. There is nothing in the proposed rules or the Statement of Basis and Purpose to explain how the harm of expanded solitary confinement will be mitigated.

The proposed rule changes consist of two main components: lengthening of solitary confinement sentences for assaults on staff and granting discretion to the Department to override the seven-day reprieve from solitary for individuals who have served thirty consecutive days in solitary confinement without meaningful oversight.

The Board should reject proposed changes to its recently adopted limits on solitary confinement without clear, documented evidence demonstrating an urgent need for such changes, including that the Department has exhausted all alternative measures to respond to violence. The Department has not publicly provided the Board or interested parties with detailed information regarding violent incidents necessitating prolonged isolation during the last several months. Indeed the evidence presented instead reflects that with a decline in the use of solitary has come a decline in assaults on staff: the Department's Petition for Rulemaking noted an approximately 40 percent reduction in assaults on staff between FY2015 to date and the same period in 2014 (27 down from 47). Perhaps more importantly, the Department has not demonstrated with specific cases or empirical data, an effort to use alternative, less harmful and possibly more effective responses to violent behavior. Thereby the Department fails to demonstrate a need to roll-back limits on isolation.

Override of Seven Day Reprieve

When the Board established a 30 day limit on stays in Solitary Confinement and incorporated a seven-day reprieve from solitary confinement between 30 day sentences, it did so to reduce the harm inflicted by long term solitary confinement. To end these protections for people who are alleged to continue to engage in violent behavior will not succeed in reducing violence, and contradicts the Board's intent to reduce the harm of long-term isolation. If 30 days of isolation does not succeed in addressing behavior, there is no reason to believe that a faster

return to additional isolation will have different results. Indeed, it is likely that the isolation itself is a contributing factor to ongoing violent behavior.

At the beginning of this year, the Department successfully established the Enhanced Supervision Housing Unit to more securely house those they claimed were the most dangerous people in the system. Yet, at this juncture, the Department claims that there are individuals who must be housed in 23 hour isolation in order to keep the jails safe. This assertion is made without documentation that these individuals could not be safely housed in the Enhanced Supervision Housing Unit (or elsewhere), where there has been consistently low census. In fact, when asked about this population during the June Board meeting, the Department stated that only some of the people eligible for an override of the 30 day limit would have been considered for placement in ESHU. No reasoning was provided as to why individuals who commit violent acts could not be safely housed in ESHU or other secure units (enhanced restraints units, or the close custody unit at NIC for example). If not to house the population of people leaving maximum solitary confinement stays, who need to be separated from the General Population and require increased security and programming, why were these units created?

The Department has not provided any details regarding the characteristics distinguishing those people who should be placed in ESHU and those who would be sent back to isolation should the new rules be adopted. The Department has not endeavored to explore targeted programmatic or therapeutic interventions to behavioral issues among the small population used to justify this rule change. The Department has not utilized existing tools available to manage violence, or attempted to expand programming within existing units to provide services to a wider range of individuals, which is apparently a necessary next step in light of the Department's claims. Permitting an override to the seven day reprieve or longer sentences for certain infractions will only lead to an ongoing cycle of violence and isolation, with which we are all too familiar.

Violence in isolation and shortly after return from isolation is rooted in a culture of neglect and abuse in solitary confinement units. The Board should be dubious about reports of violence in segregated housing and reports of assaults on staff which place all responsibility on incarcerated people. How is it that people who are confined in cells 23 hours per day, escorted in handcuffs or shackles and only leaving their cells for a slightly larger cell outdoors, are responsible for committing acts of violence? The Department of Justice noted in its investigation of violence on Rikers Island that reports of assaults on staff reflected a practice of inaccurate reporting used to justify heavy reliance on solitary confinement.[1]

Our clients in solitary confinement routinely report that they are denied basic needs like toilet tissue. They report that they do not have access to the telephone to call their families or

[1] US Dept of Justice, *CRIPA Investigation on the New York City Department of Correction Jails on Rikers Island*, August 4, 2014, 3, available at: http://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf.

their attorneys. They describe an inability to access medical care. They report that they cannot get attention from mental health staff when they well up with anxiety from being made to live in a filthy concrete box without contact with other human beings. In order to get access to these basic needs, our clients must resort to small protests like holding open the slot through which they are fed or flooding their cell. When they do, the response is routinely for the Department to send a "probe team" to extract the person violently from their cell. In almost all cases, the person will be infracted for resisting staff or assault on staff as a result of the extraction. These are Grade 1 Infractions which would, under proposed rules, lead to ever-longer stays in isolation. This cycle of violence only escalates as people become more desperate and resentful about their conditions; their small moments of agency may become more drastic as their isolation persists. It should be of no surprise that individuals who feel their only agency lies in an act of disobedience may carry this sentiment with them into the General Population – the harm of solitary reverberates through an entire system.

During the Board meeting on October 13, 2015, HHC Associate Commissioner Dr. Venters reported that many of the individuals who were the subjects of the overrides after 60 days in solitary were held over for infractions that did not involve *actual violence* but rather threats or gestures. He also reported that more than 89 percent had three or more mental health contacts. According to Dr. Venters, more than 50 percent of the people in isolation overall suffer from mental health conditions which are exacerbated by isolation, leading to the very behavior that keeps them there. This report is a good indication of the circumstances in which the proposed overrides of the 7 day reprieve would be used and who would be subjected to them. These individuals will be subjected to continuous, long term isolation not because of "persistent violent acts" but because of gestures and threats. Unwillingness on the part of the Department and Healthcare officials to think urgently and creatively about how to manage and program this population safely has led us here. The escalation of immense and horrifying self-harm, cell-fires and desperation in GRVC 12 Main before it was shuttered this year should be foretelling of the consequences when isolation is the only response to difficult behavior. After all, the same population, including some of the very same individuals who were housed there, are now the subject of 60 day overrides, and will be denied the 7 day reprieve should the new rules be adopted.

60 Day Sentences for Assault on Staff

For many of the same reasons described above, Brooklyn Defender Services also opposes the expansion of sentences to 60 days for assault on staff. Again, the Board only recently adopted rules intended to mitigate the harm of solitary confinement and there is nothing to support a claim that committing certain acts justifies exposing people to this harm. The United Nations Commission on Crime Prevention and Criminal Justice, to which a United States delegation is a party, recently submitted a report recommending revisions the UN Minimum Rules for the Treatment of Prisoners. Included in these recommendations is an explicit prohibition of terms in

solitary confinement longer than 15 days.[2] In light of this report, it is immoral for the Board to lengthen stays in solitary confinement – the Board should continue to move in the direction to reduce solitary confinement to internationally recognized standards which US officials have agreed are imperative to maintain human dignity.

The Statement of Basis and Purpose introducing the proposed rule changes states that sentences of 60 days in solitary confinement for assaults on staff are intended to serve as a "deterrent to dangerous behavior." There is no evidence to support that solitary confinement is an effective deterrent to violent behavior. The Department has provided no evidence regarding how this rule change will impact jail violence in real terms, nor do they present a convincing argument about the need for this rule change except their desire to support correctional staff by punishing incarcerated people more severely.

Prior to reforms adopted earlier this year, the CPSU was filled with hundreds of people serving months in solitary confinement, with hundreds more on a waiting list. Violence continued to plague the jails. You need not look further than the recent past to know that long sentences in solitary confinement will not effectively control or deter violence. Moreover, it is well documented that prolonged solitary confinement will only lead to more violent behavior; one notable symptom attributed to prolonged isolation (longer than 15 days) is "problems with impulse control including random violence and self-harm."[3]

The Vera Institute recently released a report, *Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives*, surveying a number of studies which demonstrate that the Department's argument on this point is flawed. The report finds that solitary confinement has not been shown to deter or reduce violence, instead pointing to alternative programming interventions as a more successful approach.[4] We also encourage the Board to review the testimony of its own experts, Doctors Gilligan and Lee, regarding the failure of solitary confinement to effectively respond to violence in New York City Jails. Their findings were unambiguous – if the goal is to reduce violence, solitary confinement should be reduced.[5]

The Board should advise the Department to study the reasons for declines in violence in the adolescent jail after solitary was abolished. Declines in assaults generally and assaults on

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[2] United Nations Economic and Social Counsel, Commission on Crime Prevention and Criminal Justice, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules)*, May 2015, Rule 44, available at: http://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_24/resolutions/L6_Rev1/ECN152015_L6Rev1_e_V1503585.pdf.

[3] Physicians for Human Rights, Buried Alive: Solitary Confinement in the US Detention System, 31 (2013). Quoting Stuart Grassian, Psychiatric Effects of Solitary Confinement, 22 Wash. U. J.L. & Pol'y, 335-336 (2006)

[4] Vera Institute of Justice, *Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives*, May 2015, available at: http://www.vera.org/sites/default/files/resources/downloads/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf.

[5] Testimony of Dr. James Gilligan and Bandy Lee, available at: http://www.nyc.gov/html/boc/downloads/pdf/Variance_Comments/RuleMaking_201412/12-19-14%20Testimony%20for%20BOC%20Hearing.pdf;

staff specifically among that population have been touted as successes by the Department and can serve as a foundation to implement evidence-based practices elsewhere in the jail system. When truly difficult-to-manage individuals emerge, the Department has tools to manage this population. The Department's petition for rulemaking, and now the Board's proposed rules both appear to ignore that just a few months ago the Department created the new ESHU in order to more safely house individuals who may need to be separated from the population in order to protect staff and other people in the jails. There has not been a documented spike in violence toward staff and no additional evidence has been provided that the ESHU is insufficient or to support a need for longer sentences in solitary confinement. The Board should remain steadfast in its commitment to reducing the harm of solitary confinement regardless of the alleged infraction.

In short, the proposal to lengthen solitary sentences is transparently punitive, will not serve the stated purpose and should be rejected.

Conclusion

Correctional staff may view longer sentences in solitary confinement as a justifiable punishment and a convenient management tool. This does not justify the torture of pretrial detainees and it detracts from the public safety mission of the Department. The vast majority of the people in our city jails will at some point return to their communities. The irreparable psychological and physiological harm caused by solitary confinement will reverberate through these communities, ultimately making us less safe. The Board and the Department have an obligation to look beyond the walls of our jails to our larger communities when safety is the stated goal.

The Board must also recognize the bias with which solitary confinement is meted out in our city jails and acknowledge that the effects of any expansion in its use are likely to be felt disproportionately by people of color. Recent research by the Department of Health and Mental Hygiene suggests that there is a relationship between race and responses by healthcare and corrections staff to poor behavior in the jails. Black and non-white Hispanic people are more likely to be punished with solitary confinement than their white counterparts, and are less likely to be assessed for therapeutic interventions early in their incarceration.[6] We believe the Board should share our concern that the rollback of limits on solitary confinement will unfairly impact people of color. This is yet another reason the proposed rule changes should be rejected.

As we have stated in the past, we share the Department's concern about jail violence, and we do not believe that the answer is to do nothing. We encourage the Board and Department to utilize all available tools to respond to violence and explore alternative responses to violence that preserve human dignity. It is irresponsible to revert back to a response that emphasizes punishment and results in torture, all the while failing to achieve reduced violence.

[6] New York City Department of Health and Mental Hygiene, Kaba et al. *Disparities in Mental Health Referral and Diagnosis in the New York City Jail Mental Health Service.* American Journal of Public Health, July 2015.

Visiting:

The Board should reject the proposed rule changes with regard to visiting. The emotional support our clients receive from their families is invaluable. Family visits are a source of solace and calm for our incarcerated clients in a setting where they are dehumanized, pulled from their communities, deprived of basic needs and perpetually at risk of violence. The vast majority of people incarcerated in city jails are pre-trial detainees who rely on their communities to fight their cases and protect their rights during incarceration. Because the majority of people in city jail are legally innocent, their right to maintain a connection with their families and communities is so fundamental that the Board should consider any restriction on visiting and contact as an absolutely last resort. If the primary concern of the Department is reducing violence, the Department should be working to *improve* access for visitors, make family visits more child-friendly, and reform the arduous visiting procedures to which families are subjected. Making visits more difficult and limiting physical contact will discourage family members from visiting, causing further isolation and desperation among the incarcerated population, thereby fomenting further violence.

The Department has not presented a record to demonstrate that visitors are a significant source of contraband smuggling. To justify its rule change, the Department has cited 29 individuals who were arrested with weapon contraband during the first 6 months of 2015. They also note 24 weapons found in visiting rooms, although they do not define what constitutes a weapon. The Department states that up to 1,500 people visit Rikers daily.[7] Starting with the Department's data, if *all* the weapons referenced were smuggled in on *one day* – that would mean approximately 1,447 people (or 96%) had nothing to do with smuggling contraband. To capture the full six month period, the number of visits jumps to 270,000, meaning that 269,447 visits had nothing to do with contraband smuggling during that period. It is absurd to adopt rule changes impacting hundreds of thousands of visits due to alleged smuggling by .0001% of visitors.

As we have noted previously, the Department of Investigation has found that a large majority of contraband is smuggled into the jails by uniformed and civilian staff. Moreover, the Board's own report has found that a majority of weapons in the jails are made from materials found in the jails and not from smuggled items.[8] We believe it is inappropriate for the Board to adopt rule changes proposed by the Department before requesting specific reporting regarding the Department's efforts to control these sources of weapons, which the data show are more urgent concerns. The recent arrest of a correctional officer smuggling large knives into a jail suggests that this officer was not particularly concerned about the security procedures to which

[7] http://www.nyc.gov/html/doc/html/visit-an-inmate/visit-schedule.shtml
[8] New York City Department of Investigation, Commissioner Mark Peters, *New York City Department of Investigation Report on Serurity Failures at City Department of Correction Facilities*, November 2014. Available at http://www.nyc.gov/html/doi/downloads/pdf/2014/Nov14/pr26rikers_110614.pdf

he was subjected.[9] This attempted smuggling took place well after increased security measures for staff were initiated by the Department. If this officer felt audacious enough to casually smuggle in multiple large knives, how many others feel confident smuggling harder-to-detect contraband into the jails?

Our Jail Services staff spends hours at the jails each week. While waiting for clients to be produced, they witness correctional officers set off alarms at magnetometers and be permitted entry; some officers who are confronted about setting off the magnetometer will pass through three times as mandated and never clear, but still enter the jail; officers may not set off a magnetometer, but their pockets remain bulging as they walk through the gate; front gate officers look away from x-ray monitors as bags pass through the scanners; all the while, officers loudly bemoan that they have to "strip down" as they enter secure correctional facilities. The only time our staff has witnessed contraband-sniffing dogs in the jails has been when they arrive to conduct a search of a housing unit or of visitors, never to inspect officers as they come on for a shift.

The Statement of Basis and Purpose draws a connection between visits and "the proliferation of dangerous contraband, including small, hand-to-hand weapons, such as scalpels and razor blades." The Department has provided no data related to the number of such weapons discovered during visit searches. In fact, during visit committee meetings our staff has requested specific data related to the number and specific type of contraband recovered during visits in order to better understand the scope of the problem from the perspective of the Department, but no such data has been provided. The Board should reject rules based simply on the "beliefs" of the Department, without supporting evidence and documentation. Instead, the Board should re-focus their efforts to tackling issues that the data shows are more urgent and will have a greater impact on controlling weapon contraband – establishing meaningful controls on staff smuggling of contraband and embarking on significant physical plant repairs.

The Department has stated in the past, and it is noted in the Statement of Basis and Purpose, that the proposed visiting procedures resemble those of other large jurisdictions, specifically Los Angeles and Cook County. No one has provided any information about why these jurisdictions should be emulated. Cursory research reveals that both of these jurisdictions have failed to reduce violence. In the case of Los Angeles, the county jail system is under renewed court scrutiny related to jail violence with a focus on violence by staff upon detainees.[10] The second-in-command of the LA County Sherriff's Department was indicted this year for interfering with a Federal Investigation into jail conditions which led to the arrests of several officers.[11] The long time Sherriff Lee Baca recently resigned, many believe, due in large part to

[9] http://www.nydailynews.com/new-york/nyc-crime/correction-officer-smuggle-knives-rikers-article-1.2373037
[10] http://www.latimes.com/opinion/editorials/la-ed-rosas-settlement-los-angeles-county-jails-20141217-story.html
[11] http://www.latimes.com/local/lanow/la-me-ln-paul-tanaka-career-20150514-story.html

the ongoing violence and corruption in the jails.[12] It is our position that New York City should not take lessons from Los Angeles County regarding jail management.

Similarly, Cook County is currently the subject of class action litigation related to violence and overcrowding in its jails.[13] It has already been under Federal monitoring resulting from a 2010 consent decree with the Department of Justice related to jail violence.[14] Simply because a jurisdiction is large does not make it a good model on which to base policy. We urge you to reject this argument as a basis to adopt the proposed rules.

Even if you accept the Department's argument that they must control all possible sources of contraband in order to limit violence, they already have the tools to properly control contraband entering through visits under existing procedures. There has not been a single incident of jail violence where it has been proven, or even suggested by the Department, that the weapon in question was smuggled through a visit. The cumbersome visiting procedure for community members was described to you by our Jail Services Social Worker during your May meeting, and is reiterated below.

> *I visited on a Thursday; where visiting hours ran from 1 to 8pm. As someone who had never been through the visitor center before, I didn't know what to expect. There were no clear signs directing you which line to wait in, what you should have ready or even what next steps would look like.*
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> *You're required to go through three checkpoints when visiting someone and you can expect a wait time of three to five hours for a one hour visit. I was told to leave everything in a locker, yet I'd need $.50 for the two lockers I was about to encounter, which DOC does not warn you on their website. At the first checkpoint I was asked to take off all layers, my shoes and walk through a metal detector while my stuff went through the x-ray. I was then required to check in according to the jail I was visiting, have my thumb print and my driver's license scanned. I proceeded to wait for the shuttle when the canine unit came around and an officer told me to remove everything from my lap and pockets and put my hands to my side while he went through my belongings. When I was dropped off in front of the jail, I repeated the process and this time there was a machine set up to wipe my hands for any chemical residue.*
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> *It took one hour to reach the second checkpoint and another two hours before I sat down with the person I came see. There's no signage about expectations and the officers wouldn't inform me why it was taking so long. The officers were unexpressive, hardly said a word and acted like I wasn't even a person. In the third checkpoint, a private area was created by a pulled screen. I was told to take off my shoes for the third time, turn my*

[12] http://www.latimes.com/local/la-me-baca-retire-20140107-story.html
[13] *Hudson et al. v Dart et al.*, case no. 2013cv8572 (2013)
[14] http://www.justice.gov/opa/pr/justice-department-announces-comprehensive-cooperative-agreement-cook-county-illinois-board

socks inside out, pull up my sleeves, use my thumbs to move across the inside of my pants, lift up my hair, open my mouth and eventually bend over and lift up my bra. By the end I felt exposed and humiliated. When I was cleared, I was told to wait again. Overall, it took me five hours of waiting and security measures for a one hour visit.

Throughout the entire process, I witnessed several families with children. I was a witness to their understanding of what it means to be institutionalized. Children were patted down, invaded by dog searches and were relentlessly waiting in lines. Visiting someone in Rikers is both psychologically and physically demanding for children and adults.

The disturbing experience described here is the norm. We know that for many visitors conditions are much worse. In 2010, New York City settled a lawsuit for $150,000 with a man who was seriously assaulted by correctional staff while he attempted to visit a loved one at Rikers.[15] Another more recent complaint alleges that a woman was sexually assaulted by correction officers during intrusive searches prior to a visit with a loved one.[16]

In addition to the intrusive searches endured by family members, people who are incarcerated are subjected to strip searches before and after visiting with their family. These strip searches are performed by officers precisely so that they can take care to find weapons or other contraband not detected by magnetometers or other scanners. If contraband is ever recovered, the Department currently has the ability to limit visits to non-contact "booth visits" through existing procedures. If staff performed the mandated searches appropriately, these procedures should be adequate to intercept contraband smuggled during visits. The Board should not punish mostly pre-trial detainees and their families for the failure of staff to follow existing procedures. If the Board believes changes are warranted, less onerous changes to visiting protocols should be evaluated before allowing the Department unrestrained discretion to deny or limit visits.

In addition to our objections regarding the need for rule changes, we also have serious concerns with the language of the proposed rules and their implementation if adopted. We are pleased to see that the Board has incorporated positive language into the proposed rules that acknowledges the importance of visiting for incarcerated people and their communities, and the wide range of individuals who may compose a community for incarcerated people. However, positive language must be reinforced by clear, detailed language and procedures which will ensure that important social connections will not be eviscerated simply based on the suspicions of a correction officer or other official. Such details are conspicuously absent in the proposed rules as presently drafted.

[15] http://www.nydailynews.com/new-york/queens-man-barry-crawford-suing-city-rikers-island-beating-article-1.455501

[16] http://www.nydailynews.com/new-york/rikers-island-visitor-sues-city-guard-groped-article-1.2390358

1-09(a)

The inclusion of positive language about the importance of visits and the range of people who constitute visitors for incarcerated people is admirable. However, the changes in the proposed rule actually weaken the rights of incarcerated people to receive visits.

The existing rules read "Prisoners are entitled to receive personal visits of sufficient length and number." The proposed rules read "All inmates are entitled to receive periodic personal visits." Inserting the word "periodic" and deleting the phrase "of sufficient length and number" suggests that the Department wants discretion to limit the number, length or frequency of visits certain people receive. The Department has provided no information as to why such discretion is warranted, or how it would be used. We agree that "Maintaining personal connections with positive social and family networks and support systems is critical to improving outcomes both during confinement and reentry." The Board should adopt language that *strengthens* protections for access to visits, not the opposite.

1-09(f)

The proposed limits on contact for incarcerated people and their families through a plexi-glass partition are unnecessary and harmful to incarcerated people, their families and their communities. It is disingenuous for the Department or the Board to claim that because the partition is short, it will not interrupt sustained contact during visits. One cannot be held by their mother in the same way when plexi-glass separates them. Sustained contact plays an essential role in the calming effects visiting provides. Using barriers to establish more separation between incarcerated people and their support networks will lead to greater feelings of desperation and alienation, contrary to the goal of reducing violence. Again, the Department has the necessary tools to intercept any contraband entering the jails under current procedures when executed properly, and have not presented a record as to why this rule change is necessary or how it will be effective in achieving the stated goal.

1-09(a)

Existing Minimum Standards provide the Department latitude to limit visits when there is a clear nexus between visiting and a threat to security. The proposed rules would expand the Department's discretion to deny or limit visits based on a set of criteria that is vague and overly broad. The criteria includes the "lack of a family relationship," probation and parole status, previous convictions for drugs or weapons, recent release from prison or jail, and pending criminal charges. While the proposed rules state that "such factors alone shall not form the sole basis for the Department's final determination," there is no language describing how these or other factors would be weighed when determining whether to deny a visit. Also unclear is how the Department intends to gather and evaluate information about these criteria; which staff member will be responsible for doing so, and when. What qualifications will Department staff have to evaluate what constitutes a "close relationship" for an incarcerated person? The Board should be deeply concerned about this vague language, as it suggests that the Department intends

to research the backgrounds of innocent visitors based on no defined threat – a patent invasion of privacy.

The proposed rules also allow the department to consider the "nature" of previous convictions or pending charges to justify denial of a visit. It is simply absurd to utilize alleged acts in making determinations to limit such an essential right as access to family visits, should you accept that the foundation of our legal system rests on a premise of innocence until proven guilty. The language notes that felony convictions and "persistent weapons or narcotics" misdemeanor convictions would be considered grounds for denying visits. However, there is no clarity regarding what particular characteristics would be considered threatening, nor is there any demonstrated nexus between how such convictions or pending charges are related to visits and jail safety. The result is a policy that is wrong-headed and ripe for abuse. For example, individuals with persistent misdemeanor narcotics convictions are often suffering long-term addiction and pose little risk to jail safety or contraband smuggling, but the proposed rules would permit a blanket prohibition on visits for these individuals.

Finally, consideration of previous contact with the criminal justice system will disproportionately impact poor people of color who are more likely to be the subject of discriminatory policing and prosecution.

1-09(h)(3) - (4)

As if the criteria described above were not broad enough, proposed changes to Minimum Standard 1-09(3) and (4) effectively give the Department unbridled discretion to deny visits and restrict contact based on no criteria at all. The proposed language states that visitation rights may be denied "when such visitation would cause a threat to the safety or security or good order of the facility." This language is so broad as to be capricious. Importantly, this particular change would remove from the Minimum Standards any nexus to behavior during visits as a reason for limiting visit rights. Additionally, language requiring that a threat be "serious" in order to deny visits is removed. Finally, language requiring the Department to employ less extreme measures before imposing prohibiting visits is deleted. What is left is complete discretion for the Department to deny visits, and questions about how exactly that discretion will be used. Who determines what is threatening? Based on what criteria? How will any information used to make such a determination be gathered? When will the determination be made? What does "good order" mean? All of these questions were asked months ago and yet the revised proposed rules upon which we have been invited to comment answer none of them. The Board should never have initiated rule-making without addressing these concerns, and should reject the rules as drafted now.[17]

[17] It is inadequate for these important procedural questions to be answered after rules have been adopted or in the Department's internal Directives. Only the Minimum Standards are legally enforceable, available for review and comment by interested parties and subject to oversight beyond a given administration.

1-09(h)(6)

Compounding an increase in discretion for the Department, the proposed rules also include unnecessary changes to the appeal system for individuals who are denied visits. Currently, people who are denied contact visits may appeal directly to the Board. The proposed addition of an initial appeal through the Department of Correction is nonsensical. The Department is already responsible for the initial determination – the proposed appeal would simply add two weeks of additional time for the appeal to be reviewed, locking out many who pass through the jails with very short stays. The Board should remain the first level of appeal to guarantee swift and independent review of the Department's determinations about visits.

Packages

We urge the Board to reject the proposed rules related to packages. The Department has not provided any evidence that packages are a significant source of contraband in the jails. The Department also fails to demonstrate why existing procedures to intercede contraband smuggling through packages are inadequate if followed competently. The Board should reject the proposal as unnecessary and unfairly burdensome to poor families. The proposed rules change existing standards in two important ways 1) by requiring families to send packages through pre-approved vendors and 2) by restricting outgoing packages from people in city jails.

The vast majority of people on Rikers Island are there before being convicted of any crime because their families cannot afford to pay bail. The proposed rules would force these same poor families to purchase anew items they already own at home. The Department claims that the cost to families will be mitigated by the use of uniforms, but ignores the need for undergarments, hygiene items, warm layers and other basic necessities for which incarcerated people rely on their loved-ones. In light of pre-trial detention lasting years in our city, the burden on families will be significant, and cannot be ignored. Even more disturbing, prison vendors typically charge significant mark-ups, profiteering from the incarceration of poor people around the country. We ask that the Board reject any proposal that will add New York City to the list of places that participate in this abhorrent practice.

The proposed rules would also permit the Department to restrict outgoing packages from incarcerated people based on a "reasonable belief that limitation is necessary to protect public safety, or maintain facility order and security." The Department provides no information about how an outgoing package would pose such a risk and therefore fails to justify the need for this rule change. Moreover, the exceedingly weak "reasonable belief" standard will permit Department staff to arbitrarily deny people's outgoing packages. In light of these facts, it is clear this standard has little to do with safety, and more to do with the Department's ability to punish certain people without meaningful oversight.

ESH

The proposed rules would reduce already-weak due process standards for people placed in the Enhanced Supervision Housing Unit, and we urge the Board to reject the proposal. While we believe the intention to return individuals from ESH into less restrictive housing is a good one, we do not believe that this must come at the expense of due process. Instead, we would argue that the Board should establish *more* due process standards for ESH placement and review.

Currently, people placed in ESHU receive notice about the reasons for their placement and may submit comments for review contesting their placement, but they do not have a right to counsel or any outside advocacy, and the determination is reviewed by Department staff, not an independent body. The only way for a person to be released from ESHU is through a poorly-defined review of the individual's behavior by Department staff every 45 days, essentially providing complete discretion to the Department as to how long someone will remain in ESH. These procedural protections are too weak in light of the significant restrictions placed on people in the unit, including cell confinement 17 hours per day for indeterminate periods.

The proposed rules would only weaken due process protections further by allowing the Department to return an individual to ESH without notice, a hearing, or the right to contest placement. The proposed rule changes fail to delineate the circumstances which would warrant return to the unit. There is no indication that the return to ESH would necessarily involve violent behavior, gang activity, or be related to any of the criteria used to make the initial placement in ESH. Furthermore, it is unclear who would make the determination that an individual should return to ESH, or if there is any review within the Department regarding that determination.

In light of the indeterminate nature of placements in ESHU, it is especially unjust to facilitate returns to the unit without due process protections. The Department should be required to demonstrate a clear justification for placement in any restrictive unit based on present behavior, not simply based on an individual's previous housing. An individual could spend a year in ESH without incident, be released to the population, and then be accused of disrespecting staff. This accusation would not warrant placement in ESH or any type of segregated housing. Under the proposed rules, however, this person would be returned to ESH without any notice or ability to challenge the determination whatsoever. The proposed changes will do little more than open the door for cyclical placements disconnected from any nexus to present behavior and should be rejected.

The Statement of Basis and Purpose states that this rule change is intended to provide the Department with more flexibility to provide incentives for good behavior, including by transitioning individuals into less restrictive housing. We support an incentive model in principle; however we do not believe that incentives and due process protections are mutually exclusive. Additionally, there is no detail provided about what "incentives" are being offered, or about the operations of supposedly "progressively less restrictive" settings. Based on client reports, the alternative settings they have been offered for release from ESH are typically also

quite restrictive – enhanced restraints units, closed custody units, and administrative segregation units with no programming. Our office remains concerned about the opacity with which these units operate.

The ESHU is relatively new and should be monitored and evaluated. The Board should review the ESHU's effectiveness in reducing violence, lengths of stay for individuals placed there, the quality of the evaluations conducted by the Department, the availability and success of programming and other metrics. There is no reason to weaken due process before the period of review delineated under the sunset provision has ended. The Board should take seriously its task to review the use and effectiveness of ESHU, particularly in light of inconsistent reports from the Department about what population the unit is intended to house. If this restrictive unit is not being utilized to complete the mission for which the Board approved its establishment, or if the unit has not been shown effective in reducing violence, the Board should not allow for its continued operation.

Conclusion

The issue of violence on Rikers Island is serious, and warrants serious solutions. The proposed rules do not rise to the challenge. There has not been compelling evidence presented to support the need for *any* of the proposed rule changes. The proposed expansion of solitary confinement is directly contradictory to the academic literature, expert testimony to the Board, and respect for human dignity – all of which tell us that the practice makes our jails more dangerous and causes irreparable harm. Restrictions on visiting and packages are unnecessary, discriminatory, unjustified, will lead to further isolation of New Yorkers in city jails, and foment violence. The approach to reduce violence should be evidence-based and include increased programming, an end to solitary confinement, and a visiting process that facilitates meaningful contact with families and communities, and respects the rights and dignity of incarcerated people and their loved ones travelling to Rikers Island. Thank you for your consideration of our comments. Please contact Riley Doyle Evans, Jail Services Coordinator at (347)-768-3017 or rdevans@bds.org with any concerns.

Sincerely,

Lisa Schreibersdorf
Executive Director

Riley Doyle Evans
Jail Services Coordinator