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October 27, 2015

Stanley Brezenoff, Chair
Members of the Board of Correction
1 Centre Street, Room 2213
New York, NY 10007

Re: Department of Correction Written Testimony on Proposed Rules

Dear Chair Brezenoff and Members of the Board:

We are writing in response to the Department of Correction written testimony (DOC Testimony) submitted at some unknown date[1] and posted on the BOC website after business hours on October 23, 2016. After the nominal close of proceedings, and depriving the public of any opportunity to comment on what is now revealed as DOC's clearly inappropriate intent, this testimony significantly clarifies DOC's previously contradictory stated positions.

It is now clear that the DOC believes that the proposed rule changes to the Board of Correction Standards on visiting will authorize the DOC to submit *all* New York City residents who visit the jails to intrusive, unwarranted, humiliating inquiries based on unfounded suspicions. The DOC Testimony is unequivocal in its intent to impose Orwellian hurdles to the ability to visit individuals in our jails despite the state constitutional right of detainees to have contact visits and other visitation while housed in the City jails. The DOC proposes to investigate "details about visitors" and "arrest and incident information," to look for "patterns," determine "red flags," "weight" the variables and *then* make an *ad hoc* decision on visit restrictions that can only be appealed after the decision is made.[2] DOC Testimony at p. 3. The

[1] The written testimony is dated October 16, 2015 but asserts that it is in response to the concerns expressed during the October 16, 2015 hearing. The Commissioner failed to appear at the public hearing or to offer *any* representative to participate or answer questions on October 16. This written document was not posted until either the last minute of the time period extended for the DOC to respond, or after the time extension.

[2] This will include the five factors listed in Proposed Amendment §1-09 (h)(2):

(i) The lack of a family relationship or otherwise close or intimate relationship between the inmate and the prospective visitor;
(ii) The prospective visitor's current probation or parole status;
(iii) The nature of the inmate's or the prospective visitor's felony convictions or persistent narcotics- or weapons-related misdemeanor convictions, if any, within the past seven (7) years;
(iv) The nature of any conviction for which the prospective visitor has been released from incarceration within the past year; and

Board must reject these inappropriate "profiling" measures and protect against this assault on our basic civil liberties and our core principles of freedom and liberty.

The DOC talks about being "pro-active" instead of reactive as the basis for incredible intrusions on privacy and the right to association. This is to misunderstand our system of jurisprudence and our love of and respect for liberty. Most of the individuals in our City jails are pre-trial detainees presumed to be innocent and others are predominantly guilty of misdemeanor offenses. Some were convicted of lower felonies where the court deemed a definite sentence to be appropriate. Their visitors, by definition, are not held on *any* charge and are not serving *any* sentence. We do not infringe upon their fundamental rights to association or to privacy absent a factual basis for such intrusion on liberty found *before* the intrusion and *after* a process that includes due process rights of notice, and an opportunity to be heard at an impartial proceeding. Yet the rule proposals eliminate due process protections and the DOC believes that it can do *pre-emptive* profiling to come up with a basis for denial or limitation on visiting rights.[3]

There has been no showing that "[t]he current constraints on visits under which the Department must operate create an unsafe environment for staff, visitors and inmates alike." DOC Testimony at p. 2. In fact, the DOC Testimony states "a *few* visit with intentions that can have serious safety and security implications" *Id.* (emphasis added).[4] As we stated in our testimony:

> There is a lack of a connection between visit restrictions, violence reduction and reduction in contraband in the jails. A recent Board of Correction report found that "the vast majority of weapons are found in areas other than intake and visits and that the majority of weapons found in the jails are inmate-made or fashioned from materials already inside the jails."[5] The data collected by the Board suggests that further restricting the already heavily

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

See The Legal Aid Society Testimony dated October 16, 2015 (LAS Testimony) at p. 15-16 for a discussion of these factors.

[3] See LAS Testimony explaining that if the DOC is taking the position that they express in this written testimony, the stated protections found in Proposed Amendment § 1-09 (h)(1) are false. "If every visitor is going to be subject to the "determination" defined in paragraph (2), then the protection in paragraph (1) is illusory and these two sections are contradictory." LAS Testimony at p. 15.

[4] The DOC Testimony suggests that risk assessments will be used in a "least restrictive manner" based on the assertion that "[l]ess than 1% of those who visit one or two inmates are arrested, but 25% of those who visited nine inmates or more inmates were arrested." DOC Testimony at p. 3. They go on to state that "Less than 2% of those who visited in FY15 visited three or more inmates" and that they have "sufficient staffing resources to conduct a comprehensive assessment of this small group." DOC Testimony at p. 3. Yet, there is no limitation on their use of risk assessments. In fact they indicate that this factor of multiple visits is from their "preliminary analysis" of factors. It in no way restricts their assertion that they will "[f]irst" collect "details about visitors" DOC Testimony at p. 3 (first bullet); and use data collected on *everyone* who visits to determine additional factors. DOC Testimony at p. 4.

[5] New York City Board of Corrections, *Violence in New York City Jails: Stabbing and Slashing Incidents*, at p. 7 (April 22, 2015), available at http://www.nyc.gov/html/boc/downloads/pdf/reports/Slashings_stabbings_CRP_2015_04_27_FINAL.pdf .

> supervised visiting process will not be of much help in reducing the prevalence of weapons in the jails, and the human cost of restricting visits will be great. DOC has provided no substantial data to support the Proposed Amendments.

LAS Testimony at p. 20.

The DOC Testimony alleges that using risk assessment reviews of objective information is appropriate and warranted for all visitors without providing any factual basis for this assertion. They claim "good correctional practice" but cite no support for their claim and present no evidence that their "risk assessment" has any valid basis. DOC Testimony at p. 2. A "first time visit" or "one time visit" is the *only* visit that would not be subjected to the profiling by the DOC. This means the DOC will be permitted to eliminate visits by everyone after one visit until they have conducted profiling on the visitor absent *any* fact based suspicion or incident. This is contrary to American jurisprudence, overbroad, an inappropriate use of law enforcement and an attack on the civil liberties of individuals who want to visit with their friends and family.

The DOC *can* be pro-active in addressing security. Appropriate pro-active measures on visitation would include working metal detectors and transfriskers, visit rooms designed for maximum visibility, a sufficient number of staff trained on visiting including the need for careful observation during visits. However, suggesting that profiling and risk assessments are appropriate for *all* visitors absent *any* factual basis or observations is incongruous with our civil liberties. It is similar to training police to conduct racial or other improper profiling, to permit "stop and frisk" absent a reasonable suspicion of dangerousness, or to permit arrest absent probable cause. The Board must make it clear to the DOC that its current intent oversteps limits on its authority. American civil liberties are offended by unfounded intrusions on the right to association, the right to privacy and the right against government intrusions. And in New York State we recognize a state constitutional right to contact visits for pretrial detainees. The Board must not stand silent when our protected liberties are so clearly under attack.

The DOC is requesting that the Board undermine fundamental rights by intruding on them under the guise of being "pro-active." This cannot be countenanced. Our rights come first and limitations on our rights are *always* to be exercised as a measured reaction to articulated, fact based, reasonable and serious need for any such limitation.

Very truly yours,

SARAH KERR
Staff Attorney
JOHN BOSTON
Project Director

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Very truly yours,

Sarah Kerr

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