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Sent via email

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Members of the Board of Correction
1 Centre Street
Room 2213
New York, N.Y. 10007

Re: Opposition to Variance Request

Use of Body Scanners and Separation Status Solitary Confinement

Dear Members of the Board of Correction:

The Board of Correction (“the Board” or “BOC”) should deny the variance requests concerning the use of solitary confinement for individuals after a positive or refused body scan, made by the New York City Department of Correction (“the Department” or “DOC”) on August 20, 2019 (“variance requests”). These requests strip incarcerated people of the protection of many health and safety standards with no due process and impose a highly punitive solitary confinement regimen labelled “Separation Status.” If the Board grants any such variance, we urge the Board to impose conditions sufficient to ensure the safety of incarcerated people, protect against the potential for abuse, and permit the Board to carefully monitor the practice.

As a threshold matter, we cannot provide comprehensive comments without access to the Department’s Separation Status solitary confinement policies. Our office requested the Department directives, operations orders, and other written policies governing the use of body scanners and any subsequent isolation. As of the writing of this letter, we do not have those documents. Our comments are based on information from incarcerated people, public reports and the Department’s own variance request—all of which raise serious alarm about DOC use of Separation Status solitary confinement.

Separation Status solitary confinement imposes severe deprivations unnecessary to the Department’s purported security goals.

DOC maintains that Separation Status solitary confinement is not punitive and seeks a variance from myriad fundamental BOC Minimum Standards “for the purpose of maintaining the safety and security of Department facilities.”¹ Commissioner Brann acknowledges in the variance request that

¹ “DOC Limited Variance Request,” Board of Correction September 2019 Meeting, August 20, 2019. Available at <https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2019/September/Sept-2019-Separation-Status-Housing-Variance-Request-Letter.pdf> (last visited September 6, 2019).

the Department has the responsibility to ensure that an individual's isolation takes "the *least restrictive form possible*" (emphasis added).² But Separation Status is the exact opposite: an extraordinarily harsh treatment.

The variance request itself reveals that DOC is not committed to the least restrictive form of isolation possible. DOC wants to continue to hold people in solitary confinement, with limited phone access and no books, legal materials, visits, recreation, or any process to challenge placement. We understand these individuals are held in GRVC Building 2, a former "bing," which is undeniably a highly punitive and restrictive setting, and they are confined to a cell 24 hours a day.

Further, accounts from incarcerated people and other sources inside DOC facilities indicate the Department is not adhering to many additional Minimum Standards missing from the variance request. The Department does not, for instance, seek a variance from the obligation to provide various personal hygiene items as required by Minimum Standard § 1-03, including clothing, bedding, toothbrushes, toothpaste, drinking cup, toilet paper, and a towel. Yet we heard reports of the Department denying not only dental hygiene items, but also phone access, showers, and meals to people in Separation Status. No variance from these required items was requested. Those reports should alarm us all.

Perhaps the Department has not sought to limit items such as bedding and toothbrushes because they cannot justify restricting those items as posing a "substantial risk of use, distribution, disposal, or concealment of contraband," as DOC claims so many other Minimum Standards do in this context. But the Board must not accept the rationale that DOC can safely provide bedding, but it cannot safely provide legal documents (§ 1-08(g), Legal Documents), a paperback book (§ 1-13, Publications), a newspaper (§ 1-14, Access to Media), or a tablet for legal research like the ones DOC allows at Horizon Juvenile Center (§ 1-08(f), Law Library Access). Whatever the Department's stated purpose for these deprivations, the inconsistent "security" rationale behind them is further evidence that Separation Status is punishment by another name.

The Board must ensure the safety of incarcerated people and provide adequate protections against abuse.

We are deeply concerned by what we understand to be a lack of due process and safety protections governing Separation Status solitary confinement. The Department of Correction and Community Supervision ("DOCCS") has a policy that provides certain protections for Special Watch Status, the analog practice in the state prison system.³ Yet those protections are absent from the regime suggested by the variance request.

² *Id.* at 2.

³ Directive 4910, Control of & Search For Contraband, New York State Department of Corrections and Community Supervision, effective June 28, 2019. Available at <http://www.doccs.ny.gov/Directives/4910.pdf> (last visited September 6, 2019).

At a minimum, the Board's inquiry should include:

1. What is a positive "finding" on a body scan, and how do we know this assessment is reliable?

The trigger for placement in Separation Status solitary confinement, as we understand it, is either an individual's refusal of a radiation scan, or a correction officer's interpretation of a radiographic image. First, what is the training given to administering officers, and does it actually qualify them to interpret the scans reliably? Are so-called "positive" findings confirmed by radiologists before an individual is placed in Separation Status solitary confinement?

Second, what kinds of "contraband"-- weapons, money, stamps, drugs -- warrant a "positive" finding and placement in Separation Status solitary confinement? Although by definition the Department has a clear interest in restricting *any* contraband, weapons and stamps pose different security threats and thus warrant differential responses.

The Department's variance request indicates that as of August 20, there were six weapons recovered through the Separation Status procedures. According to the Board's website, there were at least fifteen people cleared from Separation Status by that date,⁴ meaning that only 40% of people placed in isolation yielded the recovery of a weapon. The Department has provided no information regarding any other contraband recovered. This raises serious questions about the accuracy of scan interpretations and, in instances where a person has refused a scan, the credibility of the underlying information provided to the Department.

The Board should demand that DOC report which Separation Status placements resulted in the recovery of contraband, including details about the nature of the contraband, and make that data public. That information will assist in analysis of the accuracy of the machines and the officers operating them, and how many scan "refusals" actually produce contraband.

2. How long can someone can be held in such severe isolation?

The Department's variance request says a person will be held in these harsh, punitive conditions "until said contraband is surrendered to the Department or the individual is verified to no longer possess said contraband," but does not indicate the process by which a person can demonstrate an absence of contraband or when the Department is required to offer another scan.⁵ The Department should set a time period for presumptive release that is consistent with medical judgment reflecting a reasonable time period by which contraband is likely to have passed through a person's system. DOCCS policy, for example, requires release from Special Watch Status after 48 hours absent specific exceptions, including another scan.⁶

⁴ Separation Status, Board of Correction. Available at <https://www1.nyc.gov/site/boc/news/separation-status.page> (last visited September 6, 2019).

⁵ The Board and the Department should, of course, weigh the potential health impact of radiation accumulation resulting from repeated scans and account for when additional scans should be contraindicated.

⁶ *Id.* at 17, Section IV.J.5.e.

3. How can an incarcerated person challenge the placement in Separation Status?

It is not apparent how much information the Department is providing to the Board to justify a placement in Separation Status solitary confinement. This is particularly concerning where the basis of the placement in isolation is “credible intelligence” the person has contraband, but no positive scan.⁷ DOC should provide the Board with details—beyond the vague assertions in the posted emergency variance requests—that provide the basis for the Department’s decision to place someone in extreme isolation. The Board must be able to provide accountability as to whether “credible intelligence” is indeed credible. Moreover, there should be a defined process whereby a person can challenge a placement in Separation Status solitary confinement—an emergency procedure with independent review that does not rely on the cumbersome, lengthy grievance process.

4. Is Correctional Health Services (“CHS”) conducting medical and mental health screenings before incarcerated people are placed in extreme isolation?

It is well-settled that isolation can have a severe impact on mental and physical health, including suicidality. Especially in light of recent tragic deaths in isolation in Department custody, it is unconscionable that any person be placed in isolation of any kind without a CHS screening for contraindications to assess immediate risk. Punitive segregation policy should not provide more protections to people in custody than a purportedly “non-punitive” practice.

5. How accurate is the Department’s reporting on when people are placed in Separation Status?

The Board’s website reports five instances where DOC reported to the Board that the person is placed in separation status the day after the positive scan or refusal—more than 20% of the placements.⁸ The natural inference from that data is that either the Department is not accurately reporting when people are being separated, or the security risk is not great enough to warrant immediate separation and therefore should not be a sufficient basis for the severe deprivations represented by the Department’s variance request.

⁷ See, for example, Person 10 on the Separation Status page of the BOC website. DOC claims that there was “credible intelligence” that Person 10 possessed “dangerous contraband,” after which he refused a scan. There is no information as to whether DOC recovered any contraband from Person 10 after placing him in isolation. Available at https://www1.nyc.gov/assets/boc/downloads/pdf/News/Separation_Status/emergency-declaration-separation-status-20190814.pdf (last visited September 6, 2019).

⁸ See Persons 3, 4, 11, 19, and 23. Available at <https://www1.nyc.gov/site/boc/news/separation-status.page> (last visited September 6, 2019).

6. What is the Department doing to mitigate the harms to Young Adults?

We know that DOC has placed at least two people under 21 in Separation Status, a population that is excluded from punitive segregation due to the increased risk of harm as a result of isolation. The Board must ensure that the Department takes measures to mitigate that harm.

7. In the event that a woman is placed in Separation Status, where will she be housed and what are the conditions of that housing area?

To our knowledge, no woman has yet been separated under this practice, but the Department should share the plan for that possibility with the Board and the public.

8. If the Department believes that incarcerated people have bladed weapons or significant quantities of controlled substances in their digestive systems, is it not more appropriate to house them in infirmaries?

9. Why can't the Department produce people in Separation Status solitary confinement for their scheduled court appearances?

It is unacceptable that the Department will not produce a person to court appearances unless the person has produced a negative scan, absent a court order. If the Department is able to safely accommodate a Force Order, why can't DOC utilize those same security measures to produce a person without requiring judicial intervention? In general, the Department seeks to paint the potential harm of Separation Status as minimal, an "uncommon instance"⁹ that will affect a very small group of people and for a very short period of time. It follows, then, that it will be an even rarer occasion that a person will be in separation concomitant with a scheduled court date. Given a pretrial detainee's sacrosanct, constitutional right to access counsel and the judicial system, the Board should require the Department to develop security plans to safely produce people in Separation Status solitary confinement to their court appearances when necessary.

In addition to all of these queries, the Board should ensure that the Department is actually adhering to the Minimum Standards not included in any variance granted. We ask that the Board maintain a consistent, regular presence in Separation Status solitary confinement housing to provide accountability. Given the potential for abuse of this practice, BOC must monitor it closely.

The Board cannot allow the Department to use "security" justifications to violate Minimum Standards, and to rebrand solitary confinement under another name. The conditions described to us by our clients are worse than punitive segregation and restrictive in ways that are unjustifiable and inconsistent with the stated purpose. It is exceedingly reckless to place people in extreme isolation without a medical and mental health screening, especially when the risk is even higher for vulnerable populations like young adults and people with mental health needs. The Department cannot publicly tout its "progressive stance" on eradicating punitive segregation for young adults and people with

⁹ DOC Limited Variance Request at 2.

serious mental illness while it privately throws them in extreme isolation on the basis of a potentially unreliable technology, without a meaningful opportunity to challenge placement, and absent medical or mental health clearance.

We appreciate efforts by the Board to conduct much-needed oversight of the Department's use of body scanners and Separation Status solitary confinement. We welcome further discussion on these issues.

Very best regards,

Kayla Simpson
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