

Sent via email

February 10, 2020

Jacqueline Sherman, Interim Chair
Margaret Egan, Executive Director
New York City Board of Correction
One Centre Street, Room 2213
New York, New York 10007

Re: Opposition to Variance Requests Re: Separation Status

Dear Chair Sherman, Members of the Board, and Ms. Egan:

We applaud the Board of Correction for producing a detailed and timely public report about the Department of Correction's compliance with rules and laws governing use of radiation body scanners on people who are incarcerated in New York City jails. *Body Scanners and Separation Status in New York City Jails*, New York City Board of Correction, January 2020 ("Scanner Report").¹ The facts reported the Scanner Report show the urgent necessity for adoption of its recommendations, which we fully support. The Board of Correction should *not* grant the variances requested to operate Separation Status housing until further BOC inspections reveal that the Scanner Report's recommendations have been implemented, and that both the Department of Correction and Department of Health and Mental Hygiene are fully and competently performing their obligations to protect individuals from harm.

The purported purpose of body scanners was to improve safety by preventing weaponry or contraband that could cause bodily harm from entering the jails. This strained belief from the outset, for while both incarcerated people and correctional staff are sources of contraband in the jails, the City cynically sought a state law exemption allowing radiation to be used *only* to detect contraband on incarcerated people and *not* staff. There is no public policy rationale for treating the two groups differently: if radiation is safe for incarcerated people, it is safe for staff. If the City were serious about stemming the flow of dangerous items into the jails, then it would have sought an exemption from the health laws permitting the use of scanners on all potential sources of contraband.

We will not reiterate here the disturbing findings of the Scanner Report. But we are deeply concerned about the supervisory and leadership failure that they demonstrate. Despite years to prepare, the City's implementation of the body scanner program showed complete disregard for its own safety practices and rules. Nor was the conversion of GRVC Building 2 into *the most harsh and punitive housing area* in the Department conducted in accordance with BOC standards and

¹ Available at: https://www1.nyc.gov/assets/boc/downloads/pdf/Reports/BOC-Reports/2020.01.13%20FINAL%20Separation%20Status%20Body%20Scanner%20Public%20Report_to%20PDF.pdf

process for proactively seeking variances as needed. We note here only some of the differences between what the City had promised, and what the Board has found in practice.

<p>WHAT THE DEPARTMENT OF CORRECTION PROMISED:</p> <p><i>Body Scanners: Health and Safety Information</i>²</p> <p>June 2017</p>	<p>WHAT THE BOARD OF CORRECTION FOUND:</p> <p><i>Body Scanners and Separation Status in New York City Jails</i></p> <p>November-December 2019</p>
<p>“NYC Health Department (DOHMH), as the technical advisor and regulator of radiation machines throughout NYC, will set regulations governing use and be responsible for oversight of the safety of these machines.”³</p>	<p>“DOC staff with no Radiation Safety or Body Scanner Operator training are operating body scanners, creating a risk of radiation exposure to staff and people in custody and the potential for misinterpretation in scans.”⁴</p>
<p>“What training will staff receive to operate the scanners?”</p> <ul style="list-style-type: none"> • Per DOHMH regulations, each individual operating body scanning equipment will be required to complete a formal training course approved by DOHMH, designed by a medical physicist for the particular body scanner to be used. • The training will conclude with a written examination that <i>must be passed</i> to operate the body scanners.” 	<p>“Thirty % (n=47) of body scans were conducted by staff who had not completed all the required training in both Radiation Safety and Body Scanner Operations (which includes training on image evaluation).”⁵</p> <p>“Of the 45 placements into Separation Status, 44% (n=20) were initiated by DOC staff who had not completed Body Scanner Operator training (which includes some image evaluation training)... Thirty-six percent (36%, n=16) of Separation Status placements were initiated by DOC staff who had not completed Radiation Safety training... Eighty-nine percent (89%, n=40) of Separation Status placements were initiated by DOC staff who had not completed additional (non-mandatory) Image Evaluation training.”⁶</p>

² Body Scanners, Health and Safety Information, sent to The Legal Aid Society from the Mayor’s Office on Criminal Justice, June 7, 2017 (attached).

³ *Id.*

⁴ Scanner Report, at 6.

⁵ Scanner Report, at 6.

⁶ Scanner Report, at 28.

<p>“What oversight will there be of DOC staff?”</p> <ul style="list-style-type: none"> • The body scanners must be turned on with a key, which is kept by a supervisor, so a supervisor must initiate the start of a scanning session.” 	<p>“Forty percent (40%, n=66) of body scans were supervised by a Captain who had not completed training in both Radiation Safety and Body Scanner Operations.”⁷</p>
<p>“Can pregnant women be scanned?”</p> <ul style="list-style-type: none"> • The legislation prohibits subjecting pregnant women to body scanners.” 	<p>“In March 2019, the Department shared with the Board plans to install scanners at...RMSC. The Department clarified in January 2020 it no longer has plans to install scanners at RMSC.”⁸</p> <p>“While the Department reports it does not plan to install scanners at the Rose M. Singer Center (RMSC, the female facility on Rikers Island), DOC’s Body Scanner directive does not exclude scanning women or anyone who could become pregnant. CHS recommends that women in the City’s custody be explicitly excluded from being scanned, as there is no practical way to rule out pregnancy prior to scan.”⁹</p>
<p>“• Operators must sign in to the computer in order to operate the machine. This ensures:</p> <p>Only trained operators will have login capability, so other staff could not operate the machine.”</p>	<p>“Thirty % (n=47) of body scans were conducted by staff who had not completed all the required training in both Radiation Safety and Body Scanner Operations (which includes training on image evaluation).</p> <p>“Board staff observed one instance in which a staff member who had not been trained utilized credentials of a trained staff member to operate a scanner.”</p>

⁷ Scanner Report, at 6.

⁸ Scanner Report, at 22.

⁹ Scanner Report, at 9.

The Separation Status Variances Should Be Denied

The Department's February 3, 2020 variance requests should be denied, with one exception: the request for a variance from BOC Standard 1-04(b)(2 - 3), to permit housing in single cells without a desk or closeable storage, is reasonable for very short confinement. Otherwise, the requested variances are thoroughly unjustified or unnecessary, and in fact create the *most restrictive* conditions anywhere in the Department.

As a threshold matter, the Department cannot reliably produce facts justifying an individual's placement in Separation Status. The Department has not demonstrated the accuracy of correctional staff's interpretation of radiographic images on body scans, which are the predicate for such extraordinary deprivations. Nor has it justified the necessity for restrictive placement regardless of the *type* of contraband a correction officer believes the individual may possess: a bladed weapon, tobacco, or stamps.

Moreover, any visit to GRVC Building 2 will confirm that, newly painted "inspirational messages" notwithstanding, the conditions in which individuals are kept there are far too draconian to be tolerated. Individuals are completely isolated from other human beings for the duration of their confinement. The "recreation equipment" the Department reports it installed inside the unit offers no respite from this isolation, nor access to fresh air (and nor is it clear how an individual accesses this equipment). The purported provision of "tele-visits"—which are undefined, and difficult for most people outsiders to arrange—is no substitute for family and legal communication. Coupled with the variance requests seeking limitations on a person's ability to send outgoing mail to inform loved ones of his circumstances, or the ability even to receive outside communications, these requests envision a form of incommunicado detention simply unseen in modern corrections.

Most critically, the Department still does not even promise to produce individuals for their court dates to defend themselves against the criminal charges lodged against them. While the Department states it will follow a court order to produce individuals, the courts do not usually issue such orders for a very good reason: the Department is supposed to produce people without one. 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, in 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 to 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 in the unusual circumstance that it is necessary

Lastly, the absence of any due process protections on an individual's placement in Separation Status; opportunities to challenge the Department's asserted bases for these deprivations; or

mechanisms for a post-deprivation review in a meaningful time all render this treatment effectively lawless. The Board should not and cannot countenance such harsh and unconstrained forms of punishment.

In short, the Board cannot allow the Department to use a blanket invocation of “security” 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 are unnecessarily restrictive. It is exceedingly reckless to place people in extreme isolation without a medical and mental health evaluation first, especially when 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 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.

In addition, 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.

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 truly yours,

/s/

Mary Lynne Werlwas
Kayla Simpson
Prisoners’ Rights Project

BODY SCANNERS: HEALTH AND SAFETY INFORMATION

NYC Department of Correction (DOC) is seeking legislation (A6838) to authorize use of body scanners in correctional facilities. Under this legislation, NYC Health Department (DOHMH), as the technical advisor and regulator of radiation machines throughout NYC, will set regulations governing use and be responsible for oversight of the safety of these machines.

Why is it necessary to use ionizing body scanners?

- DOC has not been able to identify non-metal weapons brought into jails or made while incarcerated that are hidden inside body cavities.
- Since these scanners stopped being used three years ago, slashings and stabbings have nearly doubled.

Slashings and Stabbings in DOC Facilities	FY15	FY16	FY17 YTD
Total	89	133	151

- Metal detectors, non-ionizing scanners and even strip searches often don't find non-metal weapons that are used to commit acts of violence in the jails. See comparison of scanning technologies:

Technology	Detects Metals	Detects Non Metals	Underneath Clothing	Within Body Cavities
Transmission X-Ray (ionizing body scanner)	Yes	Yes	Yes	Yes
Metal Detection	Yes	No	Yes	Yes
Backscatter X-Ray	Yes	Yes	Yes	No
Millimeter Wave	Yes	Yes	Yes	No
Thermal Imaging	Yes	Yes	Yes	No

What will be the maximum annual exposure to radiation permitted for individuals who are scanned?

- These body scanners emit very low doses of radiation.
- The American National Standards Institute (“ANSI”) sets the maximum annual limit for exposure from a body scanner at 250 microsieverts (μSv).
- Out of abundance of caution, **the proposed legislation (A6838) sets maximum radiation exposure at half the national standard. No person will be exposed to more than 125 μSv annually.**

How much radiation is a person exposed to during a single scan?

- The City of New York hired a medical physicist to evaluate two potential models for use:
 - Model 1) 0.25 μSv are emitted per scan (currently owned by DOC)
 - Model 2) 4.5 μSv are emitted per scan (updated model being considered for purchase by DOC)
- If DOC uses the updated model – **a DOC client will be permitted to receive about 27 scans annually** – or the equivalent of one scan every other week.

By conservative estimates, a chest x-ray is equal to approximately 20 scans per year with the updated model.

How frequently will someone be scanned?

- When scanners were previously used in DOC facilities, scanning was conducted infrequently:
 - **93.9% were scanned <1 time per month**
 - 6.0% were scanned 1-5 times per month
 - 0.1% were scanned 5 or more per month

Understanding Risks of Exposure:

Does this exposure increase an individual's risk of cancer?

- **These scanners are considered very low risk devices.** One year of exposure to body scanners in DOC facility, at 125 μSv per year, would **increase risk of fatal cancer for an adult by one in 160 million.**

How does this exposure interfere with medical devices, such as pace makers?

- Body scanners do not interfere with pacemakers or other battery-operated medical devices.

What is the exposure to the operators?

- Body scanners will be used in a secure environment evaluated by a medical physicist with strict regulatory guidelines to ensure individuals not undergoing scanning are shielded from exposure to the greatest extent possible.
- DOHMH will review DOC's protocols for protecting operators of the scanners in the jails from radiation – similar to what DOHMH does for operators of ionizing scanners in medical facilities.

Can pregnant women be scanned?

- The legislation prohibits subjecting pregnant women to body scanners.

NYC DOHMH Regulations of Body Scanners:

- The medical safety of all DOC staff and clients is paramount. In NYC, DOHMH regulates the use of all radiological equipment. DOHMH's oversight would include DOC's body scanners.
- If DOHMH finds that DOC fails to adhere to the regulations or if deficiencies are found in the machines or their operating procedures, DOHMH will have the authority to immediately stop the use of the scanners.

DOHMH will establish rules for the use of body scanners, which will include, at minimum, the following:

- **Exposure Level:** Annual exposure limits to radiation
 - DOC will engage a medical physicist to determine the exposure for males and non-pregnant women under 18 and, using this analysis, set a reduced exposure level for this population.
- **Inspections:**
 - Each piece of equipment must be registered and regularly inspected.
 - Set frequency of unannounced inspections by DOHMH staff.
- **DOC safety plan, policies, and protocols**, which shall include:
 - Reliable tracking methods to ensure no one is scanned outside of the regulations' parameters;
 - Quality assurance testing requirements to ensure that 1) radiation doses delivered by the scanners are accurate and 2) the quality of images is high.
- **Training:**
 - Training requirements for staff operating body scanners and ongoing annual training.
- **Bystander Safety:**
 - Regulations that effectively shield bystanders from exposure, including creation of DOC employee health and safety program.
- **Recordkeeping:**
 - DOC must keep detailed records regarding individuals being scanned, use of and testing of each piece of equipment, and staff training.
- **Signage:**
 - Signs indicating that radiation is being applied must be posted in the area.

BODY SCANNERS: HEALTH AND SAFETY INFORMATION

NYC DOC Body Scanner Operational Procedures:

Under what circumstances might a DOC client be scanned?

- DOC's highest priority will be to scan clients suspected of hiding weapons or contraband. DOC clients may also be scanned on other occasions such as when:
 - A slashing/stabbing or other serious incident has occurred
 - Security camera footage shows that a client may have hidden an item
 - Other means of search (Cellsense, magnetometer, or other contraband finds) have indicated the possibility of contraband
 - The client has a history of weapons use or contraband possession

How will DOC ensure that no one is exposed to more radiation than is permitted?

- Detailed scan records will be kept by DOC electronically to ensure that all use is within the regulations.
- The scanners' software is linked to the DOC client's NYS ID number and tracks the number of scans each client receives across different facilities and scanners.
- The electronic tracking system will be set to the scan limits and **the body scanner automatically will not scan if the client has already passed the scan limit of 125 µSv annually.**

What procedures will ensure policies are followed and DOC personnel do not abuse the scanners?

- The scanners will not scan if a DOC client has already exceeded his/her annual scan limit.
- The scanners have pre-set radiation exposure limits. The **scanner operator is not able to modify or "crank up" the radiation exposure level.**
- Previously, clients' NYSID numbers were entered into the computer manually. Moving forward, DOC is implementing a RFID (Radio Frequency Identification) tracking system. RFID is an electronic bar code that is embedded in an item, such as a DOC client ID bracelet, and can be read by the body scanner. Using RFID instead of manually entering a NYSID ensures that the identification is always accurate and that no DOC client exceeds the annual limit.

What oversight will there be of DOC staff?

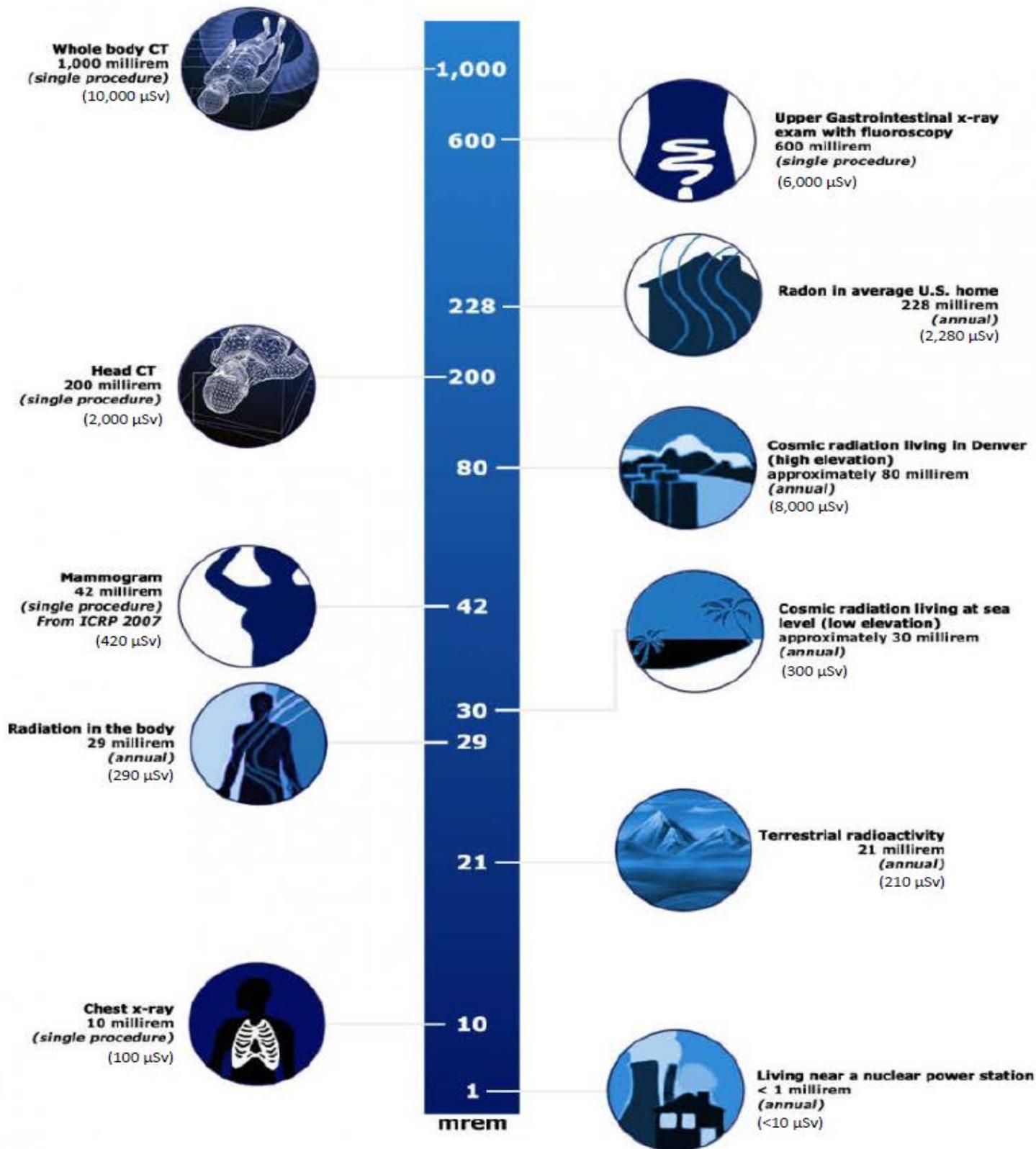
- The body scanners must be turned on with a key, which is kept by a supervisor, so **a supervisor must initiate the start of a scanning session.**
- All of the areas where the body scanners would be installed have **camera coverage**, which can be monitored in real time or watched later to investigate allegations of misuse.
- **Operators must sign in to the computer in order to operate the machine.** This ensures:
 - Only trained operators will have login capability, so other staff could not operate the machine.
 - The scanner will have a record of who was operating the machine at all times, should incident investigations be necessary.
 - Similar to tracking of DOC clients' scans, scanners track how often operators use the machines.

What training will staff receive to operate the scanners?

- Per DOHMH regulations, each individual operating body scanning equipment will be required to complete a formal training course approved by DOHMH, designed by a medical physicist for the particular body scanner to be used.
- The training will conclude with a written examination that must be passed to operate the body scanners.
- Personnel will receive additional annual training in a course approved by DOHMH to maintain their authority to operate the body scanners.

RELATIVE DOSES FROM RADIATION SOURCES

All doses from the National Council on Radiation Protection & Measurements, Report No. 160 (unless otherwise denoted)



Source: Environmental Protection Agency, Radiation Sources and Doses: <https://www.epa.gov/radiation/radiation-sources-and-doses>