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Derrick D. Cephas, Chair
Members of the Board
New York City Board of Correction
1 Centre Street, Room 2213
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Mary Lynne Werlwas
Project Director
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Re: Response to DOC Variance Requests

Dear Members of the Board of Correction:

The Legal Aid Society writes to comment on the following requests for variances by the Department of Correction. The first five, submitted on June 26, 2018, address Specialized Secure Detention (SSD) and Specialized Juvenile Detention (SJD) facilities. The other request concerns commingling of young adult and adult populations.

**1. Continuing Variance Request from Minimum Standard §3-06(e)(5)
"Nursery program"**

The variance request should be denied. These standards should rarely, if ever, come into play at all, because 16 and 17 year olds who are about to give birth should not be held in SSDs. But *if* such a girl continues to be incarcerated at the end of her pregnancy, it is essential that the nursery and child care provisions of the Board standards and New York Correction Law 611 be followed. While the Administration for Children's Services will need to decide whether it is in this particular newborn baby's best interests to remain with her mother – as it almost always is except in extraordinary circumstances – once they have made that determination, the SSD must provide for a nursery environment and childcare.

It is not our expectation that a dedicated nursery space needs to be maintained in an SSD and lie fallow awaiting the rare newborn. Such space could be used for other purposes most of the time. But if or when a girl in an SSD does give birth, and it is in her child's best interests to remain with her, the facility must then create a safe nursery space for them to remain together. We understand that maintaining the current level of incarceration of 16 and 17 year olds creates space constraints in the SSDs, and the Department states that "additional space... is not available" for a nursery. (Variance Request at 2). But it cannot

be the policy of the City of New York to separate a baby from its mother because there is not enough room. State law does not allow it, and nor should the Board.

2. Continuing Variance Request from Minimum Standard §1-11 "Correspondence"

We oppose this variance request from the Board standards securing incarcerated young people's ability to maintain ties with family, community and others during their incarceration through correspondence. The variance seeks an exemption from this entire standard pursuant to yet-to-be-announced "procedures [that] will exist for identifying individuals for whom mail correspondence is prohibited ("non-contact") or restricted based on the safety and security of the youth, the facility, and/ or consistent with any existing court orders." (Variance Request at 2). This is far too vague and broad an abrogation of deeply important rights, and fails to ensure that youth's ability to communicate with the outside world is protected. Standing alone it is too onerous, but coupled with the desired restrictions on young people's access to telephones, it limits communication to a degree that cannot be countenanced by Board standards.

More than two and a half months remain prior to the implementation of Raise the Age. This is more than enough time to develop a policy of correspondence for the Board and the public to consider. We would encourage a detailed description of which agency or agencies (ACS or DOC) will have the responsibility of implementing a correspondence policy, which staff within the agency(ies) will execute such duties, and what the appeal process would entail. Certainly there are times when correspondence must be limited, such as to comply with an order of protection or for a security reason. And the Board standard expressly provides that correspondence may be limited "to protect public safety or maintain facility order and security," (§1-11(a)), and we urge the Board to hold the Department to adhere to this standard.

3. Continuing Variance Request from Minimum Standard §1-08(f) "Law libraries"

This variance seeks an exemption from Standard §1-08(f)'s requirements governing law libraries. While we do not oppose a variance with respect to certain narrow parts of the standard, as a whole, this variance request is too broad. Certainly, the modern law library *anywhere* looks different than the law libraries of the past, and relies upon digital materials and remote assistance. Moreover, young people in SSDs may use law libraries differently than their adult counterparts, in light of their youth and the amount of their day spent in education and programming. But the fundamental need to have access to legal materials when one is facing criminal charges and held in jail is not diminished by youth, and must be maintained.

In particular, we agree that a variance should be granted with respect to §1-08(f)(2)(ii) and (iii), which require law libraries in facilities of these sizes to be open for 8.5 hours per day, and for three hours in the evenings. This is unnecessary given the full-day

school schedules and programming that will fill most of a youth's day, and more limited access would be sufficient. Similarly, §1-08(f)(4)'s requirements of access for 2 hours each day may be unnecessary for this population, and a variance could be granted providing a weekly rather than daily minimum.

Otherwise, however, it appears that operating a principally virtual or digital law library and remote access to adult law library staff, which appears to be the model envisioned by the Department, can be accomplished consistent with this standard.

4. Continuing Variance Request from Minimum Standard §1-04(b)(2) "Single Occupancy" Wet Cells

The Board standards reflect the fundamental tenet of human decency and sanitation that persons have access to a toilet and water. The standards thus provide that individuals locked into single cells have a toilet and wash basin in the cell (§1-04(b)(2)), and those held in multiple occupancy units have access to toilets "without staff assistance 24 hours per day." (§1-04(c)(4)). The Department intends to house individuals in SSDs in single cells, and thus seeks a continuing variance from the first requirement, that individuals have toilets in the cells.

Regardless of the ultimate merits of wet or dry cells, we have serious reservations about the Board granting this variance request in this posture. The Department describes a procedure for allowing toilet access that relies exclusively upon the goodwill of the correction officers staffing the area to meet this basic need:

When youth are locked in their rooms and wish to use the bathroom, they are able activate a light, from within the room, that is illuminated above the bedroom door. Staff are expected to respond to the light by opening the door and escorting the youth to the bathroom and back, allowing for an additional opportunity for staff to interact with and engage with the youth. It is expected that youth will be escorted by staff to the bathroom upon request. While this range of time can vary based on a host of factors, I am informed that detention staff are typically very attentive to these requests by youth. (Variance Request, June 26, 2018, at 3).

These general statements are too vague and inconclusive to protect the fundamental needs identified by the Board standards. First, it does not provide or suggest any operational guidance to staff—such as directives or post orders—about how this procedure is expected to work (such as, for example, if there are multiple requests, or a shortage of officers). Secondly, it does not identify a timeframe in which staff must respond to a youth's request to use a toilet. We think this should be no more than 5 minutes, a standard aligned with best practices recommended by the Juvenile Detention Alternatives Initiative of the Annie E. Casey Foundation.¹

¹ <http://www.aecf.org/m/resourcedoc/aecf-juveniledetentionfacilityassessment-2014.pdf>, p. 81.

Given the hostility that some correction officers in this Department continue to exhibit towards the individuals in their custody, as detailed extensively in the *Nunez* monitor's reports, it would be folly to presume compliance with this new procedure because the Commissioner has *heard* that staff are "typically very attentive" to such requests. For the benefit of staff and incarcerated young people, the Department should first articulate a very clear time expectation by which staff must comply, and detail the sanctions for non-compliance. Third, the Department makes no reference to how it intends to monitor staff compliance with these requests. Given that it is a new system for the Department's staff, training, guidance and close supervision would be essential.

We understand that the cells at Horizon cannot be retrofitted to become wet cells by October 1, and therefore there is some need for a limited variance until a better option can be found. At a *minimum*, we ask the Board to require the Department to provide the operational information detailed above, before it could grant any limited variance; and second, that the Department and Board agree that the Board will provide very close scrutiny of this process, including by talking frequently to incarcerated individuals to ascertain compliance.

5. Six Month Limited Variance Request from Minimum Standard §1-10 "Telephone Calls"

The variance should be denied. The Department seeks permission to limit youth to three seven-minute telephone calls *per week* during their incarceration, excluding calls to counsel and those facilitated by treatment providers, through April 2019. This is simply not sufficient family contact or community contact for most 16 and 17 year olds under any circumstances, let alone when they are facing extraordinary, difficult and sometimes dangerous conditions.

While we understand DOC maintains that this variance is temporary – as is usually the claim – it will still unduly isolate youth precisely when they addressing serious criminal charges while being subjected to a new carceral setting, staffed in part by an agency *known to* abuse its correctional authority. Such draconian limitations on their ability to communicate with their network of support during this intensely stressful time, or to tell the facts of their treatment to their caregivers, even for a six month period, is unfair.

We further oppose the policy to restrict calls only to individuals on a list the case manager approves. Youth should not be restricted in whom they may speak with on the telephone beyond ordinary security limitations and obvious circumstances such as orders of protection. Rather, case managers should work with the youth and their parents or guardians, or other appropriate individuals, to ascertain if there are individuals with whom it is not safe for the youth to speak. A case manager should not have sole discretion to decide who a youth may telephone, and an appeal process should be developed.

Lastly, the City's desire to use telephone access as an incentive to good conduct can be accomplished without unduly restricting contact with family and the community by

allowing additional calls for good conduct. But family or community contact by telephone should never be taken away as a punishment.

6. Limited Six (6) Month Variance Renewal Request to BOC Minimum Standards Regarding Implementation of the Young Adult Plan and Co-mingling Young Adults with Adults: Section 1-02

We opposes this variance request. This variance has been in effect for almost three years. Despite requests by the BOC for monthly progress reports on the implementation of the young adult plan, the data provided is both insufficient and concerning. Since January, 2018, five monthly reports have been provided. In January, 53% of the DOC young adult male population was housed in GMDC, which is slated to close this summer. As part of winding down that facility, young adults have been moved elsewhere, and 60.9% of young adult men were outside of GMDC by April. However, information detailing which facilities in which these young men are placed is not available. The reports also lack information about how these commingled units are composed, how decisions are made to remove young adults from dedicated housing, whether these decisions are reviewed or altered, and how often young adults are given the opportunity to change their original responses indicating interest in school or programs.

The discrepancy of young adults participating in programming is stark and concerning. In May, 2018, 75% of young adults were involved in programming in GMDC. The participation rate of young adults in commingled units was 12% for external programming and 13% for internal programming. While the types of programming offered in GMDC are detailed, there is no information about what programming is offered in the other facilities and whether it is appropriate for this age group.

Staff training also appears to be quite different for officers dedicated to young adults and those in commingled housing. While 96.8% of uniformed staff in GMDC had received safe crisis management training, only 53.6% of uniformed staff Department-wide have received such training. We have received reports from clients that when they are held in buildings where programs are not a priority, uniformed staff are less inclined to facilitate movement to and from program areas. Young adults who are housed with officers who are not specifically trained to work with young people are less likely to respond appropriately to this age group.

The Board should insist on more transparency in the process of housing young adults including the protocols for decision making and what type of review takes place, what programming is available for young adults and in which locations, descriptions of educational and vocational programming and availability. Given that the majority of young

adults are not in young adult housing with dedicated programming, it appears that the Department lacks the will to provide age appropriate programming opportunities to young adults and the Board should enforce the Standard §1-02(b)(3)(ii), (v); (c).

Very truly yours,

A handwritten signature in blue ink, appearing to read "Justine M. Luongo". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Justine M. Luongo
Attorney-in-Charge, Criminal Practice