Comments of The Legal Aid Society
Prisoners' Rights Project
on the Proposed Amendments
to the Minimum Standards for
New York City Correctional Facilities

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We submit herewith the comments of The Legal Aid Society's Prisoners' Rights Project on the proposed amendments to the Minimum Standards for New York City Correctional Facilities. We have not commented on every proposed amendment, and may supplement these comments based on further thought or further analysis of information we have sought from the Board of Correction and the Department of Correction.

Summary

The Board of Correction should withdraw the proposed amendments. They are the product of a flawed and one-sided process in which only the views and interests of the Department of Correction were considered. The results of the process are completely skewed towards the Department's concerns at the expense of the interests of prisoners and their families, and they fail to address any of the issues omitted from the original standards but highly appropriate for regulation by the Board at this point. The Board's explanations are mostly vague and general, and the fact that some other jails and the State Commission of Correction have harsher or more intrusive rules does not justify this independent Board in joining a "race to the bottom" with its own standards. (See § A, below.)

The Board should not amend the Overcrowding standard. Greater crowding risks more violence and less ability to maintain physical plant. The Department is not in control of either area of its operations; its own data shows that violence has been increasing. With jail population having fallen by a third from its peak and with jails and housing units standing empty, there is simply no need to make the jails more crowded. (See § B, below.)

The Board should not amend the Lock-in standard to allow 23-hour lock-in of all close custody prisoners because of the harsh consequences of such protracted lock-in times. If it makes any exception for close custody, it should require a reasonable amount of lock-in time, as is done in the state prisons' protective custody units. (See § C, below.)

The Board should not eliminate the requirement of sufficient Spanish-speaking staff to ensure that Spanish-speaking prisoners can understand and participate in facility activities; the need for such service has increased rather than decreased over the years. The proposed amendment to require "procedures" to assist non-English speakers generally is appropriate if made more specific. The Board should also spell out when the use of other prisoners as interpreters is inappropriate. (See § D, below.)

The Board should not approve the proposed amendments with respect to communications (telephones, correspondence, packages, and publications) in the absence of a showing of need. There is no showing that compliance with the existing warrant requirement has actually impeded the Department in pursuing any necessary investigation. The proposed amendments also convey entirely too much unfettered executive discretion; if any amendments are approved, they must be far more explicit about the circumstances in which intrusion and obstruction of communication are allowed. (See § E, below.)

The Board should not approve a requirement that pre-trial detainees, who are entitled to a presumption of innocence, wear jail uniforms, both because of their dehumanizing quality and because doing so would eliminate prisoners' and their families' options to provide clothing adapted to the extreme temperatures that prisoners sometimes encounter in the jails and during outdoor recreation. Further, there is no

provision for verification that the Department will actually be able consistently to provide clean clothing that fits for 12,000 detainees, and much reason to doubt that it is capable of doing so. (See § F, below.)

The Board should not approve the proposed amendment to deny contact visits to newly admitted prisoners because of the absence of any evidence that such visits have ever caused a problem and because of the potentially devastating impact of requiring such visits to newly incarcerated persons and their family members. (See § G, below.)

The Board should not approve the proposed amendment concerning housing sanitation in its current form because it is inconsistent with a governing federal court order. (See § H, below.)

The Board should not approve the proposed amendment concerning personal hygiene, since restricting showers in punitive segregation units is a potential threat to health in hot weather until such time as the Department provides some means of cooling the segregation units. (See § I, below.)

The Board should not approve the proposed amendment concerning "correctional best practices" variances, unless it is revised to provide that such variances cannot be more intrusive or restrictive than the existing standard. The proposed amendment eliminating the distinction between "limited" and "continuing" variances is appropriate. (See § J, below.)

The proposed amendments generally fail to provide an adequate oversight role for the Board and, in at least one instance, withdraws the Board from an existing oversight role. The Board should review its proposed amendments, as well as the rest of the

standards, with an eye to appropriate means to ensure that the Department actually complies with them consistently. (See § K, below.)

The Board has failed to look beyond the Department of Correction's wish list to assess whether additional amendments—especially those that might benefit prisoners or their families—are needed, both in areas of existing standards and areas which the Board has not previously regulated. (See § L, below.)

A. Introduction and General Comments

The Board should withdraw the proposed amendments in their entirety and start over. The proposals, nominally the result of a comprehensive review of the Minimum Standards, in fact reflect a completely one-sided process in which the Department of Correction pressed its agenda; in which all parties who might have questioned or opposed the Department's positions were excluded; and in which there was no voice to speak for the prisoners and the communities from which they come.

1. The Board's Flawed Process

This most recent phase of the Board's consideration of amendments to its Minimum Standards began in the fall of 2004, when the Department submitted requests for variances from the standards governing Overcrowding, Lock-in, Clothing, and Telephone Calls, along with requests for amendments of those standards.[1] A review of the ensuing process, which culminated in the publication of amendments now under consideration, reveals that Board, as a regulatory body, failed to exercise independent authority in the formulation of these proposals, failed to debate, or even discuss, the

[1] Letters from DOC Commissioner Martin Horn to BOC Executive Director Richard T. Wolf, October 19, 2004, and November 26, 2004 (two letters).

proposals prior to publication, and failed to include interested parties in the development of the proposals. The process has made a mockery of the Board's oversight mission.

A joint Board-Department committee was created to review the standards, with the Commissioner designating two Department representatives and the Board assigning two members to the review committee.[2] The Chair of the Board reviewed the standards himself and found them to be in "pretty good order."[3] On further review, the Board Chair reported that the committee would be recommending some "minor adjustments" in the standards. He described the process as follows: The committee would meet again in a week or two and would present its recommendations to the Board. Then there would be a meeting with the Department to learn what changes it would suggest. The committee would then develop its final list of recommendations to present to the full Board, and finally the "complicated process" of amending the minimum standards could begin.[4]

In March 2005, the Chair reported that the committee was making good progress, and was going to meet soon with the Department to discuss the Board's recommendations and solicit the Department's views. "Thereafter, the Board will reach out to interested constituencies for comments." In response to a question from a Board member, the Chair answered affirmatively that the full Board would have input before the recommendations were shared with the Department. It was clear at this time that the Department was working on its own set of proposals. The Commissioner reported that the Department had been working on a comparison of the Board's Minimum Standards with standards of the State Commission of Correction and the American Correctional Association.[5]

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[2] BOC meeting minutes, October 14, 2004 and December 8, 2004.
[3] BOC meeting minutes, December 8, 2004
[4] BOC meeting minutes, January 13, 2005
[5] BOC meeting minutes, March 10, 2005.

In May 2005, matters took a new turn when the Chair of the revision committee reported that the committee and Department staff would meet for the purpose of hearing *the Department's* proposals for change.[6] There was no mention of the committee having formulated its own set of proposals or recommendations. In June 2005, the Department presented its proposed revisions to Board staff. These were distributed to the full Board.[7] This set of requested revisions of the standards has not been made available for public review.

By September 2005, the committee's focus had fully shifted to a review of the Department's proposals, and away from any independent review of the Minimum Standards. Tellingly, one of the committee members commented at the September Board meeting that the committee "might" itself propose changes to the standards[8]--a remark which shows how far the process had shifted from one driven by the Board's own initiative to one driven by the Department's requests and proposals.

Over the next few months, the committee communicated with the Department to ask questions and obtain additional information about the Department's proposals. From reports given at Board meetings, November 2005 – March 2006, the Board members on the committee continued to focus on the Department's proposals rather than conducting its own independent review and formulation its own remedial proposals.[9]

At the January 2006 Board meeting, the committee chair described a process following the committee's completion of its work, that would include internal debate by the Board and then input from interested parties, such as unions and the Legal Aid

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[6] BOC meeting minutes, May 12, 2005,
[7] BOC meeting minutes, June 9, 2005,
[8] BOC meeting minutes, September 15, 2005,
[9] BOC meeting minutes, November 10, 2005, December 8, 2005, January 12, 2006, February 9, 2006, March 9, 2006.

Society.[10] In March 2006, the committee chair said that the proposed amendments would have to be discussed at a full meeting of the Board. In April 2006, the Board Chair said that after a briefing of Board members, who had not served on the committee, the Board would discuss the recommended amendments.[11] As we now know, the process–including discussion of the proposed amendments by the full Board and input from interested groups—never took place.

By July 2006, Board staff had prepared a memorandum explaining the recommendation to amend certain standards and the reasons not to change others. The memo was distributed to the Board, but not to the public.[12]

At its September 2006 meeting, the Board voted to "move the process," meaning that the proposals would be sent to the Law Department for review, but no discussion of the substance of the proposals took place.[13]

2. The Results of the Board's Process

The results of this process reflect the defects of the process. The significant changes proposed in the amendments are overwhelmingly directed towards serving the convenience and enhancing the prerogatives of the Department while limiting oversight by the Board. There is simply nothing of substance in them for prisoners or their families. Rather, the amendments would make life in jail more oppressive and intrusive. The supposed explanations in the Board's notice document explain almost nothing, and indeed seem crafted for that purpose. In short, the picture the Board's proposals present is the same picture that has become all too familiar at all levels of government: the

[10] BOC meeting minutes, January 12, 2006
[11] BOC meeting minutes, April 13, 2006.
[12] BOC meeting minutes, July 13, 2006.
[13] BOC meeting minutes, September 14, 2006.

supposed regulatory agency that has become captured by the industry it regulates and serves its interests rather than those of the public.

It is not enough to say that now is the time for the community to be heard. The agenda has been firmly fixed after two years of collaboration between Board and Department, and there is no realistic expectation that a single day of hearings and a flurry of written submissions will have any significant impact on the determinations that have been reached behind closed doors.

In proceeding as it has, the Board has betrayed both its regulatory responsibility and the public trust. We call on the Board to turn back from its present course and commence a genuine, open, and even-handed review of the Standards, open to all elements of the community who are concerned about the treatment of their neighbors, friends, family members and fellow citizens who may be held in jail, and not just those who run the jails.

One of the most disturbing aspects of the Board's comments on the proposals is its invocation of practices in certain other jails, without presenting any reason why those jails should be viewed as appropriate role models for New York's, or any evidence that their prisoners are treated any better, or even as well, as New York's prisoners. In fact, as shown below,[14] those jails are severely overcrowded and in some cases grossly mismanaged and consciously abusive of prisoners. They present nothing to aspire to, and the Board's citation of them amounts to a "race to the bottom." Nor is there any support for the Board's citation of the less demanding standards of the State Commission of Correction. If the Commission's standards were appropriate for New York, there would be no reason for the Board to have standards at all. No jail system in New York State is

[14] *See* § B, below.

as large and as complex as New York City's, and none has demonstrated such an inability over 30-plus years to manage its staff and facilities consistently with court orders incorporating minimal constitutional standards.

In the rest of these comments, we will address the specifics of each significant amendment and its supposed justification. We will also begin to address what the Board has *not* done: examine the significant areas of jail life and operations that were omitted from the original Standards and *still* will not be addressed under the Board's present proposals.

B. Overcrowding

We oppose the amendments to the Board of Correction's Overcrowding Minimum Standard (Section 1-04), which would allow the Department to squeeze more prisoners into less space by shrinking the minimum floor space per person in dormitories to 50 square feet and increasing the maximum number of detainees housed in a dormitory from 50 to 60.

We oppose these changes, first, because they have a strong potential for creating or exacerbating dangerous and disruptive conditions in the jails, as well as straining the Department's ability to maintain basic plumbing equipment (toilets, urinals, sinks, and showers) and sanitation, and to provide inmate services and programs.[15] It is wrong to

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[15] As we said in 2004, when faced with a similar, though much smaller scale, version of the current proposal:

> The Legal Aid Society is deeply concerned about the Department's variance request concerning crowding, since overcrowding has historically been the bane of the City jail system and has been linked to inmate-inmate violence, excessive force by staff, and the disruption and sometimes the breakdown of medical care access, food service, sanitation and maintenance, and other essential services and operations. *See, e.g., Fisher v. Koehler*, 692 F.Supp. 1519 (S.D.N.Y. 1988), *aff'd*, 902 F.2d 2 (2d Cir. 1990) (linking unconstitutional inmate-inmate and staff

claim that these risks are not real because these crowding levels have been allowed in some locations under variances without obvious disaster. In fact, where the Department has been allowed, through variances, to operate expanded capacity dormitories in the past, the Board has failed to adequately monitor the impacts of overcrowding.

Second, there is no need or justification for the amendment, except that other jail systems do crowd to this extent, and the State Commission of Correction standards permit it. In the absence of some affirmative policy reason to embrace more crowding, to join this "race to the bottom" just because somebody else is doing it, would constitute an abdication by the Board of its independent oversight and standard-setting authority. "Because the neighbors are doing it" is not a good reason, nor is "because we can."

That is especially true in light of the comparisons chosen by the Board. One would think that the jails that the Board suggests emulating would be jails that are known to be well-run and not grossly overcrowded or violent. But that is not the case. Specifically:

Los Angeles. It is astonishing and shocking that the Board puts forth Los Angeles as a suitable model for New York City. The Los Angeles County jail system has been in a crisis of overcrowding and violence for many years, blowing up in uncontrollable riots early last year.[16]

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violence to crowding among other causes); Benjamin v. Malcolm, 564 F.Supp. 668 (S.D.N.Y. 1983) (finding safety, sanitation, medical services, and other services inadequate for proposed population levels; finding population caps constitutionally required to provide basic services).

Letter, Prisoners' Rights Project to Board of Correction, December 6, 2004.

[16] *See* "Los Angeles Officials Defend Effort to Calm Jails," *New York Times*, Feb. 19, 2006:

> Sheriff's officials are defending recent tactics used in hopes of quelling two weeks of violence in the Los Angeles County jail system, including taking mattresses away from inmates and ordering them to strip.

Chicago. The Cook County jail system is also severely overcrowded. Prisoners routinely sleep on floors in that system and have for years.[17]

Houston. The Harris County jail system, like that of Los Angeles, is in crisis. In mid-2004, 1700 to 1900 inmates were sleeping on the jail floors, of a population of 9100; a year later, some 1000 or more were still housed on floors.[18]

Phoenix. Of all the jails cited by the Board, the Maricopa County jail system is the most incongruous. Operated by Sheriff Joe Arpaio, who boasts of being known as

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> More than 100 inmates at Pitchess Detention Center spent much of Feb. 9 naked, without their mattresses and with only blankets to cover themselves. The punishment was an effort to calm inmates who had repeatedly attacked each other, even after privileges like access to mail, television and phones were taken away, said Sammy Jones, chief of the custody division.
>
> Sheriff Leroy D. Baca said Friday that he supported the move, as long as it was over a short term. He said keeping inmates naked was at the "outer edge of our core values" but was done to save lives.

(http://www.nytimes.com/2006/02/19/national/19jail.html?ex=1176264000&en=912ba86a24dae465&ei=5070). *See also* "More Injuries as Race Riots Disrupt Jails in Los Angeles," *New York Times*, Feb. 10, 2006 (http://select.nytimes.com/search/restricted/article?res=FB0A1EFE3E5A0C738DDDAB0894DE404482); "A Jail Tour in Los Angeles Offers a Peek Into 5 Killings Behind Bars," *New York Times*, May 23, 2004 (http://select.nytimes.com/search/restricted/article?res=FA0E12FD3D5A0C708EDDAC0894DC404482).

[17] The John Howard Association, which monitors the Cook County jails pursuant to court order, has made observations on this subject for years in its reports, *e.g.* (from the two most recent reports on-line):

"Although the average daily inmate population and the number of inmates sleeping on floors have decreased somewhat since 2002, overcrowding remains a problem of the first order for CCDOC." Executive Summary, Court Monitoring Report for *Duran v. Sheahan* et al., 74 C 2949: Crowding And Conditions Of Confinement At The Cook County Department Of Corrections And Compliance With The Consent Decree at 15 (July 2004) (http://www.john-howard.org/images/EXECUTIVESUMMARY.doc).

"Sadly, with all the progress made, over 500 detainees (individuals suspected but not found guilty of a criminal act, individuals who cannot afford bail, individuals who are disproportionately people of color and increasingly female) sleep on the floors every night at CCDOC in terribly cramped and unsanitary conditions." Executive Summary, Court Monitoring Report for *Duran v. Sheahan* et al., 74 C 2949: Crowding And Conditions Of Confinement At The Cook County Department Of Corrections And Compliance With The Consent Decree at 1 (May 2005).

[18] "Revised numbers show jail crowding is worse," *Houston Chronicle*, August 5, 2005, *reprinted at* http://www.solutionsfortexas.net/id408.html .

"America's Toughest Sheriff,"[19] it is one of the few American jails to have its own report from Amnesty International.[20] Among the policies to which the Sheriff points with apparent pride[21] are chain gangs (for juveniles as well as adults), service of only two meals a day, the prohibition of coffee, salt, and pepper, the use of striped uniforms and pink underwear, and housing prisoners in a "Tent City" which he calls "a remarkable success story," but which Amnesty International described as posing "serious environmental hazards which make them unsuitable for inmate housing" and serious security and safety risks to prisoners and staff.[22] Sheriff Arpaio also instituted World Wide Web broadcasts showing prisoners and their activities via cameras installed within the jails, until the courts struck this practice down as unlawful[23] (though not before video of women inmates using the toilet had been copied onto web pornography sites[24]). These antics aside, the Maricopa County jails too are grossly overcrowded; in 2004, the system was at 176% of capacity.[25]

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[19] *See* http://www.mcso.org/index.php?a=GetModule&mn=Sheriff_Bio .

[20] Amnesty International, *Ill-Treatment of Inmates in Maricopa County Jails, Arizona* (August 1997) (http://web.amnesty.org/library/pdf/AMR510511997ENGLISH/$File/AMR5105197.pdf) (citing excessive force, inappropriate and inhumane use of restraint chairs, confinement of prisoners in outdoor tents).

[21] http://www.mcso.org/index.php?a=GetModule&mn=Sheriff_Bio .

[22] *Ill-Treatment of Inmates* report at 9-10. *See Flanders v. Maricopa County*, 203 Ariz. 368, 54 P.2d 837 (2002) (holding "[t]he history of violence, the abundance of weaponry, the lack of supervision, and the absence of necessary security measures" at Tent City support a finding of deliberate indifference to prisoner safety; upholding over $600,000 in compensatory and punitive damages to a prisoner severely injured in an assault).

[23] *Demery v. Arpaio*, 378 F.3d 1020 (9th Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005).

[24] Jamie Fellner, *Prisoner Abuse: How Different Are U.S. Prisons?* Human Rights Watch Commentary, (http://hrw.org/english/docs/2004/05/14/usdom8583.htm); "'Jail cam'" raises hackles and a law suit when links to porno site are discovered," *Village Voice*, June 6-12, 2001 (http://www.villagevoice.com/news/0123,haddon,25345,1.html).

[25] U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin, Prison and Jail Inmates at Midyear 2004 at 9, 10, Table 12 (April 2005) (http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf). This is apparently the most recent year for which data are available.

Philadelphia. The Philadelphia jail system, unlike New York's, appears to house most of its prisoners in cells rather than dormitories, allowing it to house prisoners very selectively in dorms.[26] Further, Philadelphia's jail system is a system in crisis, and New York's is not. Only a few months ago, a federal court found it necessary to enjoin the jail system's practice of backing up prisoners in intake areas and police stations because of overcrowding in the jails.[27] Philadelphia is housing prisoners in bunk beds in dayroom areas and is *triple* celling prisoners on plastic cots.[28]

Speaking of violence in the New York City jails in comparison to other municipalities, Commissioner Horn has said that a grand jury from Cook County, Illinois, after a visit to NYC DOC facilities, recommended that "Cook County should do what New York does."[29] The Commissioner also noted the placement of the Fulton County, Georgia jail under a monitor appointed by the Federal Court. BOC Executive Director Richard Wolf responded "that the favorable comparison of the City jails to other jurisdictions is due in no small measure to the Board and to its Minimum Standards."[30]

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[26] *See* facility descriptions at http://207.36.233.204/prisons/int.asp?menucat=Facilities_Menu&page=facilities_main .

[27] *Bowers v. City of Philadelphia*, 2007 WL 219651 at *35-36 (E.D.Pa., Jan. 25, 2007). The Philadelphia jail population increased from about 7000 inmates in 2000 to about 9000 at present, and the City made no concrete plans to do anything to accommodate the increase. *Id.* at *5, 18. In mid-2006, the Corrections Commissioner wrote to the Mayor: "The jails are full! The atmosphere at the Philadelphia Prison System is just too tense to allow the flow to increase." *Id.* at *6.

[28] *Bowers v. City of Philadelphia*, 2007 WL 219651 at *7.

[29] That claim is ironic at best. While Chicago is presently subject to class action litigation alleging a "long-standing and deeply entrenched culture" condoning excessive force against detainees, *Walker v. County of Cook*, No. 05 C 5634, First Amended Complaint at ¶ 3 (N.D.Ill., filed Feb. 13, 2006), the same situation prevails here in New York. Prisoners in the New York City jails have prevailed in four such class action lawsuits prosecuted by Legal Aid, the most recent of which was settled last year for substantial reforms in use of force policy, training, and supervision and discipline, with Legal Aid's monitoring to continue until late 2009. *Ingles v. Toro*, No. 01 CV 8279 (DC), Settlement Agreement (S.D.N.Y., Feb. 17, 2006), *approved*, 438 F.Supp.2d 203 (S.D.N.Y. 2006).

[30] BOC meeting minutes, December 9, 2004.

The Board should not now succumb to the temptation to use other, worse jail systems as models, disregard the beneficial impact of its own current, long-standing standards, and allow the Department's performance to sink to unacceptable levels.

The third reason to reject these amendments is that they would deprive the Board of a significant means of oversight, albeit one that the Board has not used adequately. If the standard is changed and the Department need no longer seek variances to overcrowd, the Board would lose the ability to set protective conditions, and would no longer be able to require reports on violence, maintenance, and programs in overcrowded areas. Thus the Board would not only authorize more intensive and widespread overcrowding in the entire jail system, including the planned new construction; it would also let go of a large measure of its monitoring capabilities. We've heard it said that management by variance is a poor way to manage; but in fact, oversight by variance is an extremely useful tool when the Department seeks to overcrowd, even though the Board has failed to use it adequately, and in fact has ignored evidence made available to it showing increased violence. While we would prefer for the Board to retain the present standard and require the Department to comply with it, rather than grant variances from it, if there is to be overcrowding to address short-term needs to manage population spikes, the Board should retain its present options to limit it, actually oversee it, and to set conditions for it.

1. The Effects of Overcrowding

The ill effects of prison overcrowding have long been known and have been aired in litigation concerning this jail system. Years ago, the federal court found that overcrowding compromised safety, sanitation, medical services, and other services, and

found a dormitory population cap constitutionally required.[31] The effects of overcrowding were at issue in *Fisher v. Koehler*,[32] Legal Aid's successful class action challenge to the failure to control violence in the Correctional Institution for Men, now the Eric M. Taylor Center. Even then the issue was not new. Judge Lasker observed:

> It is important to note, however, that the link between violence and overcrowding in the prison setting is hardly an issue of first impression. Over a decade ago, this court, largely on the basis of testimony from corrections experts and psychiatrists, determined that overcrowding, among other adverse consequences, intensified inmate hostility and aggression at the Bronx House of Detention. . . . Since then, numerous courts have found overcrowding to be a significant cause of violence in various jails and prisons.[33]

In the *Fisher* case it was conceded by Department personnel, from correction officers to the warden to the Commissioner, that crowding contributes to jail violence.[34] The State Commission of Correction had found overcrowding to have contributed to a serious disturbance at the jail.[35] Plaintiffs' two correctional experts testified based on their experience that overcrowding was a major cause of violence. Defendants' correctional expert—from the Sheriff's Department of Los Angeles, whose jail system the Board has suggested is a model—sought to minimize the importance of crowding, but such a relationship was acknowledged by his own agency in a staff manual he had approved.[36]

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[31] *Benjamin v. Malcolm*, 564 F.Supp. 668 (S.D.N.Y. 1983).
[32] *Fisher v. Koehler*, 692 F.Supp. 1519 (S.D.N.Y. 1988), *injunction entered*, 718 F.Supp. 1111 (S.D.N.Y. 1989), *aff'd*, 902 F.2d 2 (2d Cir. 1990).
[33] *Fisher*, 692 F.Supp. at 1541.
[34] *Id.* (noting that Warden Garvey conceded that crowding contributes to jail violence, agreeing that too much unwanted contact at close quarters creates tension which can turn into violence; noting that Commissioner Koehler conceded that "one of the variables . . . that contributes to unrest in jail systems is the density of the population. . . .").
[35] *Id.*, n.36. The Commission had recommended allowing housing at 50 square feet per person, but with no more than 50 persons per multiple occupancy housing area.
[36] The Los Angeles County Sheriff's Department Defensive Tactics Manual stated that an officer's responsibility to guard the safety and welfare of staff and inmates "becomes more difficult due primarily to the overcrowding of all custodial facilities which has created more dangerous and

There are two separate dimensions to crowding: spatial density—the number of square feet per person—and social density—the number of people held in a particular space. Both are significant. In the *Fisher* case, Verne C. Cox, a professor of psychology who had performed extensive research on prison crowding testified that the high population density at CIFM

> causes inmate stress and arousal, manifesting itself in violence as well as other adverse consequences. Cox' theories and research point to a substantial connection between overcrowding and inmate-inmate violence: a high population combined with predominance of open dormitories causes stress and arousal, one of the manifestations of which is violence. T. 4692-94. According to his research, "social density," the number of persons in a particular space, is a more potent factor in creating negative consequences than "spatial density," the actual amount of space per person. T. 4696-97. Cox' research shows that the negative effects of social density include a variety of measures of stress, such as illness complaints, mood states, natural deaths, psychiatric commitments and violence. PX 411. Cox explains these findings in terms of "social interaction demand": crowding produces uncertainty arising from contact with unfamiliar individuals, "goal interference" and resulting frustration largely related to competition for resources, and "cognitive load," which reflects the difficulty of making decisions in a complex situation. The negative effects of social density are magnified in prison because of the relative dangerousness of the environment, the high turnover and constant influx of unfamiliar persons, and the limited resources available to each prisoner. See generally PX 411 (Cox, Paulus, McCain, Prison Crowding Research, reprinted from American Psychologist, October 1984); PX 412 (McCain, Cox, Paulus, The Effect of Prison Crowding on Inmate Behavior).[37]

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violent physical hostilities towards deputy personnel, civilians and other inmates." *Fisher*, 692 F.Supp. at 1543.

Such statements from corrections professionals are common. For example, the Sheriff of Cook County—whose jails the Board has cited as supporting greater crowding in New York—has said that overcrowding "breeds agitation and tempers flare as a result. . . . [O]vercrowding contributes to volatility in a correctional setting. It increases the burdens and stress on staff and it agitates the inmate population. It contributes to the occurrences of inmate-on-inmate violence, as well as the potential for excess force." "Jail Overcrowding and Understaffing," *Chicago Tribune*, (http://www.chicagotribune.com/news/specials/chi-jailreport-parttwo-jailovercrowding,1,6513918.story?coll=chi-newsspecials-hed).

[37] *Fisher*, 692 F.Supp. at 1543. The court added that Dr. Cox "endorsed the views expressed by Susan Saegert, an expert on the psychological effects of crowding, concerning 'social overload' and its negative consequences in prisons," that the court had adopted in the Bronx House of

The City's research expert, Dr. Gerald Gaes—an employee of the Federal Bureau of Prisons—criticized Dr. Cox's testimony, but Judge Lasker observed that "much of Gaes' own research and writing supports Cox' core conclusion that there is a substantial connection between overcrowding and violence in correctional facilities." Gaes' own study of assaults at 19 federal prisons over a period of 33 months showed that

> ". . . assault rates generally increased with crowding increases." . . . He also found that "a system configured with larger percentages of their population housed in dormitories is especially susceptible to higher assault rates." Id. Gaes reconfirmed these findings in a later review of crowding literature, . . . in which he concluded that one of the "basic conclusions warranted by the prison crowding research" is that "prisons that have higher density ratios are also more likely to have higher assault or misconduct rates," . . . . He noted elsewhere that "a prison with an excessive number of inmates housed mostly in dormitories is particularly likely to have higher assault rates," and that "[i]n summary, crowding, not age or transiency, is the best predictor of assault rates." . . .[38]

Based on that evidence, Judge Lasker concluded that "overcrowding is a significant cause of violence at CIFM." He added that, although Dr. Cox was criticized "for being overly theoretical and removed from reality, the practical realities testified to by CIFM inmates, officers and corrections officials tended to support" Cox's testimony.[39]

In light of this evidence and these findings at one of New York's own jails, it is remarkable that the Department has sought, and the Board has proposed, to increase crowding when there is no need for it.

Detention litigation mentioned above. "When asked how the state of knowledge on the subject had changed since 1976, Cox stated that 'a much more substantial body of data collected within prisons has emerged that basically buttresses many of the points that Susan Saegert stressed in her article.'" *Id.* at 1544.

[38] *Fisher*, 692 F.Supp. at 1544.

[39] *Fisher*, 692 F.Supp. at 1546.

2. Increased Violence in the Jails

The rulemaking notice states that the Board recognizes "significant reductions in reported stabbing and slashing incidents in the City's jails." However, stabbings and slashings are only a small slice of violence in the jails, and their relatively low frequency says more about the Department's efforts to find and remove weapons than about the overall rate of violence and tension in the jails. The rulemaking notice does not mention the more relevant data, provided by the Department as a condition of the overcrowding variances, concerning inmate fights in the areas of OBCC and EMTC presently affected by those variances. They show levels of violence that not only are high but also substantially increased from 2005 to 2006 in both jails: the EMTC average almost doubled, while the OBCC average almost tripled.[40]

Even these data represent too narrow a view. One can't assess the impact of overcrowded housing just by looking at what happens in the housing area. Prisoners subjected to stress, tension, and frustration by crowded settings and overtaxed services and facilities don't instantaneously recover when they walk out the dormitory door, and the consequences of those conditions may erupt when they are elsewhere in the jail and

[40] In March through October of 2005, the number of fights per month in the 24 expanded EMTC dormitories ranged from 4 to 11, and averaged 7.4. In the 14 expanded OBCC dormitories, the number of fights per month in March through October 2005 ranged from 0 to 3, with a monthly average of 1.75. (data for November/December 2005 is not available; January/February data is not included because reporting periods were of varying lengths). In 2006, the average number of fights per month in the 24 expanded EMTC dormitories was almost 14, with a range of 0 to 24. In the 14 expanded OBCC dormitories, the number of fights per month in 2006 ranged from zero to 17, with a monthly average of about five. These data are taken from the Department's Expanded Dormitory Security Reports for the relevant time periods; we have calculated the averages. The EMTC monthly average almost doubled from 2005 to 2006. The OBCC average almost tripled. These data are taken from the Department's Expanded Dormitory Security Reports for the relevant time periods; we have calculated the averages.

not only in the housing area. The Board should, therefore, look at violence data and trends based on incidents occurring throughout the jails and not just within the "expanded dormitories."

Applying this broader perspective, Department-wide statistics, not confined solely to the four jails where overcrowding variances were granted, show high *and increasing* levels of violence in the jails. Stabbings and slashings increased from 30 in fiscal year 2005 to 37 in fiscal year 2006. Preliminary data for fiscal 2007 showed 20 stabbings and slashings in the first four months compared to 12 in the first four months of fiscal 2006. The number of inmate fights or assault incidents resulting in infractions rose from 6,548 in fiscal year 2005 to 6,833 in fiscal year 2006.[41] Uses of force by staff against inmates increased from 961 in calendar year 2005 to 1,290 in calendar year 2006, an increase of 26%. These numbers do not include the hundreds of instances where inmates alleged that staff used force against them but did not report it. The number of inmate injuries resulting from uses of force rose from 1,079 in 2005 to 1,565 in 2006. And the number of injuries resulting from uses of force alleged by prisoners but not reported by staff increased from 314 in 2005 to 384 in 2006.[42]

Allowing more overcrowding would be a grave mistake, when, by reasonable measures, the jails are getting more violent despite efforts to control violence, and when neither the Board nor the Department has adequately gauged the impact of overcrowding variances. Further, even if the Department were able to keep the lid on in a limited number of housing areas that it was reporting on monthly to the Board of Correction, that

[41] Preliminary Fiscal 2007 Mayor's Management Report, at 121.
[42] Department of Correction, Bureau Chief of Security Annual Reports, 2005 and 2006.

artificial situation would hardly demonstrate that it is capable of operating the jails safely when overcrowding is allowed system-wide with no further oversight.

3. Other Concerns, and the Board's Failure to Monitor Them

Violence is not the only concern raised by increased crowding. However, the Board has failed to keep itself informed about these types of impacts. In our 2004 comments on the overcrowding variances, we pointed to the detrimental impact on the delivery of health services resulting from overcrowded conditions. (Sick call access at OBCC was specifically pointed out as a problematic area.) The program reports (part of the "Expanded Dormitory Program & Maintenance Reports") submitted monthly to the Board from the jails with the overcrowding variances do not identify any problems with health services in 2005 and 2006, but these reports are conveniently devoid of data. Month after month, the Department said to the Board, "All programs were provided in accordance with existing policies and procedures." Not once in two years is there any indication that the Board questioned or reviewed these reports or asked for real information. So long as the Department said everything is fine, the Board was content to give the Department a pass.

Greater crowding also leads to greater strains on physical plant. The Department submits monthly maintenance reports on the operability of plumbing fixtures (showers, sinks, toilets, and urinals) in the dormitories affected by the overcrowding variances. These reports show a significant number of fixtures out of service each month at OBCC, EMTC, and VCBC. The number of showers needing repair in 2006 at VCBC ranged from 16 to 47 per month. At OBCC, the range was 5 to 21. And at EMTC the range was 7 to 18. Toilets and urinals are frequently out of commission at EMTC; sinks and toilets

at OBCC present regular problems, as do the sinks at VCBC. There does not appear to be any standard used by the Board for reviewing the information regarding breakdowns of plumbing, assessing its impact on the stress and frustration of densely populated dormitories, and the impact of shortages of plumbing fixtures on housing area capacities, problems which are likely to worsen under heavier use.[43]

This concern is accentuated by evidence of ongoing failures by the Department in the areas of physical maintenance and sanitation. Many of these are documented in reports commissioned by the federal court's Office of Compliance Consultants. For example, a report by an expert sanitarian found that sanitation is compromised by the lack of maintenance and the sheer level of unrepaired damage to the buildings:

> . . . Most shower and toilet rooms, many dorm and cell areas have structural defects which make proper sanitation difficult. Conditions such as missing floor and wall tiles, peeling paint, grout missing between tile work, corroded metal walls or surfaces, cracks in surfaces such as shower floors and at the wall floor junctions in dorm areas where the wall coving has come off the wall require extra diligence to maintain sanitation. All of these surfaces should be maintained in a smooth and easily cleanable condition. Rough surfaces harbor disease organisms and are difficult to clean. It is possible to keep these clean and sanitary, but at a tremendous cost and effort. It is in this effort that the institution is not effective as evidenced by the soil accumulations observed in these defective areas. . . .
>
> Maintenance also continues to compromise sanitation in the area of vermin control. Exterior emergency doors are badly damaged, corroded, and have a large opening along the bottoms which allow the entrance of vermin in from the outside. Some window screens are torn or the glass broken, these likewise are allowing the entry of vermin. . . . Failure to do these fundamental repairs is undermining the efforts of the vermin control program.
>
> Routine maintenance cleaning of soil drain lines in shower, toilets, and utility closets is needed to prevent the drain fly infestations observed.

[43] Monthly Expanded Dormitory Program and Maintenance Reports submitted by the Department to the Board, 2005-06.

> Most soil drains in these areas are up to 1/2 the pipe diameter clogged with a buildup of organic debris, soil, and soap residue. . . .[44]

Similar inattention to physical plant issues is revealed in the report of a fire safety engineer who inspected the Anna M. Kross Center on Rikers Island, after having made two prior reports documenting that jail's multitudinous failings. The engineer found a lack of maintenance resulting in essential equipment that did not work (sometimes unbeknownst to staff) and fire exits that were blocked and unusable. He stated:

> . . . [T]he overall level of fire safety has not substantially improved from my first survey of the building in 1993. . . . Although new fire alarm systems have been installed in the Chevron Units, many of these new fire alarm systems were not operational at the time of the site visit and had not been operational for some months prior to the site visit. . . .
>
> From maintenance standpoint backup unlocking mechanisms and procedures failed during the site visit. In addition, several new and existing fire alarm systems did not work. . . .
>
> A tree was located in the outside exit discharge route from the rear exit from Quad #3 in Building #1. It is clear that this is the result of poor inspection and maintenance and the lack of use during drills. . . .
>
> The rear exit stairways in Quads #11 and #13 were full of masonry debris and were not usable. It is my understanding that the debris was the result of renovations in the housing units that were completed over 9 months prior to the site survey. . . .[45]

A similarly long list of malfunctions and failure to maintain and repair appears in the recent report of an engineering firm on the ventilation systems in four of the Rikers jails. Specifically, the consultant firm noted problems of closed fire dampers and

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[44] Eugene B. Pepper, R.S. [Registered Sanitarian], *Sanitation Inspections for New York City Jail Facilities at Rikers Island* (March 3, 2006). Mr. Pepper is the expert consultant on sanitation for the Office of Compliance Consultants, the court monitor in the ongoing *Benjamin* litigation about jail conditions, who was retained after the federal court found "unconstitutionally unsanitary conditions" in the jails. *See Benjamin v. Fraser*, 343 F.3d 35, 55 (2d Cir. 2003). Mr. Pepper's comments are based on observations made in January and February of 2006.

[45] Thomas W. Jaeger, P.E., Jaeger & Associates, LLC, *Evaluation of Fire Safety: Anna M. Kross Center, Rikers Island* (February 17, 2006).

unbalanced volume dampers at three Rikers jails; improper operation of air handler units at three jails; an air handler unit and a relief fan not running because of electrical problems at one jail; loose insulation in the fan plenum or compartment in two jails; split flexible connections on exhaust fan discharges at two jails; disconnected damper actuators at two jails; automatic control systems that didn't work; and many other failures to keep these basic systems in good repair.[46]

The relevance of these findings is that there is a general inadequacy of maintenance of physical plant within the Department of Correction. In light of such findings, it is unrealistic to believe that the Department will be able adequately to maintain physical plant and sanitary conditions under even greater intensity of use and the resulting wear and tear than presently exist.

In conclusion, the Board is deceiving itself into thinking that it has sufficient basis on which to relax existing standards for dormitory capacity. Data available to the Board shows increased violence and overtaxed systems resulting from overcrowded conditions, The Board has unfortunately chosen to ignore the signals and simply adopt the Department's assurances and plan. Predictions that additional overcrowding will not have adverse impacts are based largely on guesswork. There are too many risks attached to amendment of this standard, and we urge the Board retain its current standard.

The Commissioner recently testified before the City Council Committees on Finance and Public Safety (March 13, 2007). Speaking in support of the Department's plans to build new jails and simultaneously reduce jail capacity, he said:

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[46] Lawless & Mangione Architects & Engineers, LLP., *Air Ventilation Study at Rikers Island* (July 14, 2005). This firm was engaged by the Office of Compliance Consultants in response to the federal court's finding that ventilation in the jails was unconstitutionally deficient and presented health hazards to the detainee population. *Benjamin v. Fraser*, 343 F.3d at 52.

> We don't want more jail space than we need or that we will need. The City is today in a position to do what no other big city in America is doing, reduce the size of its local jail system as a result of the dramatic reductions in crime we have achieved in New York. Can we make the jail system even smaller? I don't know yet. Maybe we will be able to. But I do know we must have enough space to avoid overcrowding in the future. Remember that in the 5 years from 1986 to 1991 we went from housing fewer inmates than we house today to more inmates than we're planning capacity for. How many people come to jail is a far larger policy question that would require changes in the law and changes in criminal justice policy, over which the Department of Correction has little control. This Department has an obligation to ensure that the City avoids overcrowding in the future and to house inmates securely and humanely. And I know that even if there was but one inmate in city custody—that one inmate should not be on Rikers Island.

We agree with the Department's goals for new construction, to reduce the Rikers Island jail population, and for secure and humane housing and conditions for the individuals in its custody. But when the Commissioner speaks of avoiding overcrowding, at the same time that he asks this Board to increase overcrowding, he is, at best, sending a mixed message, and at worst, saying one thing to the Council and the opposite to the Board.

C. Lock-in

The Standards presently require lock-in in celled areas to be kept to a minimum, and set limits on lock-in time for all prisoners except for those in punitive segregation, who are kept locked in for 23 hours per day. However, the proposed amendments to the Standards would exempt prisoners in "close custody" as well.[47] These prisoners,

[47] Close custody was unilaterally created by the Department of Correction in 2005, in disregard of the Board's lock-in standard. The Department, we understand, asserted that adding new categories of prisoners who could be subject to 23-hour lock-in was authorized by the classification standards, which provide at § 1-02(e)(v): "Prisoners placed in the most restrictive security status shall only be denied those rights, privileges, and opportunities that are directly related to their status and which cannot be provided to them at a different time or place than provided to other prisoners." The notion that this provision authorized 23-hour lock-in under

including many who are in close custody for their own protection, are to be treated substantially the same as those who are locked in because of prison misconduct such as assaulting staff or other inmates, smuggling contraband, or trying to escape. This use of lock-in time for close custody would place some of the most vulnerable prisoners into unlimited solitary confinement. This is seriously ill advised and dangerous.

There is a long and unpleasant history of solitary and near-solitary confinement in American corrections. Numerous states (including New York) used some form of the "Pennsylvania system" of solitary confinement during the nineteenth century, and the United States Supreme Court summed up the well-known results in 1890:

> A considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.[48]

Concerning New York's adoption of solitary confinement at Auburn Prison, Gustav Beaumont and Alexis de Tocqueville observed: "This experiment, of which such favourable results had been anticipated, proved fatal for the majority of prisoners. It devours the victim excessively and unmercifully; it does not reform, it kills. The unfortunate creatures submitted to this experiment wasted away. . . ."[49]

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circumstances expressly excluded by the lock-in standards was inappropriate then but was not challenged by the Board. The Board should take this opportunity to have the new Standards explicitly state appropriate and necessary limitations on the use of close custody confinement.

[48] *In re Medley*, 134 U.S. 160, 168 (1890) (striking down a statute retroactively imposing solitary confinement as an ex post facto law).

[49] Quoted in Torsten Erisksson, *The Reformers: An Historic Survey of Pioneer Experiments in the Treatment of Criminals* (New York: Elsevier, 1976), at 49. *See also* Harry Elmer Barnes, The Historical Origin of the Prison System in America, 12 J.Crim.L. & Criminology 35-60 (1921), at 53.

Modern courts have consistently acknowledged such consequences of isolated confinement as applied to the 23-hour lock-in that is commonly practiced in American corrections. One decision observed that "the record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total."[50] The court added that "there is plenty of medical and psychological literature concerning the ill effects of solitary confinement (of which segregation is a variant). . . ."[51] Other courts have made similar observations.[52] The court in the well-known Pelican Bay litigation concluded after hearing testimony from experts in corrections and mental health, that "many, if not most, inmates in the SHU [Special Housing Unit] experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in SHU."[53]

This view is amply supported by and consistent with psychological and psychiatric research:

> Empirical research on solitary and supermax-like confinement has consistently and unequivocally documented the harmful consequences of living in this kind of environment. . . . Evidence of these negative psychological effects come from personal accounts, descriptive studies,

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[50] *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988), *cert. denied*, 488 U.S. 908 (1989).

[51] *Id.* at 1316, *citing* Grassian, Psychopathological Effects of Solitary Confinement, 140 Am.J.Psychiatry 1450 (1983).

[52] *See Langley v. Coughlin*, 715 F.Supp. 522, 540 (S.D.N.Y. 1989) (citing Dr. Grassian's affidavit re effects of SHU placement on disordered individuals); *Baraldini v. Meese*, 691 F.Supp. 432, 446-47 (D.D.C. 1988) (citing Dr. Grassian's testimony re sensory disturbance, perceptual distortions, and other psychological effects of segregation), *rev'd on other grounds*, 884 F.2d 615 (D.C.Cir. 1989); *Bono v. Saxbe*, 450 F.Supp. 934, 946 ("[p]laintiffs' 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).

[53] *Madrid v. Gomez*, 889 F.Supp. 1146, 1235 (N.D.Cal. 1995).

> and systematic research . . . conducted over a period of four decades, by researchers from several different continents. . . .[54]

Researchers have also concluded that the use of severe levels of restriction on inmates in prison housing increases problems within the prison system rather than relieving them.[55]

Prisoners with no prior history of mental illness who are subjected to prolonged isolation "may experience depression, despair, anxiety, rage, claustrophobia, hallucinations, problems with impulse control, and/or an impaired ability to think, concentrate, or remember."[56] For those who do have pre-existing psychiatric disorders, the risk is much greater. As a well-known expert on prison psychiatry recently testified:

> Prisoners who are prone to depression and have had past depressive episodes will become very depressed in isolated confinement. People who are prone to suicide ideation and attempts will become more suicidal in

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[54] Craig Haney, Mental Health Issues in Long-Term Solitary and "Supermax" Confinement, 49 Crime & Delinquency (2003), at 130. See also Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondent, 2005 WL 539137 (March 3, 2005), filed in *Wilkinson v. Austin*, 545 U.S. 209, 125 S.Ct. 2384 (2005) (psychiatric and correctional experts conducted intensive literature review demonstrating repeated findings of the negative psychological effects of isolated confinement including findings of: "cognitive impairment, including the inability to think coherently and logically, as well as producing anxiety, anger and depression"; "verbal aggression, physical destruction of surroundings, and the development of an inner fantasy world, including paranoid psychosis"; "uncontrolled rage, including an increase in homicidal and suicidal impulses"; "headaches, mental and physical deterioration, emotional flatness, lability, breakdowns, hallucinations, paranoia, hostility and rage, and some were beset with thoughts of self-mutilation and suicide (which some acted upon)"; rage, panic, loss of control and breakdowns, psychological regression, a build-up of physiological and psychic tension that led to incidents of self-mutilation"; "a 'pervasive sense of frustration and hopelessness,' 'deep feelings of despair,' and the possibility that the psychological pain of their confinement might drive them 'to extreme actions, and desperate solutions'"; "'overwhelmingly negative and antagonistic to effective rehabilitation,' and that they were 'both hostile and provocative' because they 'provoked hostility, resentment and resistance',"

[55] Brief of Professors and Practitioners of Psychology and Psychiatry, 2005 WL 539137 at 28 and fn. 62 and 63 ("The creation of control units and increased use of administrative segregation have not reduced the level of violence within general prison populations." Citing Rodney Henningsen, Wesley Johnson, and Terry Wells, Supermax Prisons: Panacea or Desperation, 3 Corrections Management Quarterly 53-59 (1999) at p. 55.).

[56] Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* (2003), at 151, *citing* Stuart Grassian and N. Friedman, Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement," 8 Int'l J. of Law & Psychiatry 49-65 (1986); Grassian, Psychopathological Effects of Solitary Confinement," 140 Am. J. Psychiatry 1450-1454 (1983).

> that setting. People who are prone to disorders of mood, either bipolar . . . or depressive will become that and will have a breakdown in that direction. And people who are psychotic in any way . . . those people will tend to start losing touch with reality because of the lack of feedback and the lack of social interaction and will have another breakdown, whichever breakdown they're prone to.[57]

The dangers of over-use, and reliance on the use, of isolated confinement are all too often tragic and irreversible. Among the well-known consequences of isolated confinement are acts of self-mutilation and suicidality. One expert on prison suicide has written: "By and large, most self-harm behavior in prison is exhibited by individuals who are confined in conditions of segregation, social isolation, and/or psychosocial deprivation."[58] We have already seen at least one actual suicide in close custody, that of Matthew Cruz. Data from the New York State prisons shows that prisoners in isolated confinement commit suicide in numbers greatly disproportionate to their numbers in the prison population, further supporting this grave concern about isolated confinement:

> [Office of Mental Health] statistics for 1998 through 2000 reflect that in 1998 there were 14 suicides state-wide, five occurred in SHU and one in Keeplock. In the same time period 3% of prisoners were housed in SHU and 5% in Keeplock. Thus 36% of all the successful suicides in the entire department occurred within the 3% of prisoners confined in SHU. . . . in other years there was even a greater disproportion of suicides in isolated confinement. 1999 figures reflect that 50% of suicides in the entire population occurring in the 8% of prisoners confined in SHU or Keeplock, and 25% of all suicides statewide occurred in the 4% of the population confined in SHU. In 2000, 43% of suicides in the entire corrections department occurred in the 4% of the population in SHU. . . . a chart of suicides between 1995 and mid-2004, which demonstrates that in those

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[57] Testimony of Dr. Terry Kupers, *Jones'El v. Berge*, Civil Case 00-C-0421-C (W.D.Wis. 2001), *quoted in* Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* at 152.

[58] Raymond Bonner, Rethinking Suicide Prevention and Manipulative Behavior in Corrections, 10 Jail Suicide/Mental Health Update (2001), at 7-8, *quoted in* Human Rights Watch, *Ill-Equipped:U.S. Prisons and Offenders with Mental Illness* at 179.

years 53 of the 119 known suicides, or 45%, involved prisoners assigned to some form of isolated confinement.[59]

Rather than adopt the extreme of 23-hour lock-in for the broad range of prisoners who may be placed in close custody,[60] if the Board is to exempt close custody from the general lock-in standard, it should require that close custody prisoners be allowed several hours of optional lock-out each day, as is done, for example, with protective custody prisoners in the state Department of Correctional Services, who present comparable security concerns to many of the persons placed in close custody.[61] Such lock-out periods should, of course, be very closely supervised by correctional staff. Such investment of staff resources is appropriate and necessary to mitigate the hardship and risk of prolonged isolated confinement.[62]

D. Non-discriminatory Treatment

A proposed amendment to the Non-discriminatory Treatment standard would eliminate the requirement that the Department staff each facility with sufficient numbers

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[59] Exhibit 2, Report of Plaintiff's Expert Dr. Terry Kupers, M.D., M.S.P., June 1, 2005, *Disability Advocates, Inc. v. New York State Office of Mental Health*, 02 Civ. 4002 (SDNY GEL).

[60] At present, we understand that the numbers in closed custody are relatively small, and the present administration of the Department has indicated an intent to keep them small. However, attitudes and incumbents may change in the future, and the closed custody criteria are sufficiently broad that closed custody could be expanded considerably within the bounds of the written policy.

[61] 7 N.Y.C.R.R. § 330.4(a) ("Inmates will be afforded the opportunity to be out of their cells for a minimum of three hours per day between the hours of 7 a.m. and 11 p.m. A minimum of one hour out-of-cell time shall be scheduled for outdoor exercise.") The remaining out-of-cell time may be used for indoor or outdoor recreation or exercise, meals, telephone calls, showers, visiting, or programs on the housing unit. *Id.*

[62] It has been suggested that 23-hour lock-in is not a serious issue because of the relatively short length of stay in the City jails. However, as the Board knows, the average length of stay reflects both a large group of persons who remain in jail only a few days before they are bailed or their cases are disposed of, and a large number of persons who remain in the system for periods of many months and in some cases over a year. Further, the effects of isolated confinement may manifest themselves more quickly or more slowly depending on the susceptibility of the individual. Mr. Cruz, we understand, had been in close custody for only a matter of days before his suicide.

of Spanish-speaking employees and volunteers to enable Spanish-speaking prisoners to understand and participate in facility programs and activities. A second amendment would require the implementation of "[p]rocedures . . . to ensure that non-English speaking prisoners understand all written and oral communications from facility staff members . . . ." We oppose the first, but support the second if it is significantly modified.

The New York State Department of Correctional Services has acknowledged that "[s]uccessful programming and institutional security depend upon effective communication."[63] The Board and the City Department of Correction should do likewise.

We urge the Board to retain § 1-01(c)(1) in its present form. Hispanic prisoners, including monolingual Spanish speakers and limited proficiency English speakers constitute a significant percentage of the New York City jail population.[64] The prevalence of Spanish speakers in the City jails was significant enough when the Board first issued its standards to capture the Board's attention and to warrant the particularized requirements for deployment of Spanish-speaking staff and volunteers. The Spanish-speaking population in New York City has increased in proportion to the English-speaking population. It can be safely assumed that this proportional increase is reflected in the jail population. One rationale cited by the Board for changing the minimum

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[63] New York State Department of Correctional Services, The Impact of Foreign-Born Inmates on New York State Department of Correctional Services (April 2006), at 4.

[64] Precise figures for New York City are not available. However, in the state prison system 7.2% of the New York State prison population is Spanish-language dominant, New York State Department of Correctional Services, Hub System: Profile of Inmate Population Under Custody on January 1, 2006. It is likely that the percentage of the New York City jail population that is Spanish-language dominant is higher than that in NYSDOCS since New York State's Spanish-speaking population is concentrated in the New York City area, and 55% of the NYSDOCS population (as of January 1, 2006) was committed from New York City.

standards is the need to update them in response to the passage of time. In the area of services for Spanish-speaking prisoners, time has brought about an increased need, but the Board is misguidedly headed in the opposite direction.

The Department provided the Board with a chart showing the number of staff able to speak languages other than English. 477 staff members (4.37%) speak Spanish. The Department has not come forward with any evidence that it cannot comply with the current standard or that compliance efforts have created any hardship.

In light of the undiminished need for translation and interpreter services for Hispanic prisoners, by far the largest group of non-English speakers in the jail population, § 1-01(c)(1) should not be repealed.

We support the amendment adding § 1-01(d)(3), to provide additional requirements to benefit speakers/readers of all languages other than English,[65] with the important qualifications (1) that it should be adopted in addition to, rather than as a replacement for, § 1-01(c)(1), for the reasons stated above, and (2) that it requires significant modification.

Before adoption, § 1-01(d)(3) should be expanded to explain what procedures the Standard contemplates. The present proposal is contentless. A revision using the form "Such procedures should include, but not be limited to," would add the necessary specificity while allowing for future innovation. Also, the Board should require the Department to provide information demonstrating its capability and its performance in complying with the existing standard on services for non-English speaking prisoners.

[65] Section 1-01(d) should also be amended to eliminate an ambiguity created by the labeling of all the paragraphs in 1-01. The general designation "Different languages" following a paragraph specifically designated "Hispanic prisoners and staff" leaves open the possible interpretation that paragraph (d) does not apply to Spanish speakers. This can be avoided by redesignating paragraph (d) as "Languages other than English."

Instead of giving the Department a vague directive to implement "procedures," the Board should assure itself that the Department has been living up to the existing standards.

One area that needs to be addressed in the Standards is the practice of relying on other prisoners for interpreting at times when personal or sensitive information is being exchanged. Such reliance inhibits effective communication and compromises confidentiality. Therefore, it should be made clear that non-prisoner interpreters should be provided for medical encounters, disciplinary proceedings, and grievance proceedings, except on request by the prisoner or in emergencies—and the lack of a staff interpreter should not be an emergency. (That is another reason for retaining § 1-01(c)(1) in its present form.) Such a provision should be added to the Minimum Standards.

In summary:

- Section 1-01(c)(1), pertaining to adequate numbers of staff and volunteers fluent in Spanish, should not be repealed.

- Proposed Paragraph (d)(3) should be adopted in an expanded form, to include more specific descriptions of the translation and interpreting procedures, and to include a prohibition of the use of other prisoners as interpreters in medical encounters, disciplinary proceedings, and grievance proceedings..

- Section 1-01(d) should be relabeled "Languages other than English."

E. The Communications Issues

The Board has proposed amendments to several Standards pertaining to prisoners' communication with the outside world. In our view these proposals are unduly restrictive and intrusive and leave important First Amendment concerns to the unfettered discretion

to the Department of Correction. Further, to the extent that they do contain any safeguards or limitations at all, they are grossly inconsistent internally.

1. Telephone Calls

The proposed amendment to the telephone standard (§ 1-10(h)) eliminates the requirement of seeking a warrant to eavesdrop on prisoner telephone calls, and places *no* substantive restrictions on the circumstances under which Department personnel may eavesdrop. The amendment does say that monitoring may be done "only when notice has been given to the prisoner," but we understand that the notice contemplated is no more than a general announcement, perhaps in the form of signs near the telephones stating that they may be monitored. Thus that requirement does not place any meaningful limits on discretion or protect against abuse.

No substantial justification is presented for this change. The Board states only that "heightened security concerns provide ample justification for this amendment," without stating what these "heightened" concerns might be or what has "heightened" them. While it has become fashionable in the post-9/11 world to dispense with checks and balances and to place less value on civil liberties relative to the power of government, we suggest the Board should be guided by facts and not fashion, and there are no facts cited in support of this change.[66] Further, we believe that recent events have illustrated that when government is given this sort of *carte blanche* to invade privacy, that discretion will be abused.[67] The warrant requirement is intended precisely to prevent such abuses of

[66] The kinds of facts that would be relevant are instances where significant harm can be shown to have been done to public or personal safety because of the warrant requirement.

[67] *See, e.g.*, David Stout, "F.B.I. Head Admits Mistakes In Use Of Security Act," *New York Times*, March 10, 2007 ("Bipartisan outrage erupted on Friday on Capitol Hill as Robert S.

executive discretion; and for that reason, it should be maintained regardless of other considerations. Certainly, to say, as the Board does, that "prisoners have no expectation of privacy during confinement" is not only mistaken[68] but also misses that significant purpose of the warrant requirement. Further, the prisoner, by definition, is only half of the conversation; the other half of it is a person who is not incarcerated, and whose rights of privacy are as much invaded as is the prisoner's by the Board's proposal.

The completely open-ended power this amendment would confer is at odds with some of the other communication-restricting amendments. The proposed amendment to the Correspondence standard (§ 1-11) permits restriction of correspondence "when there is a reasonable belief that limitation is necessary to protect public safety or maintain facility order and security," and adds: "Correspondence shall not be deemed to constitute a threat to safety and security of a facility solely because it criticizes a facility, its staff, or the correctional system, or espouses unpopular ideas, including ideas that facility staff deem not conducive to rehabilitation or correctional treatment." There are also provisions for opening and reading incoming and outgoing non-privileged correspondence without a warrant if the warden has "a reasonable basis to believe" that it threatens facility safety or security, "another person, or the public." In our view these criteria are grossly

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Mueller III, the F.B.I. director, conceded that the bureau had improperly used the USA Patriot Act to obtain information about people and businesses.")
(http://select.nytimes.com/search/restricted/article?res=FB0A14F838550C738DDDAA0894DF404482).

[68] Prisoners' privacy rights are greatly diminished by incarceration, but not necessarily obliterated. For example, the Second Circuit has held that a pre-trial detainee, though not a convict, retains an expectation of privacy that forbids warrantless cell searches for law enforcement rather than prison security purposes. *United States v. Cohen*, 796 F.2d 20, 23 (2d Cir.1986) (so holding with respect to pre-trial detainees); *see Willis v. Artuz*, 301 F.3d 65 (2d Cir. 2002) (excepting convicted prisoners). The vast majority of City jail prisoners are detainees, as the Board knows.

inadequate, for reasons described below; but even so they contrast sharply with the complete absence of criteria in the Telephone amendment.[69]

The abolition of the warrant requirement would leave prisoners with no procedural or substantive protections against arbitrary abuses. In this respect, the proposed amendment contrasts sharply with the next section of the telephone standard itself, § 1-10(i), Limitation of telephone rights, which requires specific notice of the reasons for limitation, an opportunity to be heard, and a written determination, with notice to the Board[70] and a right to appeal under § 1-10(j). At a minimum, the Board should require such notice and opportunity to be heard before the Department may engage in telephone surveillance. It might be objected that such procedures are inconsistent with the necessities of law enforcement. But if a search is done for law enforcement purposes, rather than for jail security purposes, then the argument for requiring a warrant is at its strongest.

There is only one meaningful—and essential—qualification on the unrestricted right to eavesdrop on telephone calls in the amendment. That is the requirement that calls to the Board of Correction, the Inspector General, and other monitoring bodies, and to treating physicians, attorneys, and clergy, shall not be listened to or monitored. However, there is no explanation of how the Department will, or can, distinguish between those calls and other calls. The prisoners use the same telephones to call their lawyers, the

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[69] Standard 1-10 allows for limitations on telephone rights "only when it is determined that the exercise of those rights constitutes a threat to the safety or security of the facility or an abuse of written telephone regulations previously known to the prisoner." This criteria in this provision, 1-10(i), headed "Limitation of telephone rights" does not appear to apply to the proposed amendment, which is to the provision in 1-10(h) headed "Supervision of telephone calls."

[70] The notice to the Board is of importance independently of an individual prisoner's right to procedural protections. If the Board adopts this amendment or any variation on it, it should require that it be notified of all instances of telephone eavesdropping, and the reasons for it, so it may monitor and assess the Department's use of its power.

Inspector General, etc., as they do to make all other calls. While we have heard vague statements about available technology, there is apparently no actual workable plan for maintaining the confidentiality of legal, medical, and whistle-blowing telephone calls. This is not just an issue of technology. There are over 100,000 admissions to the jail system a year, a fact that presents great logistical difficulties if the Department of Correction is to distinguish between confidential phone calls and those that will or may be monitored for its population on a continuing basis. There is no plan apparent for addressing that logistical problem. Yet the Board has not even provided in this amendment, as it did for the uniform clothing amendment, that the Department must have a system permitting reliable compliance with the standard's distinctions among types of calls—much less required, as it should, that the Department demonstrate the workability of such a system before it begins to eavesdrop on telephone calls.

Finally, the standard says that telephone calls shall be of "at least up to six minutes in duration." The words "up to" are new. It is completely unclear what the Board intends by this change. At present, telephone calls are subject to a six-minute cut-off, and it is impossible to tell whether the amendment is intended to change anything or not. The confusion is compounded by the juxtaposition of two terms, "at least" and "up to," that have contrary meanings.

2. Correspondence

Standard § 1-11(a) states: "Prisoners are entitled to correspond with any person." The amendment would add "except when there is a reasonable belief that limitation is necessary to protect public safety or maintain facility order and security." The amendment does not give any hint as to what circumstances may lead to a belief that

limitation of correspondence is needed. The amendment does add: "Correspondence shall not be deemed to constitute a threat to safety and security of a facility solely because it criticizes a facility, its staff, or the correctional system, or espouses unpopular ideas, including ideas that facility staff deem not conducive to rehabilitation or correctional treatment." While these provisions are an improvement over the completely standardless telephone amendment, they are still not specific enough to provide any meaningful limit on official discretion. Any provision for prohibiting correspondence must be closely and specifically linked to its intended purposes. For example, prohibition on correspondence with particular individuals might be permitted where there was evidence that the correspondence would advance criminal activity, promotion of jail contraband, or interference with parties or witnesses to any court proceeding.

We note that this paragraph (§ 1-11(a)), which appears to refer to the prohibition of correspondence with particular individuals, contains no procedural protections for either prisoner or outside correspondent, unlike the subsequent provisions concerning the opening and reading of outgoing and incoming mail (§§ 1-11(c)(6), (e)(2)). Such protections, including reasons and notice, are equally necessary in this context.

There are also provisions for opening and reading incoming and outgoing non-privileged correspondence without a warrant if the warden has "a reasonable basis to believe" that it threatens facility safety or security, "another person, or the public." Although a record of such actions is to be maintained, it need not include the reasons for reading the mail—surely an essential piece of information for purposes of safeguarding against abuses of power.

We have the same objections to dispensing with the warrant requirement for outgoing and incoming correspondence as stated in connection with the telephone surveillance provisions. In the absence of evidence that the warrant requirement has caused significant damage or risk, this amendment should not be adopted. Further, to allow such surveillance based merely on an order "articulating a reasonable basis to believe that the correspondence threatens the safety or security of the facility, another person, or the public" fails to provide sufficient protection against the abuse of unfettered discretion. Above we have suggested an appropriate way of narrowing this open-ended provision (requiring evidence that the correspondence would advance criminal activity, promotion of jail contraband, or interference with parties or witnesses to any court proceeding). If this suggestion or some variation of it is adopted, the record that is maintained (§§ 1-11(c)(6)(iii), (e)(2)(iii)) must include the reason that the correspondence is deemed to be a threat. Further, the Board should receive notice of all such instances so it may exercise oversight to ensure that the power is not abused.

One issue which the standards do not address directly is the forwarding of mail between jails, although it is clearly required by the provision requiring delivery to the prisoner within 24 hours "unless the prisoner is no longer in custody of the *Department.*" § 1-11(d) (emphasis supplied). Forwarding was also formerly a requirement of a federal court order, but that order has been terminated, and it does not appear that mail is now being forwarded. Legal Aid's mail to City prisoners is often returned with an indication that the prisoner has been transferred, rather than delivered to the current jail location. The Standard should be amended to make it explicit that when inmates are transferred between jails, their mail should be forwarded to their current location.

3. Packages

The current standard says: "Prisoners shall be permitted to receive packages from, and send packages to, any person." (§ 1-12(a)) The amendment adds "except when there is reasonable belief that limitation is necessary to protect public safety or maintain facility order and security." There is no provision for notice or a record of prohibitions on sending and receiving packages. Nor is there any hint of what circumstances might justify such action.

This amendment is unacceptable for similar reasons to the telephone and correspondence amendments: it fails to spell out the kinds of circumstances where it is reasonable to believe that such limitation is necessary. In fact, it is difficult to see any need for any amendment here. There is already a restricted list of items that may be received in packages. Items that are not on the approved list need not be delivered. The Board gives no indication in its explanation how a package of approved items can possibly present a threat to public safety or to order and security.

4. Publications

The current standard says prisoners "can receive new or used publications from any source, including family, friends and publishers." (§ 1-13(a)) The amendment adds "except when there is reasonable belief that limitation is necessary to protect public safety or maintain facility order and security." For no apparent reason, it does *not* include the limits on this power that appear in the Correspondence amendments which state that criticism, unpopular ideas, etc., are not to be censored. The amendments retain the provision that incoming publications may be censored or delayed because of instructions on the manufacture or use of weapons or explosives, or plans for escape, but they also

add a provision allowing delay or censorship of "other material that may compromise the safety and security of the facility." The amendment does not say what kind of material this might be. The only justification for this change is the boilerplate formula "The Board believes that heightened security concerns justify the proposed amendment"; there is no statement of what concerns are heightened, why they are heightened, and what reading materials might run afoul of them, other than the already-acknowledged categories of instructions concerning weapons, explosives, or escape plans.

The absence of detailed and explicit criteria for censoring publications is completely unacceptable. While no one disputes that some written material can appropriately be excluded from prisons, there is a long history in corrections of excessive and unjustified censorship, and the Department is no exception.[71] Experience shows that keeping censorship within lawful bounds requires explicit and detailed rules as to what may and may not be censored. A good example of comprehensive but not vague or overbroad censorship rules is the New York State "media review" policy, which provides:

> (a) In general, the materials should be acceptable for regular mailing according to United States Postal Law and regulations.
>
> (b) Publications which contain child pornography or which promote a sexual performance of a child in violation of Penal Law, article 263 are unacceptable. Publications which, taken as a whole, by the average person applying contemporary community standards, appeal to

[71] Examples of Department censorship we are aware of include the removal from the *New York Times* of a news story concerning the settlement of Legal Aid's litigation about excessive force in the Central Punitive Segregation Unit. Another instance involved the censorship of a story in *Newsday* concerning an inmate homicide in one of the Rikers jails under circumstances which reflected poorly on the vigilance of Department staff. *See* letter, John Boston to Members of the Board of Correction, March 12, 2004 (pointing out violation of Board standards and Board's failure to act on it). These are examples of Justice Scalia's observation that "All government displays an enduring tendency to silence, or to facilitate silencing, those voices that it disapproves." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 235 (1987).

prurient interest, and which depict or describe in a patently offensive way sexual bestiality, sadism, masochism, necrophilia, or incest and which taken as a whole, lack serious literary, artistic, political or scientific value are obscene and are unacceptable.

(c) The publication should not incite violence based on race, religion, sex, sexual orientation, creed, or nationality. Incite violence, for purposes of this guideline, means to advocate, expressly or by clear implication, acts of violence.

(d) Any publication which advocates and presents a clear and immediate risk of lawlessness, violence, anarchy, or rebellion against governmental authority is unacceptable.

(e) The publication should not incite disobedience towards law enforcement officers or prison personnel. Incite disobedience, for purposes of this guideline, means to advocate, expressly or by clear implication, acts of disobedience.

(f) The publication should not give instruction in the use or manufacture of firearms, explosives, and other weapons, or depict or describe their manufacture. Mere depictions of the use of hunting and/or military weapons which reasonably would not affect the safety and/or security of the facility are not prohibited.

(g) The publication should not provide instruction by word(s) or picture(s) regarding martial arts skills. Martial arts includes, but is not limited to, aikido, jiujitsu, judo, karate, kung fu, and tai chi chu'an. Publications which discuss martial arts without providing instruction are acceptable.

(h) The publication should not:

(1) contain information which appears to be written in code; or

(2) depict or describe methods of lock picking; or

(3) depict or describe methods of escape from correctional facilities; or

(4) depict or describe procedures for the brewing of alcoholic beverages or the manufacture of drugs or use of illegal drugs; or

(5) depict or describe methods or procedures for smuggling prison contraband; or

(6) depict or describe techniques or methods for rioting and/or information instructive in hostage or riot negotiation techniques.

(i) The department reserves the right to deny the inmate publications which may be held noninciteful or nonadvocative, as the case may be, during the media review process, but which actually result in

> violence or disobedience after entrance into a facility, as is clearly set forth in paragraphs (h)(3) and (6) of this section. . . .
>
> (j) Publications which discuss different political philosophies and those dealing with criticism of governmental and departmental authority are acceptable as reading material provided they do not violate the above guidelines. For example, publications such as Fortune News, The Militant, The Torch/La Antorcha, Workers World, and Revolutionary Worker shall generally be approved unless matter in a specific issue is found to violate the above guidelines.

7 N.Y.C.R.R. § 712.2. The foregoing rules have been in effect for over two decades, except that the Department of Correctional Services added the provisions about techniques of hostage negotiations, § 712.2(h)(6), more recently..

If the Board is to expand the Department's powers of censorship, there is no reason it cannot promulgate rules as concrete and specific as the State DOCS rules, based on the specific concerns that the Department has, rather than adopting a nebulous phrase like "reasonable belief that limitation is necessary to protect public safety or maintain facility order and security."

F. Clothing

Since the inception of the Minimum Standards, the Board of Correction has recognized that humane treatment of detainees includes allowing them to dress in civilian clothing. Detainees currently can wear their own clothes, and their families can bring them clothing as needed. The amendments would allow the Department of Correction to make pre-trial detainees wear institutional clothing, as sentenced inmates already do. (§ 1-03) We are concerned about the dehumanizing effect of forcing jail uniforms on persons who have not been convicted and are presumed innocent, about the Department's ability to provide a sufficient quantity of clean clothing that fits, and about the fact that

families will no longer be able to help take care of their loved ones in prison by ensuring that they have sufficient clothing appropriate to the season. The current Board says that some other large jail systems require uniforms for detainees, but does not give any reason for changing the long-standing practice in New York City.

Forcing an accused defendant, yet to be tried on the charges against him or her, to dress like a convict is degrading treatment, and treatment that *de facto* brands a defendant as a criminal without benefit of trial. Despite any disclaimers that may be offered, such treatment is contrary to the presumption of innocence. The picture of a citizen dressed in a jail uniform is far more powerful than a thousand words of rationalization of the practice, and it will inevitably have an effect on detainees' treatment in court and elsewhere.

It is no answer to say that detainees will be allowed to wear their own clothes at trial. Our point applies to the daily treatment of human beings and not just to their appearances in court. Moreover, the proposed amendment would require detainees to wear uniforms to all court appearances other than trials. Apparently the assumption is that judges, unlike jurors, will not be susceptible to influence by the appearance of the defendants who are brought before them. This assumption is facile and unrealistic. Judges are human beings too no matter how hard they may strive for objectivity.

The Board states no justification at all for changing this Standard, except that other jail systems require institutional clothing. As stated before, this "race to the bottom" approach to the treatment of prisoners is not an acceptable reason for weakening the Standards. Insofar as there are security concerns underlying the proposal,[72] they are

[72] We understand informally that this is the Department of Correction's concern in seeking this amendment.

not sufficient justification for stripping inmates of the dignity and individuality which personal clothing represents. Inmates are already searched thoroughly, including strip searches, whenever they leave or enter the jail or go to and return from visits, recreation, court, or other outside destinations. Inmates are also searched in their housing areas and in the hallways of the jail both regularly and randomly, with and without cause to believe that contraband will be found. In addition, disobedient inmates in punitive segregation are already required to wear uniforms.

The proposed amendment raises major practical problems as well as questions of principle. The Department would have to establish *and maintain* sufficient laundry service to provide a clothing exchange every four days for *the entire jail population.* When Legal Aid examined the state of laundry operations several years ago, the Department nominally made laundry service available to all prisoners, but in practice it was completely inadequate for that purpose. Few prisoners knew of the service, fewer still used it, and it was conceded that the Department lacked the equipment to handle even 20% of the prisoners' laundry.[73] As far as we know there has been no significant expansion of this capacity. More importantly, those laundry facilities that existed were not kept operational. Throughout the system, we observed washers and dryers that simply did not work. At one of the jails, some of the machinery had not worked for a year without being repaired.[74] This is unfortunately consistent with the general failure of the Department to maintain its physical plant and equipment adequately, a failure that persists to the present, as shown in § B.3, above.

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[73] *Benjamin v. Fraser*, 161 F.Supp.2d 151, 178 (S.D.N.Y. 2001) (citing testimony of Patricia Feeney, Director of Environmental Health), *aff'd in part, vacated in part, and remanded,* 343 F.3d 35 (2d Cir. 2003.

[74] *Benjamin v. Fraser*, No. 75 Civ. 3073 (S.D.N.Y.), trial transcript, May 17, 2000, at 995-96.

Further, this situation persisted despite the fact that a court order in effect for 20 years required the Department to implement a system to provide detainees with clean clothing twice a week.[75] Despite this order, most laundry was, and still is, washed by the prisoners in their housing areas in plastic buckets and dried on pieces of twine.[76] Yet the proposed amendment would require the Department to establish *and maintain* laundry facilities for nearly 14,000 inmates, a work that would be *in addition to* the present enormous demand to wash and distribute sheets, pillow cases, blankets, towels, visit and special housing jumpsuits, and work clothes, among other items that presently strain the Department's limited laundry capability.

For these reasons, the proposed amendment's requirement that the Department of Correction establish sufficient laundry service to provide all prisoners with a clean change of clothing twice a week is illusory. The amendment makes no provision for the Board to verify the adequacy of laundry service, and it makes no reference to the need to ensure that that service is maintained consistently, a task that all evidence suggests is beyond the capabilities of the Department.

The proposed amendments also require establishment of secure storage facilities where prisoners' personal clothing can be retrieved and cleaned promptly for court appearances and upon discharge. This is all very well, but it fails to account for the much greater need for storage facilities where *institutional* clothing for 14,000 people, in

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[75] Section D of the *Benjamin* consent decree provided, in part, that "defendants shall provide free laundry service sufficient to provide all detainees with a neat, clean change of clothing and a clean towel at least twice per week." Paragraph EE required that this provision, and many others, would be implemented within the year, i.e., by 1980. *Benjamin v. Malcolm*, 75 Civ. 3073, Stipulation for Entry of Partial Final Judgment (S.D.N.Y., March 30, 1979).

[76] *See* Department of Correction, Directive 1251R: Inmate Personal Laundry (Oct. 21, 1997).

institutions where populations have exceeded 2,000 inmates, can be stored and retrieved regularly so as to provide clean clothes that fit for that many prisoners.

In addition, the amendments do not address the fit, quality and condition of the clothing, subjects we have already had complaints about from indigent prisoners who were forced to rely on the institutional "clothes box" because they lacked sufficient personal clothing. The amendments address storage for civilian clothing but not the storage necessary to maintain a stock of institutional clothing sufficient for institutional populations that have often exceeded 2,000 in a single jail. They call for clothing exchange every four days but do not allow for more frequent changes that may be necessary when clothing becomes soiled, *e.g.*, when women are menstruating. (Prisoners would have only four sets of undergarments and socks, two shirts, and a single pair of pants.)

The amendments also do not provide for temperature-appropriate clothing. The jails can become very hot in the summer and cold in the winter (and vice versa, when the heating and ventilation systems malfunction, which is rather often). At present, prisoners can wear short pants and short-sleeved shirts when it is hot and long pants and sleeves–and in many cases long underwear–when it is cold. It appears they would lose these options under the proposed amendments.

We have similar concerns about clothing for outdoor recreation, especially in the winter. The clothing amendments require only "one sweater or sweatshirt" during cold weather. Gloves and hats are not mentioned. Proposed amendments to the Recreation standards (§ 1-06, formerly 1-07) state that "appropriate outer garments" shall be provided for outdoor recreation without stating what those garments might be. Outdoor

recreation is prisoners' only respite from the jails' crowded, noisy and sometimes claustrophobic housing areas, and we are very concerned that prisoners' ability to take advantage of it may be compromised by these new clothing restrictions.

G. Visiting

The amendment to § 1-09(d) limits the initial visit within 24 hours of admission to a non-contact visit. The Board's explanation is that "during the first 24 hours of custody, DOC must determine a prisoner's security risk and classification, and health providers must evaluate a prisoner's health status, including whether a prisoner may have a contagious disease." However, there is no justification for treating every new admission as if he or she had a contagious disease. The requirement that visiting be permitted within the first 24 hours of custody has been in effect for almost three decades, and the Board cites no actual problem that has ever been caused by allowing prisoners to visit in the normal fashion during that period. This proposed amendment appears to be a completely gratuitous restriction on prisoners.

This amendment may have devastating consequences for some detainees. It is well known that the greatest danger of suicide in jail is during the first few days of custody, and the risk is particularly great for persons with a history of mental health problems—who make up quite a significant proportion of the Department of Correction's population. To deny a person who is first undergoing the shock of incarceration the right guaranteed to nearly all other prisoners, to be able to embrace family members and speak to them directly and not through a telephone hookup, may have grave psychological consequences for the most vulnerable new detainees. The same is true for family members, especially young children.

In the absence of any need for this new restriction, it should be withdrawn.

Section 1-09(g)(4) allows the Department to require visitors to secure personal property in a lockable locker and also repeals language allowing visitors to wear wedding rings, religious medals and religious clothing. The purpose of this change is completely unclear and there is no explanation for it whatsoever in the "Statement of Basis and Purpose." If this change is actually intended to mean that the Department will require all visitors to take off their wedding rings, religious medals, and religious clothing, then it is excessive and of doubtful validity under the First Amendment's Free Exercise Clause and the similar protection of the State Constitution, which provides (at Article I, section 3): "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind . . . ." It also likely violates the Religious Land Use and Institutionalized Persons Act to the extent that it obstructs the rights of prisoners to receive visits as well as the rights of visitors. Even if the change is not intended to require visitors to remove all religious items, it is likely to be interpreted that way. The Board should reinstate the language about wedding rings and religious medals and clothing, and should not repeal it.

The visiting process is an area where there is a particular need for the Board to do more in light of the experience of the past several decades. We address that issue in § L.4, below.

H. Housing Area Sanitation

Section 1-03(j) amends the standard requiring provision of cleaning supplies to prisoners by adding an exception "when contraindicated by medical staff. Under such circumstances, the Department shall make other arrangements for cleaning these areas."

The meaning of this language is not clear. It appears that it may be intended in part to be consistent with a court order entered in litigation against the Department in which unsanitary living conditions were found to exist in the Department's medical and mental health housing areas where the prisoners were too sick to clean the dormitories and cellblocks. In any case, it does not do so correctly. The relevant order says:

> Cleaning crews *that do not include infirmary patients* shall be assigned to clean the NIC, GMDC, and RMSC infirmaries twice each day, or more often if need is indicated . . . . At NIC, the cleaning crew shall continue to consist of civilians. Cleaning crews shall also be assigned to all mental health housing areas. Residents of the mental observation units may be assigned to those crews . . . *only if they have been cleared in writing by their primary mental health provider* as mentally fit for such work. The mental health provider shall certify that such work will not adversely affect the inmate's mental health . . . . These crews shall clean all common areas twice daily and any cells or living areas occupied by inmates who cannot clean these personal areas adequately by themselves. The correctional and mental health staff assigned to mental health housing areas will identify in writing those prisoners whose cells or living areas shall be cleaned by the cleaning crews.[77]

Therefore, the proposed amendment should provide that prisoners shall be provided cleaning materials

> , except that infirmary patients shall not be assigned to cleaning crews, and at the North Infirmary Command, civilian cleaning crews shall be used. In mental observation units, cleaning crews shall be assigned, and residents of those units may be assigned to the cleaning crews only if they have been cleared in writing by their primary mental health provider as mentally fit for such work. In mental health housing areas, the correctional and mental health staff shall identify in writing those prisoners whose cells or living areas shall be cleaned by the cleaning crews. Other prisoners may be excused or excluded from cleaning duties based on medical contraindication, and the Department shall make other arrangements for cleaning.

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[77] *Benjamin v. Fraser*, 75 Civ. 3073 (HB), Order on: Environmental Conditions at ¶ 19(b) (April 26, 2001) (emphasis supplied).

There is no dispute that in general population housing the Department may excuse any inmate it chooses from cleaning duties, that on a doctor's orders prisoners must be excused from cleaning duties, and the Department must find other ways to keep the prisoner's living area clean and sanitary.

I. Personal Hygiene

The amendments to § 1-03 would allow restricting access to showers and shaving for prisoners in punitive segregation who are convicted of infractions on the way to, from, or during showers to three per week. (Shaving is included because punitive segregation prisoners shave when they are in the shower.)

Any restriction on an inmate's access to showers in punitive segregation areas can have severe health consequences during hot weather. The temperatures in punitive segregation cells can reach 100 degrees or more during the summertime. The federal court has recognized the life-threatening dangers of heat stroke posed by extremely hot temperatures and has entered orders to ensure that inmates have access to cool showers during hot weather to protect their health.[78] In punitive segregation, where the Department of Correction has taken the position that it cannot let prisoners out of their cells for additional showers during the day, the court has ordered submission of a plan for cooling those areas. So far, no plan has been submitted.[79] Until the Department provides for cooling in punitive segregation areas, any Board standard that limits the already limited ability of inmates to take cool showers during hot weather will pose serious health and safety risks to those prisoners.

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[78] *See Benjamin v. Horn*, 2006 WL 1370970 at *5-6 (S.D.N.Y., May 18, 2006).
[79] *Id.* at *5.

The fact that the proposed shower limit is already permitted by variances to the standards is not a legitimate excuse for codifying the variance as an amendment to the Minimum Standards. Rather, it illustrates the point that the Board has been excessively free in granting variances.

J. The Variance Procedure Amendments

The Board proposes to simplify the section of its Minimum Standards pertaining to the process for requesting and granting variances from the standards. We support the removal of the distinction between "continuing" and "limited" variances, but we oppose the "correctional best practices" amendment.

We agree that distinguishing continuing and limited variances makes matters more complicated than necessary. The amended version would make it clear that in the application and decision processes, the purpose and duration of a variance will be accurately described, making it unnecessary to have two different kinds of variances. We support this simplication, with the caveat that this simplification should not make the Board's review of variance requests less rigorous.

We oppose the amendments that would introduce "correctional best practices" as an alternative form of variance. There is no need to create a special form of variance to introduce an improved practice, and doing so introduces the kind of unnecessary complication that the previously discussed amendment is intended to get rid of.

Further, it is unclear what the proposal actually means. The term "correctional best practices," as it is used in the profession, does not really connect with the subject matter of the Board's Standards. In his keynote address to the 2003 annual conference of the International Corrections and Prisons Association, Reginald Wilkinson, Director of

the Ohio Department of Rehabilitation and Correction, described several examples of best practices. One was compliance with the accreditation standards of the American Correctional Association. Others, however, included: telemedicine and medical teleconferencing; victim services programs; "Operation Night Light" (home visitation of youthful offenders by police and probation officers); community crime prevention efforts; and intensive community supervision programs.[80] Based on these examples, it is hard to see any intersection between the best practices and the Board's Minimum Standards. Best practices have been studied and instituted in the areas of crime prevention, treatment, and re-entry, which are not areas where the Board has chosen to regulate by issuing minimum standards. Nor are they areas apt to affect the conditions of confinement, programs, activities and procedures that are governed by Board standards. Since correctional best practices seem to fall outside the scope of the minimum standards, we fail to see how their implementation would create a compliance problem. If the Board has something else in mind by the term "correctional best practices," it has not identified it.

The Board does refer in its commentary (at 6) to "a procedure or practice that demonstrably has improved jails in other jurisdictions." That is not the same as a "correctional best practice," a term which we understand represents a broad consensus in the field and not just a practice that has improved some jails somewhere. If that is what the Board means, the term "correctional best practice" is not accurate and should not be used.

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[80] Reginald Wilkinson, Correctional Best Practices: What Does It Mean in Times of Perpetual Transition? http://www.drc.state.oh.us/web/Articles/article91.htm.

Based on the present proposals and their justifications, we are concerned that this proposed amendment would perpetuate the "race to the bottom" phenomenon we have already commented on, whereby the Department continually seeks more restrictive and intrusive conditions of confinement simply because some other institution is using them and it will make the lives of staff and administration easier. Such measures can always be justified in terms of safety or security. But the Board Standards are supposed to set a floor for the humane treatment of prisoners despite the competing concerns of safety and security, and they should not be compromised further.

For those reasons, the "best correctional practices" amendment should not be adopted, unless it is revised to provide that the variance shall be no more restrictive or intrusive than the existing standard. In cases where there is a legitimate concern that compliance with a standard is causing a serious security or safety problem, § 1-15(b)(1)(iv), with its provision for variances for "extreme practical difficulties as a result of circumstances unique to a particular facility," will allow temporary measures to address such concerns, which in the longer run should probably be addressed by amendment rather than variance.

For the foregoing reasons, the change of the definition of variance, removing the distinction between "limited" and continuing" variances should be adopted, and the amendments establishing correctional best practices as alternative bases for granting variances should be disapproved.

K. The Board's Abdication of Its Regulatory Role

One of the most striking features of the proposed amendments is the manner in which the Board has proposed to avoid or withdraw from its regulatory role.[81] As we have already mentioned:

> The Board would play no role in verifying that adequate laundry and clothing exchange systems had been created and were workable in connection with the proposed uniform requirement;
>
> The Board does not require the Department to demonstrate any means of complying with the requirement of the telephone amendment that phone calls to the Board, other oversight agencies, lawyers, treating physicians, and clergy be exempted from monitoring;
>
> The Board has proposed to do away with the requirement of sufficient Spanish-speaking staff to assist Hispanic prisoners and replace it with a general requirement that the Department implement "procedures" to ensure that prisoners can understand staff communications, with no specification of what those procedures might be, and no requirement that the Department demonstrate their adequacy. The Board has essentially issued the Department a blank check on this important issue;
>
> Though the Board remains the decision-maker on appeals from publication censorship, it has provided no comparable appeal procedure for decisions to prohibit or surveil correspondence or to restrict receipt of packages. The Board need not even be informed of instances of such surveillance or restriction, though the need for outside scrutiny and an independent decision-maker is as great in these instances as for publications;
>
> With respect to law libraries (§1-08(f)(7)), the Board has *eliminated* the requirement that the Department report to the Board about available law library resources. There is not a word of justification in the Statement of Basis and Purpose concerning this change. It is far from trivial. We have received a number of complaints about failure to keep important materials up to date,

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[81] The City Charter at § 626(c) assigns the Board the following powers and duties, among others:

1. The inspection and visitation at any time of all institutional and facilities. . . .;
2. The inspection of all books, records, documents, and papers of the department;

* * *

4. The evaluation of departmental performance.

> contrary to the Standards' requirement (§ 1-08(g)(1)), since the termination of the relevant court order. This is an issue that calls for monitoring by the Board, not for the Board to abolish its means of monitoring.

In the rest of the proposed amendments, there is nothing that enhances the Board's oversight or scrutiny of the Department.

There is another significant respect in which the Board's oversight function is weakened by the proposed amendments. In several cases—most notably Overcrowding—the amendment would convert long-standing variances into permanent amendments. We have heard statements to the effect that "it's time to stop administering by variance."

We respectfully disagree. In our view, the Board has been entirely too free in granting variances. However, the variance process at least has had the virtue of providing some opportunity for oversight. In some cases, the Board has formally or informally disapproved variances in part, based on its independent assessment of conditions in particular units, and it has required the Department to provide it with relevant information both in support of the variance and on an ongoing basis. That opportunity will be gone if it amends the Standards to conform to previously granted variances.

We have already said that the Board should withdraw the proposed amendments and conduct a genuine comprehensive review of the Minimum Standards. Part of that review should be consideration of what measures can be enacted to ensure that the Board can verify the Department's actual compliance for each area in which the Board is to have a substantive standard.

L. The Board's Failure To Look Broadly at Jail Conditions

The Board's review of the Minimum Standards, the first in decades, was fatally compromised by its narrow focus on the agenda of the Department of Correction and its neglect of the broader range of issues that affect prisoners and their families and communities, including a number where the protections of court orders have been stripped away in recent years. The Board should withdraw its proposed amendments and start over, and this time it should perform a genuinely comprehensive review of the Standards—one that broadly considers what the Board *should* be regulating to fulfill its responsibilities, and not merely what is already in the 30-year-old standards or on the Department's wish list.

The following is a list of some issues that the Board should have considered, and did not. It is far from exhaustive and is intended to illustrate the need for a broader review.

1. Grievances

The City Charter at § 626(f) explicitly confers on the Board the power to establish procedures for hearing grievances. However, the Minimum Standards do not address that subject. The jail grievance procedure is governed by a directive promulgated by the Department of Correction. While the Board is nominally the decision-maker of final grievance appeals, there are five levels to the system, and the prisoner must traverse the first four before even getting to the Board. As a result, the Board does not play any meaningful role in hearing grievances. We understand that it has been several years since a single grievance appeal has reached the Board level for decision.

The reasons for this fact are not hard to find, and it is not because the grievance process is solving all of the problems at lower levels.[82] Prisoners have repeatedly complained to us that they cannot get to the grievance office, that grievance personnel refuse to accept their grievances or even to make a record of their complaints, sometimes on the ground that their complaints are not "grievable"[83] and sometimes for no stated reason. Prisoners who have persisted in trying to file grievances have found themselves transferred, sometimes repeatedly, resulting in their grievances being dismissed. Many prisoners who manage to file grievances say they receive no response from anyone.

The Board should require that the grievance system be simplified so that grievances may be processed more quickly and reliably and prisoners will have the opportunity to bring their complaints to the final level of appeal.[84] Further, there is a simple step that the Board could and should take to help restore the integrity of the grievance process: provide that grievances can be filed initially at the jails, as is now the case, *or* directly with the Board, for transmission to the relevant facility, so the Board can

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[82] Some problems do get solved at lower levels. Our clients' reports suggest that some grievance personnel are exceptionally helpful to them, while others are not.

[83] There are some issues that are legitimately non-grievable, such as "complaints pertaining to an alleged assault or verbal harassment." Department of Correction Directive 3375R at § B (March 4, 1985). However, we have seen grievances rejected on the ground that grievances "cannot be brought against Officers or Staff," which is not supported by the Directive. *See Davis v. Frazier*, 1999 WL 395414 at *4 (S.D.N.Y., June 15, 1999) (noting allegation that prisoners were told that during orientation). Other grounds for rejecting grievances have been invented by grievance personnel. For example, in one case, the prisoner stated that the jail grievance coordinator told him that his complaint about issues including failure to place him in a non-smoking environment "did not qualify as a grievance" and refused to document it. The grievance coordinator denied making such a statement, but what he did say is equally contrary to the grievance Directive: that "in order to grieve medical concerns, [the prisoner] would need written physician authorization for each request." *Kendall v. Kittles*, 2004 WL 1752818 at *2 (Aug. 4, 2004). There is no basis for such a requirement.

[84] Grievance systems typically have fewer intervening steps before the final decision-maker. The New York State grievance system has three steps, 7 N.Y.C.R.R. § 701.5, and the Texas prison system's grievance procedure has only two. *See Washington v. Texas Dept. of Criminal Justice*, 2006 WL 3245741(S.D.Tex., Nov. 5, 2006), *citing Wendell v. Asher*, 162 F.3d 887, 891 (5th Cir.1998), and TDCJ Admin. Directive No. AD-03.82 (rev.1), Policy ¶ IV (Jan. 31, 1997).

track and verify that those grievances are actually recorded and processed. The Department should be required to respond in writing to all grievances and to all appeals.

2. Intake Processing

For many years, a court order required that prisoners be placed in a legitimate housing area within 24 hours of admission to the jail system; prisoners already admitted to the system who are transferred between jails were required to be housed within 12 hours. That order was issued because prisoners were languishing for days, essentially incommunicado, in crowded and filthy receiving room pens, sleeping on floors and benches if they could sleep at all, without separation of those suffering from contagious diseases and with no treatment for those undergoing drug withdrawal. After a number of years and payment of fines for noncompliance to a number of prisoners, the Department of Correction became able to comply consistently with the order, and it was later terminated. This is the sort of minimal standard of decency that should become part of the City's own regulation of its jails. Although the Department has adopted these time frames in its own policy directives, it has not always complied with them,[85] and in the absence of a court order there is no external pressure to maintain them. In our view the Board should adopt these requirements as part of the Standards. Certainly it should have considered the issue as part of any overall review of the Standards.

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[85] "The growing jail population is already causing logistical and bureaucratic problems on Rikers Island, including unacceptably long waits to process newly arriving inmates, Mr. Horn told members of the city's Board of Correction at a public meeting last month." "City Inmate Population Up; Brooklyn Jail May Reopen,"*New York Times*, March 3, 2006, http://select.nytimes.com/search/restricted/article?res=FA0712FF3F550C708CDDAA0894DE404482. Legal Aid has received complaints from clients of multiple days waiting in the receiving rooms.

3. Confinement in Cells Without Working Toilets And Sinks

Similarly, for many years a court order forbade locking prisoners into holding cells and receiving pens without working toilets and sinks, for obvious reasons.[86] The need is especially urgent where, as indicated above, prisoners may spend up to 24 hours in such areas without even violating Department policy, and must pass through them repeatedly on intake, when transferred, when taken to and returned from court appearances, medical appointments, or other trips outside the jail. While in theory staff can let a prisoner out of a toiletless cell and provide access to a toilet, or to a source of drinking water,[87] the reality of busy jails—especially intake areas with high levels of traffic and many demands on staff—is that this will not happen reliably. And even when staff are responsive, they shouldn't have to be. They have enough to do and enough to pay attention to in such busy environments that they should be freed of this responsibility by making sure that prisoners have access to toilets without staff intervention. Not surprisingly, both federal courts applying the Constitution[88] and correctional standards[89]

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[86] *Benjamin v. Sielaff*, 752 F.Supp. 140, 148 (S.D.N.Y. 1990) (noting "[t]he defendants have previously been ordered to refrain from confining any inmate in a holding cell, room, or other non-housing area which lacks unmediated access to an operable toilet and sink"). The City agreed to a similar order concerning jail medical and specialty clinic holding cells in other litigation. *Vega v. Sielaff*, 82 Civ. 6475, Order at ¶ 2(F) (Holding Areas) (S.D.N.Y., Oct. 5, 1990).

[87] Drinking water is a serious need given the hot temperatures often encountered in the jails, the risk of heat-related illness, and the number of persons who are admitted to jail suffering from drug detoxification, for whom adequate hydration is an especially urgent necessity.

[88] *See Benjamin v. Sielaff*, 752 F.Supp. at 141-42 n.3; Flakes v. Percy, 511 F.Supp.1325, 1329 (W.D.Wis. 1981) ("However primitive and ordinary, the right to defecate and to urinate without awaiting the permission of the government. . . are rights close to the core of the liberty guaranteed by the due process clause. . . . Surely by any common understanding of the word, it is "cruel" to subject a person to involuntary confinement in a cell without a toilet."); *Wolfish v. Levi*, 439 F. Supp. 114, 157 (S.D.N.Y. 1977), *aff'd in relevant part and rev'd in part on other grounds*, 573 F. 2d 118, 133, n.31 (2d Cir. 1978), *rev'd on other grounds sub nom. Bell v. Wolfish*, 441 U.S. 520 (1979) (holding "it falls today below an acceptable level of humaneness to confine a prisoner of any sex where he or she must solicit freedom to use a toilet.")

have generally forbidden confinement of prisoners in cells without direct access to working toilets, and the Board's own standards (§ 104(c)(3)) specifically require that toilets "be accessible for use without staff assistance 24 hours a day" in multiple occupancy housing areas. The Board should act to guarantee the humane necessities of toilet access and water in all cells in which prisoners may ever be locked.

4. Visiting Delays and Procedures

There is a long history of egregious delays in the visiting process on Rikers Island—delays which, when added to the difficulties in getting to and from Rikers Island, make visiting impractical or nearly impossible for many people. Legal Aid addressed this problem through litigation and obtained a consent judgment that required visits to start within an hour of the time the visitor checked in at bridge control (now the visitors'center).[90] While DOC never achieved perfect compliance with that standard, most visitors did see their loved ones within the hour time limit or close to it.

That consent judgment is now terminated, and there is no specific requirement in the Standards concerning the timeliness of visits. They provide only for the Department to "make every effort to minimize the waiting time prior to a visit." § 1-10(b)(3). Reports we receive from prisoners and visitors indicate that waiting times have again become excessively long. This is a perfect example of an instance where the Board

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[89] *See* American Correctional Association, *Standards for Adult Local Detention Facilities* (3d. ed., March 1991), Standard 3-ALDF-2C-08 (requiring that "[i]nmates have access to toilets and hand-washing facilities 24 hours per day and are able to use toilet facilities without staff assistance when they are confined in their cells/sleeping areas").

[90] *Benjamin v. Abate*, No. 75 Civ. 3073, Stipulation and Order re Uniform Visit Procedures for Visitor Access (S.D.N.Y., March 11, 1993). The one-hour time limit was adopted into the Department's own policy. *See* Department of Correction, Directive 2005, Inmate Visit Procedures, Rikers Island (March 18, 1993) at § II.F ("no visitor shall spend more than one (1) hour in total processing time between arrival at Rikers Island and the actual commencement of the particular visit").

should step up now that the courts have withdrawn from involvement with this issue. It is also an example of an area of concern to prisoners and the community that the Board has not addressed in its supposed comprehensive review of the Standards.

The Board should adopt the one-hour visiting time limit, which was proven to be workable over a period of years. The Board's present standard, which requires only an exhortation to "make every effort to minimize the waiting time prior to a visit," § 1-10(b)(3), proved ineffectual, resulting in the need for the above described litigation.

The Board should also adopt additional measures to facilitate visiting. The improvement in the visiting process depended on several key reforms in that process that were required by the consent judgment and were subsequently adopted into Department policy—but which could be changed at any time for reasons of convenience or cost-cutting. These measures merit protection by adoption into the Board standards.

Elimination of duplicative visitor processing. The consent judgment required elimination of the duplicative registration and search procedures, and the reformed procedures provided "expeditious, prompt and efficient processing of visitors and inmates for visits *without duplication* and with a minimum of delay. . . ."[91] The Board should adopt a standard prohibiting duplicative processing.

Uniform visit schedule for all jails. The present Standard (§ 1-10(c)) says "Visiting hours may be varied to fit the schedules of individual institutions." Before the Minimum Standards were enacted, different jails had different schedules, and it may have appeared necessary to accommodate them. The varying and conflicting schedules caused much confusion about when prisoners could receive visits,

[91] Directive 2005 at § I (emphasis supplied).

especially since prisoners were (and are) frequently transferred between jails without notice to friends and family. It was not uncommon for a family member to make the long trip to Rikers Island only to be turned away because the prisoner had been moved and was on a different visit schedule. This practice, a source of enormous frustration, wasted time, and expense for visitors, was abolished by the consent decree and the Department has been operating with a uniform visiting schedule ever since. The Board should make that practice a Minimum Standard.

Notification to facility and inmate when visitor arrives at Rikers. One key change in reforming the visit process was notifying the relevant jail that a visitor had arrived for a particular prisoner in that jail when the visitor checked in at "bridge control" (now the Visitor Center). Formerly, the process of locating and producing the prisoner did not begin until the visitor arrived at the jail itself. Now, that process starts while the visitor is on the way to the jail, so the visit can begin more quickly after the visitor's arrival. This now proven process should be adopted as a Minimum Standard.

Separate shuttle buses for each jail. The consent judgment required that each jail on Rikers have a separate shuttle bus to take visitors directly to and from the Visitor Center. This system has helped enormously in eliminating excessive delays in visitors' getting to visits and back to the Visitor Center, and should be adopted in the Standards.

Cleaning and maintenance of visiting room. In the past, the visiting areas were sometimes so filthy and dilapidated that prisoners told their loved ones not to visit because they did not want to subject them to such degrading conditions. The consent

judgment required creation of a sanitation plan to keep these areas clean. The Minimum Standards should include a requirement of regular cleaning and sanitation to ensure that they are maintained in a sanitary condition.

5. Attorney Visiting Delays

In this area, too, Legal Aid obtained a court order—not a consent judgment, but an order reflecting a court finding in 2000 that the pattern of delays was so excessive and unjustified as to violate the Constitution.[92] The order required that attorney visits begin within 30 minutes after the attorney's arrival at Rikers and check-in at the visitor center, and within 45 minutes after the attorney's arrival at one of the borough jails, except during the afternoon count. The Department of Correction, after devising new procedures and after a period of implementation, was able to comply with those time frames in the vast majority of cases, and successfully pressed for termination of the order on the grounds that it had complied satisfactorily.

The Board should adopt the attorney visiting time limits, which have proved to be workable over a period of years.

6. Court Transportation

In our litigation over the "Red ID" practice, we learned that prisoners frequently spent as much as eight hours, and sometimes as long as 14 hours,[93] en route and in holding pens when they were taken to court appearances at which they might be in court for no more than a few minutes—or in some cases, not at all. This is a grossly oppressive

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[92] *Benjamin v. Fraser*, 264 F.3d 175 (2d Cir. 2001).
[93] 264 F.3d at 181.

and unnecessary practice, and one which encourages the view that many detainees hold that the system is designed to coerce them to plead guilty.

The Board should adopt a standard requiring that prisoners be returned promptly to their jails once they have left the courtroom. We suggest that an appropriate rule would require the Department of Correction to have each prisoner in a vehicle on the way back to jail within an hour after they leave the courtroom.

There is also an ongoing problem with transportation to court of disabled prisoners. Persons in wheelchairs have often been taken to court (and to medical appointments and other out-of-facility destinations) in vans not properly equipped for such transportation, exposing the prisoners to the risk of injury. This problem has been mitigated recently by the Department of Correction's purchase of additional wheelchair-adapted vans, but we have received some further complaints from prisoners either about not being transported in such a van or of their wheelchairs not being adequately secured. The Board should adopt a standard requiring transportation of persons with mobility problems in wheelchair-adapted vans, properly secured.

7. Education

The Department of Correction was grossly out of compliance for years with the requirement that young prisoners without high school diplomas be permitted to attend school. Legal Aid has been litigating these issues for some years.[94] As a result of the litigation, a new high school was built on Rikers Island, and now it appears that around

[94] *Handberry v. Thompson*, 92 F.Supp.2d 244 (S.D.N.Y. 2000) (granting summary judgment to plaintiffs); *Handberry v. Thompson*, 446 F.3d 335 (2d Cir. 2006) (affirming in part, vacating in part, and remanding).

90% of the school-eligible young people go to school, instead of the 40% who were able to go before the litigation.

Although the litigation remains pending, it is highly appropriate for the Board of Correction to promulgate standards to preserve these gains.

It is also important for the Board to promulgate standards to address the provision of education more generally. All inmates, not only those under age 21, should have the right to receive an education, at least through a high school diploma or G.E.D.[95] Vocational programming should be available.[96] Space for programs and sufficient escorts should be mandated. BOC should ensure that jail programs do not conflict with educational and services. BOC should promulgate standards to ensure that inmates, including those in special housing units, receive a meaningful education while incarcerated.

Formal educational programs are not the only essential component to educational services. The Board should also promulgate standards to ensure that DOC meets its obligations,[97] and provides library services to all inmates in its custody.

8. Searches

Search practices were governed for many years by consent decrees, and the Department's policies were rewritten to comply with them and with general legal

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[95] The Department of Correctional Services acknowledges this as a goal for every inmate to attain prior to release. New York State Dep't of Correctional Services, Directive 4804 at § I (April 18, 2001).

[96] The link between education and decreased recidivism is well recognized. A significant obstacle to securing employment after release is the fact that, while imprisoned, prisoners do not have the opportunity to develop the necessary educational and vocational skills. *See, e.g.*, Jeremy Travis, Amy L. Solomon & Michelle Waul, *From Prison to Home: The Dimensions and Consequences of Prisoner Re-Entry*, at 31-32 (Urban Justice Center, Wash. D.C. 2001) available at http://www.urban.org/pdfs/from_prison_to_home.pdf .

[97] 9 NYCRR §§ 91.1-91.2.

requirements. Those consent decrees have been terminated. In their absence, we receive many complaints from prisoners about abusively conducted searches notwithstanding the Department's nominal policies. Prisoners have complained that strip searches are conducted in full view of numerous other prisoners and many staff members, including those of the opposite gender.[98] Muslim prisoners have complained that the Directive's explicit protections of their religious rights are no longer respected.[99] The Board should adopt as standards the protections the Department has adopted on paper but fails to comply with.

Prisoners also report that their property is treated contemptuously, thrown on the floor, sometimes damaged, and sometimes confiscated without apparent reason and without a receipt—again, contrary to the Department's official policy.[100] Mistreatment of property by staff appears to be a significant source of staff-inmate conflict and in some cases violence and injury.

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[98] Department policy provides that such searches must take place in "an area which provides privacy and does not permit other inmates or persons not involved in the search to observe the undressed inmate" and that only personnel of the same gender as those being searched should be present." Department of Correction, Directive 4508R-B at ¶ VI.D.4.a-b (June 10, 2005).

[99] Muslim inmates "shall only be strip frisked in an isolated (private) area with one officer present of the same sex. This procedure will prevail absent of an emergency situation where staff/inmate safety would be compromised." Directive 4508R-B at ¶ VI.D.4.a.

[100] Policy provides:

> All of the inmate's personal and assigned departmental property shall be examined carefully. However, an inmate's property should be moved only to the extent necessary to facilitate the search. . . .
>
> At the end of the search, every effort shall be made to leave the living quarters in the same condition as it was prior to the search. To the extent possible, items are to be returned to the same place and in the same condition in which they were prior to the search. When this is not possible, items shall be placed on the already searched bed in an orderly fashion. Bedding stripped from an already "made up bed", shall be placed in an orderly manner at the foot of the bed.

Directive 4508 at ¶ VIII.D.7, 10. If items are confiscated, the prisoner is to receive a receipt or an infraction on contraband charges, as appropriate. *Id.* at ¶ VIII.D.7.a-b.

The Board should adopt a standard providing (as Department policy already does) that detainees' property should not be disturbed more than necessary to conduct the search, should be returned to its place and condition to the extent possible at the end of the search, and receipts should be given for all confiscated property.

9. Cross-gender Surveillance

Sexual assault and harassment of prisoners by staff or by other prisoners is a serious issue in all jails and prisons,[101] including the New York City jails, yet it is an area that the Board has failed to address. International standards require that women prisoners be guarded by staff of their own gender.[102] Even short of promulgating such a standard, BOC should take steps to minimize the risk of sexual harassment and assault to all inmates in DOC custody. For example, the Board should promulgate a standard ensuring prisoners sufficient privacy so that they can dress, shower, and perform private functions without being watched by staff of the opposite sex. Cross-gender pat frisks of women prisoners should be prohibited, except in emergency situations, particularly where the prisoner reports a history of post-traumatic stress disorder caused by a history of physical or sexual abuse.[103] The Board should promulgate standards describing the steps that

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[101] The importance of this issue is widely recognized. *See, e.g.*, Prison Rape Elimination Act, Pub. Law Section 108-79 (2003).

[102] United Nations Standard Minimum Rules for the Treatment of Prisoners, Rule 53, adopted Aug. 30, 1955.

[103] *See, e.g.*, New York State Department of Correctional Services Directive 4910, III.B.3 (female prisoners are not to be subjected to cross-gender pat frisks over objection except in emergency situations when female staff is available or when the inmate has received a "cross-gender pat frisk exemption" as determined by mental health staff based upon a showing of a history of PTSD.

DOC should take in responding to reports of sexual abuse.[104] Sexual abuse is a critical issue, but one where BOC has so far taken no responsibility at all.

10. Non-Discrimination

There are two glaring omissions in the present provisions and the proposed amendments.

Transgender prisoners. We have received terrible accounts from transgender persons, both pre- and post-operative, of abuse and mistreatment both by other prisoners and by staff. It appears that hostile attitudes towards such persons remain widespread and persistent. This treatment stems in part from the present Department of Correction practice, which appears to be to place all male-to-female transgender prisoners—even post-operative ones—in male facilities, where hostility to them is especially intense.

The Board should promulgate a standard requiring transgender persons to be treated in a humane and non-abusive fashion. The standard should also require that transgender prisoners be housed in a facility that reflects the gender of their identity if they so choose.

Disability discrimination. Since the Minimum Standards were first promulgated in 1978, society's conscience and consciousness about the treatment of persons with disabilities have been significantly raised, and the Americans with Disabilities Act has been enacted. Yet the proposed amendments say nothing about the very real problems of failure to accommodate prisoners' disabilities in the jails. These include lack of wheelchair accessibility even in those areas where wheelchair users are concentrated; the placement of prisoners with serious mobility problems in the general population, where

[104] Standards in a variety of areas should be promulgated including, for example, requiring confidential reporting procedures for victims of sexual assault and requiring that appropriate mental health services be immediately offered to all persons who report such abuse.

they are sometimes unable to access services as fundamental as meals; the failure to provide ADL (assistance with daily living) services to persons who are paralyzed or otherwise incapacitated; the repeated confiscation of medical aids such as canes and crutches from prisoners who need them to get around; and the above-mentioned failure to transport prisoners who use wheelchairs in appropriate vehicles appropriately secured.

The foregoing list represents only part of the long list of issues not addressed in the Minimum Standards and not addressed in the proposed amendments. Additional such issues include the large number of environmental health and physical plant-related issues, some of which are still the subject of litigation, and some of which are not: food service, pest control, sanitation, ventilation, lighting, temperature control, fire safety, noise, and others.

Conclusion

For all the foregoing reasons, the Board of Correction should withdraw its proposed amendments to the Minimum Standards and conduct a genuinely comprehensive assessment of the appropriate standards for jail operations in this community, with attention to the needs and interests of prisoners and members of the communities they come from in addition to the desires of the Department of Correction.

Dated: New York, New York
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