CITY OF NEW YORK
BOARD OF CORRECTION

OPEN MEETING
November 18, 2014

MEMBERS PRESENT
Gordon Campbell, Esq., Chair
Jennifer Jones Austin, Esq.
Greg Berman
Derrick D. Cephas, Esq.
Robert L. Cohen, M.D.
Honorable Bryanne Hamill
Michael Regan
Steven M. Safyer, M.D.

An excused absence was noted for Alexander Rovt, Ph. D., Vice Chair

DEPARTMENT OF CORRECTION
Joseph Ponte, Commissioner
James Dzurenda, First Deputy Commissioner
Martin Murphy, Acting Chief of Department
James Perrino, Acting Assistant Chief
Erik Berliner, Deputy Commissioner
Peter Thorne, Deputy Commissioner
Errol Toulon Jr., Deputy Commissioner of Operations
Winette Saunders-Halyard, Acting Deputy Commissioner for Youthful and Adult Offender Programs and Assistant Commissioner for Community Partnerships and Program Development
Heidi Grossman, Esq., General Counsel
Jeff Thamkittikasem, Chief of Staff
Sean Jones, Deputy Chief of Staff
Shirvahna Gobin, Executive Director for Intergovernmental Affairs
America Canas, Senior Policy Advisor
Yolanda Canty, Assistant Chief
William Barnes, Deputy Warden
Joseph Caputo, Deputy Warden
Hon Pun Chan, Deputy Warden
Terrence Graham, Deputy Warden
Damon Harris, Deputy Warden
Tonya Hayes, Deputy Warden
Angelo Jamieson, Deputy Warden
Karen Lewis, Deputy Warden

Becky Scott, Deputy Warden
Brian Sullivan, Deputy Warden
Marsha Elliott, Captain
Jack Ryan, Press Officer
Shaquana Thomas, Correction Officer
Danielle Leidia, Correction Officer
Ana Billingsely, Urban Fellow

DEPARTMENT OF HEALTH AND MENTAL HYGIENE
Mary Bassett, M.D., M.P.H., Commissioner
Sonia Angell, M.D., M.P. H., Deputy Commissioner, Division of Prevention & Primary Care
Elizabeth Ford, M.D., Executive Director, Mental Health, Bureau of Correctional Health Services
Anthony Waters, Psy.D., Director, Mental Health, Bureau of Correctional Health Services
Zachary Rosner, M.D., Deputy Medical Director, Bureau of Correctional Services
Sarah Glowa-Kollisch, Director of Policy and Evaluation
Anne Sperling, Deputy Director of Intergovernmental Affairs
Nathaniel Dickey, Special Assistant
Patrick Alberts, Esq., Agency Counsel

OTHERS IN ATTENDANCE
Skylar Albertson, The Bronx Defenders
Anna Andel, Columbia Mailman School of Public Health
Joseph Antonelli, Office of Management and Budget (OMB)
Jessica Souhanian-Braunstein, Public Advocate Office
John Boston, Legal Aid Society
Gina Bull, Public Advocate Office
Dahianna Castillo, OMB
Jared Chason, Public
Billy Clareman, Paul, Weiss
David Condliffe, Public
Albert Craig, Correction Officers Benevolent Association (COBA)
Brian Crow, NYC Council
Marion Defeis, National Religious Campaign Against Torture
Agata Deia, Jails Action Coalition (JAC)
Riley Evans, Brooklyn Defenders Services/JAC
Joseph Ferramosca, Correction Captains' Association
Chrissy Fiorentini, NYC Independent Budget Office (IBO)
Elizabeth Glazer, Director of Mayor's Office of Criminal Justice
Susan Goodwillie, JAC
Dashone Hughey, OMB, Senior Analyst
Elias Husamudeen, COBA
Kim Joyce, NYC Law Department
Deandra Kahn, NY Civil Liberties Union (NYCLU)
David Karopkin, NYC Council
Martha Kashickey, Stoll, Glickman & Bellina
Alyssa Katz, Daily News Reporter
Michael Kenny, OMB
Sarah Kerr, Legal Aid Society
Martha King, Senior Policy Analyst
Celeste Koeleveld, Executive Assistant, Corporation Counsel for Public Safety
Arthur Larkin, NYC Law Department

Neil Leibowitz, M.D., Director, Mental Health, Corizon
Jennifer Levy, Public Advocate
Jeff Mailman, City Council
Felix Martinez, Board of Correction
Elizabeth Mayers, JAC
Barbie Melendez, Board of Correction
Ingrid Montgomery, OMH
Valentina Morales, Principal Attorney at Mental Health Legal Service
Sharon Nelson, COBA
Jennifer J. Parish, Urban Justice Center/JAC
Amanda Parsons, Vice President of Community and Population Health at Montefiore Medical Center
Jake Pearson, Associated Press
Shaquana Pearson, Board of Correction
Julie Pennington
Victoria Phillips, JAC
Charlotte Pope, Children's Defense Fund-NY
Beth Powers, Children's Defense Fund
Jeffrey Prey, US Attorney's Office (USAO)
Celia Rhodes, NYC Law Department
Ariel Rtichin, Student
Alisa Roth, OSF
Norman Seabrook, COBA
Jeffrey Schwartz, US Department of Justice
Sidney Schwartzbaum, President, Assistant Deputy Wardens Association
Michael Schwirtz, New York Times
Stefen Short, Disability Rights New York
Jane Stanicki, JAC
Marc Steier, COBA
Eric Stone, Paul, Weiss
Chris Terranova, Paul, Weiss
Mariana Veras, MDRC Program Assistant, Mental Health
Amy-Monique Waddell, Board of Correction
Gale Weiner, JAC
Michael Winesip, New York Times
Eisha Wright, NYC Council, Finance
Milton Zelermyer, Legal Aid Society, Prisoners' Rights Project

The meeting commenced at 9:11 AM. A video recording of the meeting is available on the Board of Correction (BOC) website at www.nyc.gov/boc.

Board Chair Gordon Campbell opened the meeting with a tribute to former Executive Director Cathy Potler, whose memorial service was held at the NYU Kimmel Auditorium on November 1, 2014. Chair Campbell read an excerpt from the program describing her life and accomplishments. He went on to say that Ms. Potler cared so much for incarcerated persons and that she made a difference in their lives. After the Board observed a moment of silence in her memory, Board members Greg Berman, Michael Regan, Dr. Robert Cohen, Dr. Steven Safyer, and Judge Bryanne Hamill each paid special tribute to Ms. Potler and thanked her for her service and commitment to the Board.

Chair Campbell then welcomed the three new Board members: Jennifer Jones Austin, Derrick Cephas, and Dr. Steven Safyer. He read their biographies which are also posted on the BOC website. Board member Austin is the Chief Executive Officer and Executive Director of the Federation of Protestant

Welfare Agencies. She recently served as co-chair of Mayor-Elect De Blasio's transition committee, and is currently a board member and spokesperson for the National Bone Marrow Donor Program. Board member Cephas is a partner at Weil, Gotschal & Manges LLP, where he heads Weil's Financial Institutions Regulatory practice. He previously served as a member and chair of the Civilian Complaints Review Board. Board member Dr. Safyer is the President and Chief Executive Officer of Montefiore Health System and previously worked at Montefiore's Rikers prison health program from 1985 to 1993.

The Board approved a motion to approve the minutes for the September 9, 2014 board meeting.

The two-month variance granted on September 19, 2014 to comingle 18- to 21-year-old inmates

Chair Campbell opened the discussion with a brief history on the Department of Correction's (DOC) continuing variance request for a housing cohort for 18- to 21-year-old inmates. Chair Campbell reminded the Board that it had approved the variance at the September 9, 2014 board meeting. He stated that at that meeting and in a subsequent letter to DOC Commissioner Joseph Ponte the Board raised a number of concerns regarding cameras, programming, Safe Crisis Management training for staff, as well as the proper staff-to-inmates ratio. While noting that Commissioner Ponte did submit a letter to the Board earlier today, he asked Commissioner Ponte to address the Board's concerns.

Speaking on behalf of Commissioner Ponte, First Deputy Commissioner Jim Dzurenda first addressed the Board's concerns about cameras. First Deputy Commissioner Dzurenda stated that DOC began its review of camera system coverage needs at RNDC and determined that they will need around 1,250 cameras to cover the entire facility. Given that estimate and the number of beds at RNDC, First Deputy Commissioner Dzurenda extrapolated that 10,515 cameras would cover every DOC facility. He explained that DOC has 2,703 cameras installed and in operation, and that they secured funding for 3,000 additional cameras. He added that DOC is currently seeking funding for an additional 4,811 cameras. Amending First Deputy Commissioner Dzurenda's statement, Commissioner Ponte stated that the City has committed to funding the additional cameras and that DOC will issue a request for proposals (RFP). He added that DOC hopes to have complete camera coverage in all the facilities within 18 months after they award the contract. In response to Judge Hamill's subsequent question as to why only one of the units housing 18-year-olds has cameras, First Deputy Commissioner Dzurenda stated that RNDC is DOC's priority, and that the units housing 18-year-olds will eventually be covered.

Winette Saunders-Halyard, the Acting Deputy Commissioner for Youth Offender Programs and Adult Programming, responded to the Board's concerns about staff training. Acting Deputy Commissioner Saunders-Halyard stated that pursuant to DOC's plan to develop a "trauma-informed care environment," it has integrated the Safe Crisis Management (SCM) curriculum into its academy's syllabus. She explained that training began in September 2014, and that DOC will have 250 staff trained in SCM by the end of 2014. Acting Deputy Commissioner Saunders-Halyard stated that 30% of the 110 staff who have completed training thus far work in the adolescent and young adult housing areas.

Responding to Chair Campbell's subsequent question about programming, Acting Deputy Commissioner Saunders-Halyard stated that DOC plans to integrate re-entry services and comprehensive discharge planning continuum for adolescents and young adults. She added that DOC also plans to integrate career and technical education, as well as workforce development. She said that the programming is largely contingent on whether DOC secures an estimated $5 million in funding. Acting Deputy Commissioner Saunders-Halyard said that DOC has already requested the funding. In response to the Chair's subsequent request for additional information on funding, Commissioner Ponte stated that they have discussed with the City several possible revenue streams, and that DOC is in the process of fine-tuning their request for funding.

In response to Chair Campbell's next question as to whether a 1:15 staff-to-inmate ratio is necessary for the 16- and 17-year-old housing units, Commissioner Ponte stated that DOC has discussed adding other types of staff to the units because a 1:15 ratio is cost-prohibitive at this time and difficult to achieve.

Judge Hamill stated that her understanding is that DOC has not met the conditions enumerated in the Board's variance approval letter. She emphasized that the two-month variance approval was premised upon DOC meeting those conditions, and went on to ask Commissioner Ponte whether DOC has prepared a report for the Board focused on whether a C-post officer is needed in the young adult housing area – a report that the Board had specifically requested. Commissioner Ponte responded that they have no report for the Board because DOC has not used the variance and the groups have not been comingled. He explained that the conditions attached to the variance were unachievable.

Returning to the Board's staffing concerns, Judge Hamill stated that during her tours at Rikers, correction officers have told her that they feel unsafe inside the units where 18-year-olds are held because they feel outnumbered by the inmates. After emphasizing that 18-year-olds were included in the U.S. Department of Justice's investigation, report, and recommendations, Judge Hamill asked why DOC has not augmented supervision in the units where 18-year-olds are held. Commissioner Ponte responded that the staffing ratio and staffing plan are "pretty traditional," and that he will be more than happy to discuss staffing concerns with his staff.

Dr. Cohen stated that during his visits to GRVC and GMDC, where 18- to 21-year-olds were to be comingled in young adult housing units, he spoke with the wardens of both facilities. He stated that both wardens, including Warden Canty who is no longer at GRVC, told him that they could not safety staff the young adults housing units unless there was a C-post officer in those units.

Dr. Cohen went on to state that DOC should withdraw the variance request and bring it back to the Board when it is ready to implement the changes. He explained that DOC has not implemented the changes, and does not have in a place a plan to do so, despite their prior representations to the Board that they needed the variance. Addressing Commissioner Ponte's earlier statement that the variance conditions were unachievable, Dr. Cohen said that the Board and DOC negotiated those conditions. Commissioner Ponte challenged Dr. Cohen's statement that the conditions were negotiated, and when asked what specific conditions he disagreed with, Commissioner Ponte stated that he does not wish to be specific. When asked to comment, Ms. Masters stated that she and Deputy Commissioner Berliner had an extensive conversation about each of those variance conditions, and that it was represented to her that DOC would not have problems complying with those conditions.

In response to Chair Campbell's subsequent question as to when DOC plans to comingle the 18- to 21-year-olds, Deputy Commissioner Berliner stated that they would like to do so immediately. He explained, "A lot of our programming assumptions, in terms of being able to provide everybody with the programming, are based on the need to put the 19- to 21-year-olds in the same housing areas as the 18-year-olds." Deputy Commissioner Berliner further stated that he and Ms. Masters discussed the Board's conditions on training, and they were going to be difficult for DOC to achieve by the timeline set forth by Board. Deputy Commissioner Berliner clarified, however, that DOC has committed to training everyone, and that the agency has expedited the training to have more officers trained by the end of December.

Judge Hamill moved to table the variance to the next Board meeting. She explained that the Board is in the midst of rulemaking addressing related issues, and that it will take DOC some time to implement the conditions that would make it safe to comingle the 18- and 21-year-olds. The Board voted unanimously to table the variance to the next Board meeting.

<u>The proposed rule establishing Enhanced Supervision Housing (ESH) units</u>

Chair Campbell launched the discussion on the proposed rule with some background. He stated that the Department had originally submitted a request for a variance so that they may establish Enhanced Supervision Housing (ESH) units. Chair Campbell said that a number of Board members felt strongly that the variance request warranted a public hearing, and some thought that the request should be considered through the CAPA rulemaking process. He added that the Board also heard from many stakeholders who posited that DOC's request should go through the CAPA rulemaking process.

Chair Campbell said that he subsequently reached out to Corporation Counsel and was advised that the best course of action is to consider DOC's request through the CAPA rulemaking process. Chair Campbell stated that Corporation Counsel drafted the proposed rule based on DOC's request for the ESH variance, and that the proposed rule goes one step further in that it addresses the issue of owed punitive segregation time, a longstanding issue for the Board. Chair Campbell stated that if the Board votes to place the proposed rule into the CAPA rulemaking process, the public and interested stakeholders will have an opportunity to submit written comments and testify at a public hearing at the end of the 30-day notice period. Chair Campbell clarified that voting to place the proposed rule into the CAPA rulemaking process is not the same as adopting its provisions. He emphasized that process gives interested stakeholders the opportunity to comment and the Board the opportunity to deliberate.

Chair Campbell stated that the Board will have to consider a number of issues during this rulemaking process – issues that he discussed with both Commissioner Mary Bassett of the Department of Health and Mental Hygiene (DOHMH) and Commissioner Ponte as recently as a yesterday. Chair Campbell said that they discussed exclusion criteria including medical conditions and mental illnesses. He stated that the Board seeks the best thinking from both departments on that point. Chair Campbell also stated that the Board will also want to spend some time considering:

- the appropriate screening mechanism,
- the appropriateness of the various restrictions that are built into the proposed rule,
- a review of the procedural process for placement in and exit from the ESH unit,
- the proposed elimination of owed punitive segregation time,
- the reduction of punitive segregation sentence lengths from 90 to 30 days per infraction, and
- whether to place a cap on the number of 30-day punitive segregation sentences one may be sentenced to in a 90-day period or a six-month period

Chair Campbell stated, "By proceeding with the rule now, we will expedite the elimination of owed time and significant reduction of punitive segregation from 90 to 30 days."

Commissioner Ponte then guided the Board through DOC's PowerPoint presentation. A printed copy of the PowerPoint slides is attached hereto as Apendix A.

Referencing one of the PowerPoint presentation slides, Judge Hamill asked Commissioner Ponte what criteria DOC uses to determine who gets placed in its maximum custody units such as the ones she visited at the Manhattan Detention Complex (MDC) and Brooklyn Detention Complex. She described them as units where inmates are largely isolated and placed in individual cells that open up into enclosed spaces surrounded by metal bars, thereby affording inmates limited opportunities for contact with others. Speaking on behalf of Commissioner Ponte, Acting Chief Martin Murphy responded:

> Those are inmates who are identified as being involved in violent incidents, usually stabbings, slashings, and serious assaults on staff. They cannot comingle with many others. There may be one or two inmates who can comingle together, so they're placed

> in a cubicle side-by-side. But, for the most part, those inmates would not do well in general population.

When asked about the isolation unit at West Facility where inmates are locked into cells with small anterooms and have limited contact with others, Acting Chief Murphy stated that those inmates were transferred to the North Infirmary Command (NIC) Main building after renovations were completed. He also said that NIC Main building and housing area 9 South at MDC are enhanced restraint housing units, and the criteria for placement there are the same as those he had described earlier.

Dr. Cohen commented that he visited 9 South at MDC last week and that the men there have limited access to programs, much like the men placed in punitive segregation at the Central Punitive Segregation Unit (CPSU). He stated that medical staff at MDC informed him that the prisoners in 9 South repeatedly miss their medical appointments because there are no DOC staff available to escort them to the clinic. Dr. Cohen also compared the access to recreation and recreation conditions at MDC with those at the CPSU. He emphasized that inmates at 9 South there because they are categorized as enhanced restraint and that they are not there to serve punitive segregation sentences.

Following a brief exchange between Dr. Cohen and Acting Chief Murphy, Commissioner Ponte continued his presentation and stated that ESH is not punitive segregation. He explained, "All inmates are out of their cells seven hours a day and have access to all programming which will come to the house for delivery." He continued, "And there will be no reduction in the services to those with mental illness."

In response to Dr. Safyer's question as to the number of people in mental observation (MO) housing, Deputy Commissioner Berliner stated that there are approximately 800 inmates there.

Commissioner Ponte continued his PowerPoint presentation and stated that DOC will reduce the cap on punitive segregation sentence lengths from 90 days to 30 days per infraction. He further stated that DOC will eliminate all punitive segregation owed time and eliminate the backlog of inmates waiting to serve their punitive segregation sentences. Commissioner Ponte also stated that DOC is also creating a "punitive segregation lite," which would give DOC staff more options. He explained:

> You could go to regular segregation. You could go to segregation where you get out seven hours a day. Or, for lower charges – Grade III – you would not go to segregation at all. So there are options in the model that we currently don't have.

Commissioner Ponte stated that establishing ESH will give DOC a place "to put our real dangerous inmates quickly" to get them out of population. He stated that ESH will help DOC maintain safer and more humane correctional facilities. He went on to state that only ten percent of the inmate population commit rule infractions, and only six percent commit violent rule infractions. Commissioner Ponte explained that ESH will have 250 beds and cover approximately 2.2% of DOC's average daily population.

Responding to Judge Hamill's questions on the timing of DOC's announced reforms on reducing the use of punitive segregation, Commissioner Ponte said that the reforms are in progress. However, he went on to say that at this time DOC is hesitant to move forward on certain elements of the reform, such as the elimination of owed time, unless it is able to remove violent inmates from population. He explained:

> It's not about reducing punitive segregation or reducing the number of punitive segregation beds. We have to have safe facilities. Once we have safe facilities, then we can have a pretty open conversation about how do we move forward from that point.

In response, Judge Hamill stated:

> You just said that programming can wait because you have to have safe facilities. Certainly, in your best practices research, you've found that having intensive therapeutic programming available—including idleness reduction, and for all those in mental observation (MO) units something in the nature of CAPS [Clinical Alternatives to Punitive Segregation]—could help to dramatically reduce the number of incidents among those that are mentally ill. Is there a reason that has not been implemented to try to see what effort can be made to reduce the violence among the mentally ill before putting them in enhanced supervision [housing] units?

In his response, Commissioner Ponte said that the City has offered DOC funding for four additional housing units operating on a model similar to CAPS except that inmates in these units would be placed there prior to committing an infraction. He said that the first of these units will open in six weeks.

Dr. Safyer asked Commissioner Ponte to describe the predictive analytics DOC used to identify the inmates who will go into the proposed ESH. Dr. Safyer expressed concern that there ought to be a balance between sensitivity and specificity, and that it is important that people who are not prone to violence not be placed there. Commissioner Ponte responded that there are some "obvious indicators" as to who would be placed on the list for ESH:

- people who have committed violent acts, including serious assault or attempted assault,
- those who have a "propensity for violence,"
- those who may have "acted out" in the community,
- those who "may have gotten to the point of not actually committing the violent act but have the likelihood that they may."

Commissioner Ponte conceded that the latter indicators can be subjective, which is why DOC will also look to intelligence, staff reports, and DOC's gang units to get more information on who may become violent. Commissioner Ponte emphasized that it is not enough for DOC to respond to incidents; DOC is also trying to prevent incidents from occurring.

Board member Cephas asked the Commissioner to clarify whether an inmate could be sent to segregation because DOC suspects that he may become violent, even if the inmate has not committed an act of violence. Commissioner Ponte stated that Board member Cephas is correct, and added that DOC would also consider "what the charge was, what they've done on the street, and prior history".

Chair Campbell stated that if the Board votes to place the proposed rule into the CAPA process, it would want to look closely examine screening process during the deliberation and hear from stakeholders, including the DOC and DOHMH.

Dr. Cohen remarked that DOC's use of punitive segregation has actually increased under this current administration; the average length of stay in punitive segregation is now 15 days, an increase of one day since the start of the calendar year. Dr. Cohen expressed his concern that Commissioner Ponte has stated that he will repurpose the RHUs and use those cells to increase the punitive segregation capacity at Rikers Island. Interjecting, Commissioner Ponte stated that it is part of his response to the State Commission's concerns about the punitive segregation backlog at Rikers. The Commissioner added, "We need to respond to the backlog . . . [which is] why it wouldn't make sense to reduce cells and also try to reduce the backlog." Dr. Cohen stated that he understands DOC's need to clear the backlog, but he is concerned

that the number of punitive segregation cells will remain the same, and that DOC is also talking about adding a new punitive segregation lite and ESH units starting with 250 beds.

Dr. Cohen asked whether DOC will close the RHUs and integrate that population into the regular solitary confinement. Commissioner Ponte responded that the RHUs have not worked well and that DOC is looking at a new model that may work better. Dr. Cohen then turned to DOHMH Commissioner Bassett and asked her to reflect on Dr. Safyer's earlier question about the validity of the prediction model concerning placement in the proposed ESH units. He also asked Commissioner Bassett to comment on Commissioner Ponte's proposal to eliminate the clearance process for people with mental illness entering solitary confinement, as Commissioner Ponte described in a letter to the State Commission.

Commissioner Bassett stated that she is not aware of the proposal to eliminate the clearance process, and that she would be happy to comment on it once she has had the opportunity to look at the letter Dr. Cohen referenced. Adding to Dr. Cohen's question, Dr. Safyer asked whether mental illness is included in the screen and whether it would trigger another review of some kind. In response, Commissioner Bassett stated that they are in discussions about the separating the assessment – the process of identifying groups of people for whom placement in solitary confinement would be inappropriate – so that the assessment is independent of the punitive process. Commissioner Bassett went on to say that the occurrence of violent events – though horrible and should not happen – is relatively rare. She stated that 88 slashings out of 11,000 inmates indicates that slashings are a relatively rare event. She added, "It is very, very difficult to predict rare events."

Chair Campbell invited other Board members to ask questions. Board member Austin stated that DOC is requesting material changes and that therefore the changes need to be considered through the rulemaking process. She further stated that while she appreciates the work that the Board has done over the last year with respect to rulemaking on punitive segregation, there are "exigent circumstances" that require the Board to "move expeditiously while thoughtfully" on the proposed ESH rule. Board member Austin moved the Board to engage put the proposed ESH rule through the CAPA process.

Judge Hamill, in response, voiced strong opposition to moving the proposed ESH rule through the CAPA process. She stated that Board members were provided copies of the proposed rules for ESH late yesterday, with no notice to her or the Chair of the other rulemaking committee. Judge Hamill went on to say that as Chair of the Adolescent Rulemaking Committee, she has for some time engaged in fact-finding meetings, reviews of draft standards prepared by Board staff, research in best practices, and discussions, in an open, transparent, deliberative process. She also stated that the Chair and Executive Director declined to submit the piecemeal rules she has been proposing over the past six months on the ground that CAPA requires certifications from the Mayor's Office of Operations and Corporation Counsel. Judge Hamill asserted that "this will be a grave injustice to the work of this Board and to the people of the City of New York to consider these proposed rules alone, to start the CAPA process" on the proposed ESH rule independent of the rulemaking on solitary confinement that is already in progress.

Judge Hamill also expressed concern that the proposed rule does not address the "substantial questions of exclusion of vulnerable groups, including young adults, the mentally ill, the physically disabled, due process, [and] programming." She stated that these issues must be addressed first, and that it is not her experience that they will be properly addressed once CAPA starts. She stated that the rules should have been inclusive, and that the process is flawed. She went on to say, "It is nothing short of sandbagging the Board of Correction, which is meant to be an independent oversight and regulatory authority." Judge Hamill emphasized that the Board has fiduciary responsibilities to the City of New York and its people, and that she is concerned that the Board's actions may constitute a breach of office that she has sworn to uphold. She subsequently moved the Board to table the proposed rule.

Board member Austin responded that her experience has been that when rules are put into CAPA, it is possible to have a "thoughtful, deliberate exchange and discussion." She emphasized that it is not clear to her what the Board would lose by moving the proposed ESH rule through the CAPA process, apart from "moving as expeditiously as we can to address what is a mounting, serious issue."

Board member Cephas sought confirmation that the Board would be at liberty to deliberate on the proposed rule, conduct research, and input additional language before adopting it as the final rule. Board member Cephas stated that he would support the motion to move the proposed rule through the CAPA process if the Board retrains that liberty. Board member Berman also wanted confirmation that the Board is not being asked to "explicitly endorse the language as proposed."

Chair Campbell stated that Board members Cephas and Berman are correct and deferred to Ms. Masters for additional comments. Ms. Masters stated that they are correct that the language in the proposed rule need not be the same as that which will be included in the final rule. She explained that there will be an opportunity for the public to submit written comments and testify at the hearing, and that the Board will have opportunities after the hearing to discuss among themselves the statements that were given and what changes, if any, should be made to the proposed language.

Dr. Safyer sought confirmation that the proposed rule is only provisional and that it can be modified by the Board based on its prior work and future deliberations. Chair Campbell stated that he is correct.

Dr. Cohen opposed moving the proposed ESH rule through the CAPA process. He stated:

> For 30 years, I have watched the Board of Correction and have participated in the process of developing standards and developing rules. And this has always been a deliberate and careful process in which the members of the Board recognized that they have a grave responsibility . . . that the Minimum Standards of the Board of Correction set a floor—a moral and political floor—to protect our citizens.

He stated that he was involved in the Board's rulemaking process regarding mental health services, when he was a Montefiore Medical Center employee working on Rikers. Dr. Cohen added that it took years to establish those rules, and yet at 6 PM last night—the night before the Board meeting—he was provided a set of proposed rules which the Board has not had the opportunity to analyze. Dr. Cohen stated that proceeding in this manner would "discard a year's worth of" work by the Board on rulemaking on solitary confinement.

Dr. Cohen urged the Board to table the resolution. He went on to state that the Board has been presented a proposed rule that is too broad and that it requires careful deliberation. He also stated that the Board and CAPA process are not nimble, and it is not easy—despite what some have suggested—to make changes to the rules once they have entered the CAPA process. He stated, "We should not be tampering with the Minimum Standards at this point in this way, and I would really urge the Board to table this resolution." He went on to say that there is no emergency or exigent circumstances that would require the Board to move as quickly as it is asked to do now. He explained that DOC had initially requested a variance for ESH housing in July, later withdrew it, and resubmitted the request in October, with no communication between the Board and DOC during the intervening months on this matter.

Dr. Cohen proposed another option: the Board could adopt a rule allowing it to consider through a variance-like process DOC proposals. He explained that DOC can request variances, as the need arises, to put into practice best practices for a limited period, tell the Board why it is a good idea, how it will measure its efficacy, and later come to the Board and explain that it worked or did not work.

Chair Campbell clarified that the Board's work on rulemaking on punitive segregation will continue because the proposed ESH rule before the Board at this meeting is narrower in scope.

Judge Hamill stated that if the Board does not vote to table proposed rule, she would move the Board to amend Board member Austin's motion to include adoption by the Board of Correction of the Jails Action Coalition's (JAC) petition, with its detailed proposed rules and the law supporting their proposed rules. Judge Hamill explained that the petition by JAC essentially supports the extensive work that the Board has done on rulemaking on the issue of solitary confinement. Judge Hamill further stated that including their petition in the rulemaking process would allow the Board and the public to consider it as a whole.

Chair Campbell put to a vote Judge Hamill's motion to table the proposed ESH rule. With only two votes, the first motion failed. Chair Campbell next put to a vote Board member Austin's motion to put the proposed ESH rule into the CAPA process. The second motion passed. After some discussion, Chair Campbell put to a vote Judge Hamill's motion to add the JAC petition, which they received this morning, into the CAPA process. With only three votes, the third motion failed.

Requests from DOC for continuing variances

Ms. Masters stated that the first of several variance requests from DOC is for a variance from Minimum Standard § 1-02 which relates to classification of prisoners. She said that the variance was originally granted in 1989 and it has been reapproved by the Board since that time. Ms. Masters stated that it allows DOC to house together adolescents who are sentenced and those who are pre-trial detainees, provided that sentenced prisoners are given the same rights as pre-trial detainees. Ms. Masters explained that it was originally granted due to space constraints and that DOC has asked for renewal of the variance. No Board member moved to support the variance and the first variance request failed.

Ms. Masters described the second request as another variance from Minimum Standard § 1-02. In place since 2009, it allows DOC to comingle adolescent and adult detainees at RMSC who are pregnant. She explained that the Minimum Standards would normally prohibit the comingling of adolescents and adults, but this variance was granted in 2009 on the notion that housing these women together would help DOC limit their access to contagious diseases, and to facilitate provision of an appropriate diet and pre-natal care. Ms. Masters stated that she has discussed with DOC's General Counsel a possible conflict, now that the Prison Rape Elimination Act (PREA) regulations have come out, and they prohibit comingling of adults and adolescents in housing areas. She stated that she asked General Counsel to consider whether they are seeking renewal of the variance. Ms. Masters stated that while DOC's intent is a good and that the variance seems to have been working for them, it does violate federal and state laws prohibiting comingling. Ms. Masters recommended that the Board enquire of DOC the number of young women affected and whether it is possible for DOC to come up with an alternative way to protect their health. Deputy Commissioner Berliner responded that he is fairly certain that two women are affected, but he will have to confirm that. Judge Hamill subsequently moved the Board to terminate the variance effective today. The motion passed and the variance was terminated effective immediately.

Ms. Masters stated that the third continuing variance request was one that the Board had already discussed earlier in the meeting, concerning the 18- to 21-year-old cohort, which the Board tabled.

Ms. Masters stated that the fourth request is for a variance from Minimum Standard § 1-03 concerning personal hygiene. She explained that the variance, which has been in place since 1991, allows DOC to put detainees who are in punitive segregation in uniforms. She stated that the variance is designed to help DOC control violence in punitive segregation by reducing the number of places a person can hide objects in their clothes. Ms. Masters explained that the Board requires that their jumpsuits be laundered appropriately and that prisoners be given their street clothes every time they go to court.

Interjecting, Judge Hamill asked whether the Board's practice of continuing variances for as long as this one – since 1991 – is consistent with the Board's own rules on variances. She further asked whether the request is being considered for a rule change and the CAPA rulemaking process that the Board is engaging in now. Ms. Masters responded that Judge Hamill raises a good point, and stated, "The difference between wearing your street clothes and wearing a uniform is the sort of thing that may not meet the threshold of being something that [DOC] cannot accomplish, if the issue is that you do not use the variance process unless it is something that you cannot accomplish." Board member Regan moved the Board to continue the variance. The motion passed and the variance was continued.

Ms. Masters stated that the fifth request is also for a variance from Minimum Standard § 1-03 which pertains to personal hygiene. She explained that this variance has been in place since 2003, a time when there were a number of troubling suicides, when inmates used their bed sheets to create nooses and harm themselves. Ms. Masters stated that the variance allows DOC to place inmates on suicide watch in a special suicide smock that cannot be turned into a noose. It also permits DOC to use special bedding that cannot be fashioned into a noose. Ms. Masters explained that the purpose of the variance is to protect the health and wellbeing of inmates. Board member Regan moved the Board to continue the variance. The motion passed and the variance was continued.

Ms. Masters said that the sixth request is for a variance from Minimum Standard § 1-04 which relates to overcrowding. She stated that the variance allows for some dorm housing to have increased capacity beyond what is allowed under the Minimum Standards. Ms. Masters stated that it allows DOC to house up to 60 inmates per dorm at EMTC, MDC, and OBCC. It also allows dorms at VCBC—the boat in the Bronx—to house up to 55 inmates. She reported that the Board initially granted the variance in 2004, and that variances covered all four facilities by 2005. Ms. Masters explained that the variance was initially granted at a time when the prisoner census was higher. Ms. Masters further explained that the census now is approximately 10,976, and approximately 80% of the cells in the system are in use. Ms. Masters then asked the Board to consider whether this variance continues to be necessary, and whether the facilities are using the variance. Chair Campbell invited DOC to respond.

Acting Chief Murphy stated that the variance is currently in use. Dr. Cohen remarked that the Board has not received any information from DOC explaining why the variance is necessary now, given that there is more space on Rikers Island. He also cited the risk of violence when there is a smaller correction officer-to-prisoner ratio. Dr. Cohen went on to say that the Board should not approve the request, and that it can reconsider the request if DOC provides the Board information as to why the variance is critical. Board member Regan stated that he agrees with Dr. Cohen and added that there were extraordinary circumstances in 2004 and 2005. The Board voted to deny this request for the continuing variance.

Ms. Masters stated that the seventh request is for a variance from Minimum Standard § 1-06 which relates to recreation. She stated that it allows for limited indoor recreation for inmates who are in the Communicable Diseases Units (CDU) at the West Facility, and explained that they are there because they are too sick to be among others. She stated that this variance has been in place since 1992, and it allows DOC to provide these prisoners indoor recreational activities such as arts and crafts. Board member Regan moved to approve the continuing variance. The motion passed and the variance was continued.

The eighth request was for a variance from Minimum Standard § 1-09 which requires DOC to allow inmates at least two evening visits during weekdays. Ms. Masters said that this is a Thanksgiving variance that the Board grants every year, and it allows DOC to conduct visits on Thanksgiving Day on a day schedule rather than evening schedule. She explained that its purpose is to encourage and facilitate visits between inmates and their family and friends. Board member Berman moved the Board to approve the variance. The motion passed and the variance was continued.

Multi-day lockdown at GRVC

Chair Campbell reported that GRVC was locked down from October 6th through October 10th, and that Board granted DOC an emergency variance from October 9th to the 10th. He stated that Board has raised a number of concerns about the lockdown and has repeatedly requested information on which mandated services were provided in each housing area. Chair Campbell stated that the Board has received limited information from DOC. He then asked the Commissioner to respond.

Commissioner Ponte stated that DOC has looked at it, and that one of the problems is that DOC does not collect information "in this manner." Commissioner Ponte went on to say that one of the things DOC looked at was medication compliance for those inmates on medication. Deputy Commissioner Berliner stated that medication compliance was in line with normal rates.

In response to Dr. Cohen's subsequent question about sick call, a mandated service, Deputy Commissioner Berliner confirmed that sick call was afforded to prisoners during the lock down. Seeking clarification, Dr. Cohen asked, "People signed up for sick call and they were taken to sick call?" Deputy Commissioner Berliner responded that DOC did not afford "normal sick call" due to the lockdown, but they did have emergency sick call and sick call for those who required certain types of care.

Directing his statement at DOC, Dr. Cohen stated that an emergency variance is premised on the importance of providing services, and yet DOC's request for the emergency variance did not cover most of the days that the facility was on lockdown. Dr. Cohen went on to say that Board staff have reported that people did not get sick call. He then turned to DOHMH. Dr. Elizabeth Ford, the Executive Director of Mental Health, confirmed that there were disruptions to sick call, and that no mental health programming was afforded in the way that they would usually prefer, especially in the RHUs.

Dr. Cohen stated that DOC is supposed to notify the Board when they are going to lock down a housing area for 24 hours and not provide mental health or medical care services. He stated that DOC's position is that inmates are locked down from 9 PM to 5 AM anyway, so even if the facility is locked down from 5 AM to 9 PM, it is still less than 24 hours. Dr. Cohen stated that this is an area where further discussion is warranted. Chair Campbell stated that he agrees with Dr. Cohen, and added that he hopes that DOC will soon provide the Board the same lockdown reports that the Commissioner and his staff receive. Commissioner Ponte stated that DOC does not track information, and has not kept information like that. He stated that they will begin to collect that information on what services were provided during lockdowns, and DOC will provide them to the Board in the future.

GRVC 12 Main

Chair Campbell moved the discussion to GRVC 12 Main. He stated that 12 Main is a housing area located inside GRVC's clinic, and that inmates there are in punitive segregation and have serious mental illness (SMI). He reported that inmates there have little access to services. He added that the unit experienced a large number of fires started by inmates, and that the fires seriously affected the health of clinic staff and rendered the clinic intermittently inaccessible to others at GRVC. Chair Campbell went on to say that while he understands that most of the nine SMI inmates have been relocated, the Board is concerned that 12 Main may be repurposed. He asked Commissioner Ponte to respond.

Commissioner Ponte said that everyone agrees that 12 Main did not work. He went on to say that all but one inmate in 12 Main has been transferred elsewhere, and that the one inmate still there will be moved. Deputy Commissioner Berliner added that DOC worked with DOHMH to find an appropriate placement

for all of the inmates housed at 12 Main. He went on to say that the transfers have been successful and that the one inmate who is still there now should be moved no later than tomorrow.

Dr. Cohen stated that he and Ms. Masters visited 12 Main recently, and that it was a terrible, dangerous place. He said that there were fires there every day or every other day. He went on to say:

> There were people in there serving thousands of days of solitary confinement. There were excessive uses of force and extractions. I just want to compliment the Department of Health for its consistent efforts to try to close this unit down. Corizon staff also publicly and personally asked that this situation be ended; they could not provide mental health services in this area.
>
> But it should be known that when I began on the Board in 2009, 12 Main was 12 Main. It was the same horrible place that it is now – that it was till last week. It was shut down when Board members [went] there and said this is a bad place, and it was repurposed again; it was closed down and then it was set up again. [There] should be some process involved where the Department remembers its history and does not set up another horror show like 12 Main.

Recent inmate deaths

Chair Campbell moved to the next agenda item and turned to Ms. Masters. Ms. Masters stated that the Board would like to ask DOC and DOHMH questions about two inmate deaths that occurred in October. She stated that one was a 53-year-old man who had not been in DOC custody very long, and the other was 24 years old. She said that both deaths raised some questions about the policies on providing first aid and CPR to inmates, and the procedures for getting inmates to medical care quickly.

Commissioner Ponte requested that the discussion be moved into executive session because they involve ongoing investigations.

Interjecting, Judge Hamill moved the Board to amend the by-laws of the Board of Correction so that the Board meets monthly, as it has in the past, not bimonthly. She explained that the Board is dealing with many issues, such as the DOJ investigation and report, escalating violence, the proposed ESH and the CAPA process, DOI report, and deaths that raise serious concerns. She stated, "To be able to carry out our oversight and regulatory authority, a monthly public meeting where these issues can be aired and discussed among the Board is necessary." Chair Campbell responded that the Board members should discuss the request and bring the issue back at the next Board meeting. The motion did not pass, with only three Board members voting in favor of it. Chair Campbell stated that the motion did not fail, and that the Board will seriously consider it at its January meeting.

Returning to the subject of inmate deaths, Dr. Cohen stated that the concerns about the availability of CPR to inmates is not new, and asked whether DOC or DOHMH has taken any action to review CPR training and emergency notifications. He also asked whether any staff have been counseled subsequent to these deaths, and whether the lack of access to CPR was raised. Dr. Zachary Rosner, the Deputy Medical Director of Correctional Health stated:

> We have a robust internal morbidity and mortality review that is ongoing at the Department of Health. Often, findings come out of this process. Our meeting is Friday. And we work with Department of Correction to address any issues that come up within the Department of Correction protocols. We do have concerns about the CPR as well,

and there's regular training that occurs with the Department of Correction. And we'll continue to work with them on that.

The public comment period may be viewed in full at www.nyc.gov/boc. Written public comments provided to Board staff are attached hereto as appendix items.

The public portion of the Board meeting concluded at 12:04 PM, and the Board entered executive session.

Appendices:

A. DOC PowerPoint presentation
B. Written public comments

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November 10, 2014

BY E-MAIL
Gordon J. Campbell, Chair
Members of the Board
NYC Board of Correction
51 Chambers Street, Room 923
New York, NY 10007

Re: DOC request for variances re Enhanced Supervision Housing

Dear Mr. Campbell and Members:

The Board of Correction should not vote at its November 18 meeting on the DOC's present request for variances, and should certainly not approve it, because:

- The requested variances related to creation of Enhanced Supervision Housing (ESH) cannot be granted under the Board's Standards because they seek permanent substantive changes to the Standards and therefore must be addressed through the Standards amendment process—*i.e.*, administrative rulemaking—with its procedural protections. *See* below at pp. 2-3.

- Granting these variances would pre-empt the ongoing rulemaking process commenced September 9, 2013, which also addresses the use of punitive segregation and reforms to the disciplinary system. The present proposals should be considered as part of that Standards amendment process, and the Board should conduct the same kind of careful examination and consultation with stakeholders that have characterized the rulemaking process—and should have public hearings on whatever rules it proposes. This is especially true since DOC itself says that "[m]any of the variances requested here will soon be proposed as permanent changes in BOC rules"—*i.e.*, they will seek Standards amendments by rulemaking. (Variance request, p. 5.)

- Some of the requested changes raise significant constitutional questions, both state and federal. *See* below at pp. 8, 10, 11, 13, 14.

- The requested changes, individually and collectively, will pose substantial hardship to the affected incarcerated individuals and their families, many of whom are poor or indigent. *See* below at pp. 7-12.

create a danger or undue hardship to staff or prisoners. . . ." The Department omits the requirement that compliance "*cannot* be achieved or continued," § 1-15(b)(1), and its request is not based on "circumstances unique to a particular facility," but on its desire to remedy problems cutting across all facilities.

For these reasons the variance should be denied without prejudice to the Department's invocation of the Standards amendment process. The variance process is simply not designed for what it wishes to do. Further, the issues DOC raises are very closely related to the current rulemaking process and should not be pursued on a separate track as DOC has proposed.

Government agencies are obliged to follow their own rules. *In the Matter of Frick v. Bahou*, 56 N.Y.2d 777 (1982) ("Rules of an administrative agency, duly promulgated, are binding upon the agency as well as upon any other person who might be affected."); *In the Matter of Epstein et al., v. Valenti*, 97 A.D.2d 881, 882 (1983) (same). The Board of Correction and its Minimum Standards, which are formally promulgated regulations, *see* New York City Charter § 626(e), are no exception, including the standards applicable to variances.

Although we believe that proper procedures preclude the Board voting on the DOC request at the November 18, 2014 BOC meeting, we are providing limited substantive comments on the substance of the proposals, including their failure to provide the factual basis for the proposed serious restrictions on the liberty and dignity of incarcerated persons, to the extent possible in the unduly limited time.

What Happens to Persons with Mental Illness?

The proposal for ESH in the variance request does not exclude persons with mental illness of any sort or degree. This is a terrible and significant omission, because about 40% of the City jail population are reported to have a psychiatric diagnosis, many with major mental illness.[1] Placing such persons in settings involving greater isolation courts disaster, sometimes fatal disaster. The Board is familiar with such instances as the death of Bradley Ballard, isolated and neglected in his cell for a week, and ultimately found naked and unresponsive in his cell. But shorter periods of isolation may be dangerous as well, as shown by the case of Horsone Moore, who hanged himself on October 14, 2013, after 15 hours alone and unobserved in a decontamination room when he should have been placed on suicide watch. More isolation is precisely the wrong treatment for people in such condition. More generally, a 2012 report based on DOHMH data showed that incarcerated individuals with mental illness were more likely than others to be injured while in custody and were more likely to end up in punitive segregation,[2] and a more recent DOHMH report

[1] Kaba, Lewis, Glowa-Kollisch, Hadler, Lee, Alper, Selling, MacDonald, Solimo, Parsons and Venters, *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 AM.J. PUBLIC HEALTH 442, 445 (2014), available at: http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301742.

[2] Andrea Lewis to Homer Venters, Memorandum, March 14, 2012, "Medical Informatics, New York City Department of Health and Mental Hygiene and Correctional Health Services."

Given the failure to exclude individuals with mental illness from the ESH, the plan to eliminate the DOHMH clearance requirement for placement in punitive segregation *and* the failure of the ESH Directive to identify mental health treatment needs as a priority for the restrictive ESH, the DOC appears to be abandoning its efforts to place infracted prisoners with mental illness in a therapeutic environment and proposing to place them in high security instead. On its face, this is a shocking retreat from what initially appeared to be a valuable if limited step forward. If the Department contends that this is not what it actually intends, it must clearly say so, and that answer must be made known to the Board *and to the public* with adequate time for public comment before any decision is made.

What Happens to Adolescents?

The variance request does not exclude even 16 and 17 years old from the ESH. This omission is striking, because it is widely recognized that young people in custody do not need more isolation. Rather, they need *more* engagement, more programming, and a more therapeutic environment. There is already too much emphasis on restricting and confining this population.[6] Pursuant to the Prison Rape Elimination Act (PREA), if 16 and 17 year olds are to be housed in ESH, presumably they would have to be housed in a separate unit from the adults. Does DOC expect to fill an entire ESH housing unit with them, from a population that is generally less than 300? Or does DOC expect to have an ESH unit housing only a few people? As noted below at p. 7, adolescents are disproportionately involved in use of force incidents, which almost invariably result in disciplinary charges against the incarcerated person regardless of what actually happened. Does this mean that young people will be overrepresented in ESH?

These questions are particularly urgent in light of DOC's prior representation that they want to end punitive segregation of 16-17 year olds imminently—though DOC has not explained exactly what that means to the Board, or to our knowledge, to anyone else. Is DOC planning simply to switch 16-17 year olds who present behavioral problems, or are accused of such, from one form of segregation to another? (We note that the 7-hour lock-in proposed for ESH is the same as the proposal for "punitive segregation lite" for lesser offenders DOC has put forward to the SCOC.)

We don't know the answer to these questions, and neither does the rest of the public, and neither does the Board as far as we know. The Board must know the whole story about DOC's plans for the treatment of young people remaining in its custody before

[6] The dangerous overuse of punitive segregation by DOC is also identified in the recently released Department of Justice report concerning the treatment of adolescent male inmates between the ages of 16 and 18 in the jails on Rikers Island, the DOJ states that "the DOC relies far too heavily on punitive segregation as a disciplinary measure, placing adolescent inmates--many of whom are mentally ill—in what amounts to solitary confinement at an alarming rate and for excessive period of time." (Letter to Mayor de Blasio *et al.*, re: CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island, August 4, 2014, p. 3) The DOJ specifically found that "DOC's use of prolonged punitive segregation for adolescent inmates is excessive and inappropriate." (*Id.*, p. 4.)

excessive period of time." (DOJ 8/4/2014 Report at p. 3.)[8] Yet another concern is reliance on information from disciplinary records, many of which are based on the above described false reporting. While it did not focus on the inmate disciplinary system, the DOJ noted that "based on the volume of infractions, the pattern and practice of false use of force reporting, and inmate reports of staff pressuring them not to report incidents, we believe the Department should take steps to ensure the integrity of the disciplinary process." (DOJ 8/4/2014 Report at 49 n. 45.) Yet, these are the information sources that will be relied on to place persons in the restrictive ESH units apparently for the entirety of their incarceration.

Nothing in the DOC variance letter acknowledges that this pattern and practice of violence, false reporting, lack of integrity and over-utilization of restrictive housing must be taken into consideration before relying on DOC data and/or discretion concerning alleged past violence, gang affiliations and other conduct *to create yet another restrictive housing setting*. Regrettably, the DOC variance request wholly fails to address DOJ recommendations that are clearly needed before the integrity of DOC staff and DOC data to implement such criteria may be relied upon.

Based on this history of false and misleading reporting, the asserted factual basis for the DOC variance must be subject of greater scrutiny than is afforded in the variance process. For example, what is the basis for the size of the 250 person ESH? The recent BOC Violence Trend Report dated October 28, 2014 examines trends in "use of force" incidents in the City jails. The report suggests an alarming increase in use of force rate for the 16-18 year old age group. For this group, the use of force rate is increasing even though the population is decreasing. Unless the intent is to house 16 to 18 year olds in ESH, the need for creation of this restrictive housing may be illusory. If the intent is to use the ESH for young persons, the restrictive environment of the proposed ESH is even more alarming and inappropriate. Moreover, the DOJ report, as well as the report to this Board completed by Drs. Gilligan and Lee, squarely place the blame for the high number of violent incidents involving the adolescent jail population on DOC staff malfeasance and lack of training.

The question "who should be housed in ESH?" is closely related to the question "how many?" On that point, DOC relies on the 2015 Budget to state that ESH will be limited to 250 beds. Indeed, it claims that this number is a "procedural protection" for incarcerated individuals because it makes ESH a "scarce resource." (Variance request, p. 4) Not only is it an alarming number of beds given the severe restrictions in these units, there is nothing in the draft Directive whatsoever to maintain any limit on the number of ESH beds in the system. If the variance is granted, DOC can reallocate its resources or procure more money to impose ESH restrictions on as many persons as it wishes, as it did with punitive segregation. There is also no guarantee in the Directive or elsewhere that the proposed increased staffing—four (rather than one) correction officer as well as dedicated escorts and meal relief officers on the two day tours—will be maintained.

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[8] The DOJ cautioned that its "focus on the adolescent population should not be interpreted as an exoneration of DOC practices in the jails housing adult inmates. Indeed, while we did not specifically investigate the use of force against the adult inmate population, our investigation suggests the systemic deficiencies identified in this report may exist in equal measure at the other jails on Rikers." (DOJ 8/4/2014 Report, p. 3.)

Restrictions on Visiting

Of these restrictions, deprivation of contact visits may be the most serious. The American Bar Association has written:[12]

> Maintaining personal connections through contact visits improves the lives of incarcerated individuals, their families, and the community in three important ways. First, people who receive visits from and maintain relationships with friends and family while incarcerated have improved behavior during their time in custody,[13] contributing both to a safe and more rehabilitative atmosphere in the facility. Second, individuals who maintain relationships have more successful transitions back to society than those who do not.[14] For example, the Minnesota Department of Corrections found that prisoners who were visited were 13 percent less likely to be reconvicted of a felony and 25 percent less likely to return to prison on parole violation.[15] Third, families and children that are able to visit their relatives in jail benefit greatly from maintaining family ties during a time that can often cause family trauma.[16]

The ABA's conclusions are consistent with those of other research finding that people who maintain family ties during incarceration and benefit from the support of family

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[12] Letter, American Bar Ass'n Governmental Affairs Office to Chairperson, Committee on the Judiciary and Public Safety, Council of the District of Columbia (June 19, 2013), pp. 2-3, available at: http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013june19_dcvisitation_1.authcheckdam.pdf . This letter was written in support of allowing contact visits in the District of Columbia jails in addition to video contact.

[13] *See* ABA Standards for Criminal Justice: Treatment of Prisoners, Standard 23-8.5 cmt. at 260. *See also* Virginia Hutchinson et al, U.S. Dep't of Justice, Nat'l Inst. of Corr., *Inmate Behavior Management: The Keys to a Safe and Secure Jail,* 8 (August 2009) (noting that maintaining contact with family and friends (including visitation) is integral to behavior management in the jail setting and that a failure to meet this important social need can lead to depression and inappropriate behavior in the under-custody population); Karen Casey-Acevedo & Tim Bakken, *The Effects of Visitation on Women in Prison*, 25 Int'l J. Comp. & App. Crim. Just. 48 (2001); Richard Tewksbury & Matthew DeMichele, *Going to Prison: A Prison Visitation Program*, 85 Prison J. 292 (2005); John D. Wooldredge, *Inmate Experiences and Psychological Well-Being*, 26 Crim. J. & Behav. 235 (1999).

[14] *See* Jeremy Travis et al, Urban Institute, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry* 39 (June 2001) ("Studies comparing the outcomes of prisoners who maintained family connections during prison through letters and personal visits with those who did not suggest that maintaining family ties reduces recidivism rates.") (internal citation omitted).

[15] *See* Minnesota Dept. of Corr., *The Effects of Prison Visitation on Offender Recidivism* (Nov. 2011), pp. 18-21.

[16] *See* Hairston, C.F. *Family Ties During Imprisonment: Important to Whom and for What?* 18 Journal of Sociology and Social Welfare 87-104 (Mar. 1991) (literature review of research showing maintenance of family ties improves mental health of inmates' children and increases likelihood of family reunification after release).

incarcerated persons or their families must purchase items new (and often pay for delivery) even if they own perfectly serviceable ones at home, or if family members are able to obtain them cheaper at local vendors. For people living on the economic edge—or over it, as are incarcerated persons without family support—this is an unnecessary economic barrier.

In support, the Department offers only rhetorical hyperbole: "It simply is not realistic to expect that the Department can detect *every* miniscule scalpel which may be secreted within a hard-cover book, every strip of suboxone which may be inserted into a magazine, or every small parcel of cocaine which can be hidden within a pair of sneakers." (Variance request, p. 3 (emphasis supplied)) On one level that is true, but trivial: no human activity can be 100% successful without exception. On a more common-sense level, careful searching of those items both visually and with a metal detector should uncover such contraband with very few exceptions. DOC must assign and supervise sufficient staff to complete careful searches. We note that only last week the Department of Investigation issued a report demonstrating a massive failure by jail staff to perform proper searches of staff entering the jails, one of whom had his pants stuffed full of contraband.[21] It appears that the solution to contraband in the jails is not to oppressively restrict the prisoners, it is to require staff to do their jobs properly.

The restriction on publications is unwarranted. The right to obtain and read published material is protected by the First Amendment. Individuals in our jails who will be restricted from receiving them from their families and friends will often not be able to afford to buy them from "approved vendors" and *the City jails do not have libraries other than the law libraries.*[22] Where are individuals in our jails supposed to obtain reading material and why would we make obtaining reading material more difficult for them? This is an important practical question as well as a constitutional one. One of the biggest problems of correctional management is mitigating idleness and its proverbial consequences—especially in jails, which have many fewer programs and activities than do prisons. It is a terrible mistake to limit reading, the cheapest and most cost-effective means of giving people in jail something worthwhile to do, in this drastic fashion.

This is not to say that no adjustment in the property regime can be allowed. For example, if it is the practice that families and friends bring in very large stacks of books and

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[21]The *New York Times* reported on November 4, 2014 that a newly released Department of Investigations report indicates that visitors to city jails may be the source of some contraband, but that a large proportion of the illegal trafficking is carried out by uniformed guards and civilian employees: "'Given the extent of smuggling that we know goes on and given what we know about what's coming in from visitors, a lot of stuff has to be coming in from guards and employees because this stuff doesn't magically appear,'" said Mark Peters, the Department of Investigation commissioner." The article is available at: http://www.nytimes.com/2014/11/07/nyregion/rikers-island-undercover-investigator-contraband-inquiry.html?hp&action=click&pgtype=Homepage&module=second-column-region&region=top-news&WT.nav=top-news.

[22] Even the Supreme Court decision that upheld a "publisher only" rule—which restricted only hardcover books, not softcover books and magazines—did so for a jail that was conceded to have a "relatively large" library for its population. *Bell v. Wolfish*, 441 U.S. 520, 552 & n.33 (1979).

for reading the mail. The variance request pays lip service to this principle ("We have no objection to requiring issuance of a Warden's written order stating the basis for such monitoring . . . .") but then says that "the need to monitor mail should be presumptively established for any inmate in Enhanced Security [sic] Housing," which is not individualized at all. (Variance request, p. 4) Since under the very broad criteria for placement, ESH may sweep in persons as diverse as highly placed gang leaders and drug dealers *and* people who simply have a habit of getting into fist fights, this approach is seriously overbroad. If a change is needed in this Standard, it must be one that preserves the principle of individualized suspicion for reading personal mail.

The Procedural Protections Are Inadequate

We have already noted the overbreadth of the criteria for placement in ESH. *See* above at pp. 6-7. The problem is compounded by the requirement that the affected person initiate a request for a hearing. The hearing should be automatic and any claim that a person refused the hearing should be verified in person by a superior officer. Requiring individuals to initiate their own hearings presents a large risk that the right to due process will be illusory. The disciplinary process and the grievance process within our jails already fail to provide the procedural protections which are supposed to be available. Individuals incarcerated in our jails regularly report not being called to their disciplinary hearings and then being informed later (falsely) that they had refused to attend. Grievances are frequently unanswered and we receive many complaints that no hearings on grievances are ever permitted despite the terms of the Directive.

The lack of periodic review of placement in ESH is facially unconstitutional. ESH is a variety of administrative segregation, and one of the basic due process rights for persons in such segregation[24] is "some sort of periodic review" to determine if there is a continuing need for segregation. *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983).[25] Such review must be meaningful and not perfunctory and cannot simply repeat stale justifications.[26] Meaningful

[24] In cases involving convicts in state prison systems, the need for procedural due process depends on whether administrative confinement is onerous enough to be "atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). That analysis is not applicable to pre-trial detainees in jails. *Bistrian v. Levi*, 696 F.3d 352, 373 (3d Cir. 2012); *Iqbal v. Hasty*, 490 F.3d 143, 162-63 (2d Cir. 2007), *aff'd in part, rev'd in part, and remanded on other grounds sub nom. Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Surprenant v. Rivas*, 424 F.3d 5, 17 (1st Cir. 2005); *Benjamin v. Fraser*, 264 F.3d 175, 188-89 (2d Cir. 2001); *Mitchell v. Dupnik*, 75 F.3d 517, 523-24 (9th Cir. 1995); *Zarnes v. Rhodes*, 64 F.3d 285, 292 (7th Cir. 1995).

[25] *See Gittens v. LeFevre*, 891 F.2d 38 (2d Cir. 1989) (requiring periodic review or opportunity to be heard on initial or continued placement in segregation); *Ramsey v. Squires*, 879 F. Supp. 270, 283 (W.D.N.Y.) *aff'd*, 71 F.3d 405 (2d Cir. 1995) ("[i]f the state regulations do not provide for this minimal opportunity to be heard, they are unconstitutional on their face."); *cf. Torres v. Stewart*, 263 F. Supp. 2d 463, 469 (D.Conn. 2003) (finding no due process violation where pretrial detainee was put into close custody because of SRG status but was given opportunity, through periodic review, to return to general population).

[26] *Smart v. Goord*, 441 F. Supp. 2d 631, 642 (S.D.N.Y. 2006) (allegation that review hearings were a "hollow formality" and officials did not actually consider releasing plaintiff stated a due process claim); *McClary v. Kelly*, 87 F. Supp. 2d 205, 214 (W.D.N.Y. 2000) (upholding damage verdict for sham review), *aff'd*, 237 F.3d 185 (2d Cir. 2001); *Giano v. Kelly*, 869 F. Supp. 143, 150 (W.D.N.Y. 1994); *see also Sourbeer v. Robinson*,

hour lock-in punitive segregation for all Grade 2 infractions to be replaced by punitive segregation "lite" alternative discipline. The elimination of all punitive segregation for youth aged 16-17 to be replaced by "alternative sanctions more conducive to management of a juvenile population," may also be permissible if the conditions comport with the Standards.[28]

Elimination of old bing time may take place immediately (and we believe must be ended to comport with due process). The Board should encourage DOC to eliminate all old bing time immediately and reduce new infraction sentences to 30 days.

For all the above reasons, the Board should not approve the requested variances at its November 18 meeting, and should not consider them until they are properly presented as amendments to the Minimum Standards through the rulemaking process.

Very truly yours,

JOHN BOSTON
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The Legal Aid Society

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[28] Punitive segregation "lite" and "alternative sanctions" for adolescents are directly related to the current rule-making. Implementation of the changes with the introduction of revised Directives will, therefore, be subject to community comment during that process.

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November 11, 2014

Via email

Gordon J. Campbell, Chair
Amanda Masters, Acting Executive Director
NYC Board of Correction
51 Chambers Street, Room 923
New York, NY 10007

Re: New York City Department of Correction's Request for Variance to Create Enhanced Supervision Housing on Rikers Island

Dear Mr. Campbell and Ms. Masters,

We write in reference to the New York City Department of Correction's (DOC) October 22, 2014 and November 4, 2014 letters to the Board of Correction requesting a variance to create enhanced supervision housing (ESH) on Rikers Island. We urge the Board to consider our concerns and recommendations before addressing the variance because of the procedural and substantive concerns outlined below. We hope DOC can address those deficiencies and then proceed, through proper procedural mechanisms, to create therapeutic housing units that we agree will be an essential component of comprehensive reform.

The NYCLU's mission is to defend and promote the fundamental principles and values embodied in the Constitution, New York laws, and international human rights law, on behalf of all New Yorkers, including those incarcerated in jails and prisons. We applaud ongoing efforts to reform the use of solitary confinement in NYC jails, and are committed to working with the Board, DOC, and advocates to achieve such reform in a transparent and collaborative manner.

The DOC stated in an October 22, 2014 letter to the New York State Commission of Correction (SCOC) that in order to fully implement solitary confinement reforms[1] it needs to create enhanced supervision housing "to manage the population of inmates who have traditionally served lengthier punitive segregation sentences."[2] We recognize the need to manage "security risk groups" as part of violence-reduction at Rikers Island, and understand that new systems must be put in place to manage this population as long-term isolation is phased out. However, any alternative to long-term solitary confinement must promote rehabilitation and basic human rights; the DOC's current description of ESH lacks this essential therapeutic mission. We are concerned by the proposal's overly broad criteria for transfer to ESH and the absence of a clear pathway for transitioning out. These concerns are compounded by the absence of an

[1] These reforms include much-welcome caps on sentences, elimination of "time owed," and elimination of solitary for 16 and 17 year-olds. *See:* Letter from Joseph Ponte, Commissioner of the New York City Department of Correction to Thomas A. Beilein, Chairman, New York State Commission of Correction (Oct. 24, 2014). Note that although the contents of the SCOC letter are not mentioned in the DOC's variance request and Directive, they are closely connected.
[2] Ibid.

apparent plan for mental health services for individuals in ESH[3] and the failure to provide specific protections for vulnerable populations, like individuals with disabilities or severe mental illness, pregnant women, and adolescents. The letters to the Board written by the Legal Aid Society, Disability Rights New York, and the Jails Action Coalition provide more detailed descriptions of where and why the variance is problematic, and we encourage you to consider their arguments.

We are also concerned that the timing of the request circumvents the Board's rulemaking regarding the use of solitary confinement, which has been well underway since September 2013 and will be introduced in early 2015. In effort to honor the processes that have been underway, and in the spirit of transparency and comprehensive reform, we recommend the following:

- The Board of Correction should not approve the requested variance at its meeting on November 18th and instead should schedule a public meeting or hearing, providing ample notice beforehand. This would give all interested parties an opportunity to share their position on the proposal.[4]
    - Because the variance proposes substantial changes to housing for individuals without adequate detail, and because the plan is closely linked to the implementation of solitary reform, we suggest that the Board consider the proposal *simultaneously or after* it introduces its rulemaking on solitary confinement.
    - Furthermore, the DOC states that their request for variance to create ESH will "soon be proposed in whole or part as permanent changes in BOC rules," making it even more important that the Directive be fully evaluated beforehand.[5]
    - As a possible alternative, we recommend a mission-based, time-limited variance that is subject to public comment, data-reporting, and evaluation.

We are hopeful that the Board and DOC will work together to create alternatives to long-term solitary confinement that emphasize rehabilitation, not punishment. As is, the request for enhanced supervision housing and accompanying Directive provide no assurances of this, and we strongly urge you to consider our recommendations before addressing the request for variance.

We look forward to working with the Board, DOC, and advocates on this matter, and thank you for considering our concerns.

Sincerely,

Donna Lieberman	Taylor Pendergrass	Deandra Khan
Executive Director	Senior Staff Attorney	Organizer

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[3] In fact, the DOC intends to eliminate the Department of Mental Health and Hygiene's "clearance" before assignment to punitive segregation; since we know solitary is especially harmful to individuals with a mental health status, many of whom are sentenced to isolation, it's important they be professionally and fully assessed before admittance into any given segregation unit. This attempt proposal may put vulnerable individuals at higher risk for harm. *See:* Letter from Ponte to Beilein, ibid., stating that 908 out of 1,054 individuals "waiting to serve punitive segregation time" have a mental health status.

[4] The DOC has asked the Board to vote on this variance at the next Board meeting on November 18, 2014; this does not provide adequate notice and time for public comment, nor have all interested parties been notified. Given the breadth of the changes proposed, and DOC's intent to eventually propose them as permanent changes in BOC rules, the Board should treat the variance as a petition to alter the Minimum Standards, which requires a comment period.

[5] Letter from Joseph Ponte, Commissioner of the New York City Department of Correction to Gordon Campbell, Chair of the Board of Correction, Request for Variance: Enhanced Supervision Housing (Oct. 22, 2014).

CC: Alexander Rovt, Vice-Chair
Greg Berman
Robert L. Cohen, M.D.
Hon. Bryanne Hamill
Michael J. Regan
Derrick Cephas
Jennifer Jones Austin
Steven Safyer, M.D.
Joseph Ponte, Commissioner of NYC Department of Correction

The Bronx Defenders | Redefining public defense.

November 10, 2014

Gordon Campbell
Chair
NYC Board of Correction
51 Chambers Street, Room 923
New York, NY 10017

Dear Mr. Campbell and Members of the Board of Correction,

I am writing to convey my organization's serious concerns regarding the Department of Correction's (DOC) request for variances from the Minimum Standards. While certain aspects of the Department's proposals to reduce violence at Rikers Island are promising, the establishment of Enhanced Supervision Housing (ESH) units – as currently described by the DOC – will expose individuals detained at Rikers to increased abuse. While controlled settings such as the Clinical Alternatives to Punitive Segregation (CAPS) program are critical for reducing violence at Rikers, the lack of adequate protections and programming for incarcerated people in ESH will cause this proposal to worsen the situation at Rikers rather than improve the conditions there. As the Department's use of solitary confinement has made clear, deprivation of social contact is unproductive toward both jail security and the rehabilitation of incarcerated people. Enclosed, please also find a copy of *Voices from the Box*, The Bronx Defenders' report on solitary confinement at Rikers Island.

Rule-Making Process

As an initial matter, The Bronx Defenders joins the Jails Action Coalition (JAC) in urging the Board of Correction to view the DOC's letter not as a request for variances to the Minimum Standards but rather as a petition for amendments to the Minimum Standards. Given the scope of the Department's request, the short notice given to interested parties to comment on the Department's proposal, and the Department's poor track record in its efforts to curb violence at Rikers, it is clear that the requirements of notice, comment, and a full public hearing are necessary for ensuring that the Department's plans moving forward reflect a genuine commitment to meaningful reform.

Punitive Segregation

The creation of any new housing units with increased lock-in time must correspond with an equal or greater decrease in solitary confinement units (referred to by the DOC as "punitive segregation"). While ESH has the potential to be a significant improvement upon solitary

confinement, this will only be true if at least one solitary confinement bed is removed from use for every ESH bed created. Similarly, the Department must clarify its plans for "punitive segregation lite" and the CAPS program before the Board can accurately assess the potential impact of ESH. The Board of Correction should push the DOC to invest in rehabilitative housing units such as CAPS and the new "Second Chance" unit as alternatives to solitary confinement instead of ESH. On account of the apparent absence of therapeutic and educational programming in ESH, I urge the Board to prohibit the DOC from placing individuals directly from solitary confinement into ESH. Incarcerated people who have experienced the trauma of solitary confinement should only be transferred to housing units where there is unimpeded access to mental health treatment as well as educational and therapeutic programming.

Criteria and Procedure for Entering ESH

The criteria for placement in ESH that the Department has listed are overboard. In particular, the criterion describing "inmates who otherwise have either engaged in violence or demonstrated involvement in serious gang activity" threatens to unfairly expose individuals whom correction officers merely suspect are dangerous to the restrictions of ESH. Indeed, the criteria that the Department has listed are so overbroad and the standards for meeting them so low that there is every reason to expect that in practice this policy would allow the Department to place individuals in ESH simply because they have fallen out of the favor of correction officers.

The hearing process for placements in ESH is also unfairly stacked against incarcerated people. The Department has proposed to replicate the hearing process that it uses for placements in solitary confinement. As we have discovered through interviews with over 60 of our clients, these hearings serve little purpose beyond allowing the DOC to falsely claim that it respects due process. The "independent adjudication officers" who preside over hearings are correction officers who have every reason to side with their peers in disputes against incarcerated people. Although the DOC claims that incarcerated people are permitted to call witnesses and present evidence, correction officers often deny these rights in practice. Furthermore, the standard of evidence for these hearings is unacceptably low. The Board should require that the Department provide clear and convincing evidence for any placement in ESH or solitary confinement and that all hearings be held before an administrative law judge.

Most significantly, the Department does not allow independent attorneys or advocates to represent incarcerated people in these proceedings. These hearings cannot be considered fair until incarcerated people have advocates preset to represent them. Finally, the Board of Correction should not permit the DOC to place individuals in ESH before the conclusion of

hearings. Otherwise, correction officers will be able to subject any individual on Rikers to ESH restrictions without providing justification.

Programming and Mental Health Treatment

Unless ESH involves increased access to educational and therapeutic programs compared to general population, as we understand is the case in CAPS, the potential of ESH to reduce violence at Rikers is exceedingly minimal. Given the repeated failures of the DOC to provide my organization's clients with adequate access to law library services and the total absence of programming in solitary confinement, I am extremely skeptical of the Department's claims that it will be able to provide these services to individuals in ESH. With the opening of the "Second Chance" unit at Rikers, the DOC has acknowledged the potential for positive programming to reduce violence at Rikers. The Department must drastically expand these types of programs if it hopes to implement restrictive housing units in a manner that will improve the conditions at Rikers.

The Department's request to omit mental health evaluations as a requirement for placements in ESH is shocking considering the abuses of mentally ill individuals at Rikers that have recently come to light. Restrictions of the type and degree that the Department is seeking to implement for ESH are only acceptable for individuals with mental illnesses if those restrictions are accompanied by comprehensive and therapeutic mental health treatment administered by competent mental health professionals. While the specific details of the CAPS program remain unclear, what little knowledge that Bronx Defenders advocates currently have of CAPS leads me to believe that the DOC should use this program or similar housing units as the only placement for individuals suffering from mental illness whom correction officers accuse of infractions.

Restrictions and Surveillance Related to Visitors, Packages, and Mail

The DOC's proposed restrictions for ESH relating to visitors, packages, and mail are unnecessary and will have broad and devastating consequences for individuals held at Rikers. The proposed "approved list of visitors" would give the Department the ability to prohibit visits from any individual with a criminal record. Given that most of the individuals detained at Rikers come from over-policed communities, this requirement would give the Department unfairly wide discretion to prohibit visits from family members and friends. Far from preventing violence at Rikers, depriving incarcerated people of visits would undoubtedly inflict serious psychological damage upon them and lead to increased tensions at Rikers as a result. As strong relationships with family and friends outside are crucial to successful reentry, this policy will also increase the likelihood of re-arrest upon release from jail. Likewise, there is no reason for the DOC to expand

existing restrictions on contact visits, which already prohibit visits for "inmates who have either used or possessed a scalpel or like blade while in custody under the present charge."

The Department's request to have families send packages through approved vendors will expose the families of individuals held at Rikers to exorbitant fees that many family members will likely be unable to afford. I recognize that the Department needs to prevent individuals from smuggling weapons into Rikers via packages, but the Department – not the families of incarcerated people – must bear any costs related to this goal. As the DOC is aware, there is no fail-safe method for keeping contraband out of jail and attempts to do so must be balanced with protecting incarcerated people's fundamental rights. If the recent Investigation Department inquiry is any indication, the DOC might be better served focusing on smuggling carried out by correction officers. Similarly, the DOC's request to waive the requirement of warrants for reading incarcerated people's mail is unnecessary, unfair, and likely unlawful. The Department has not articulated sufficient reasons to depart from its current policies regarding the surveillance of mail.

In conclusion, I urge the Board of Correction not to approve the DOC's request for variances to the Minimum Standards. The Board should only allow the DOC to create new housing units with increased lock-in hours if these new units include increased access to educational and therapeutic programming. Moreover, these units should be used in place of solitary confinement; any increase in restrictive housing must accompany a corresponding decrease in solitary confinement cells. The Board of Correction should require the DOC to commit in writing to a comprehensive plan that involves increased programming for incarcerated people, therapeutic alternatives to solitary confinement, and improved care for individuals suffering from mental illness.

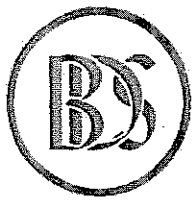
If you would like to speak with me regarding this matter, please do not hesitate to reach out to me at RobinS@bronxdefenders.org or at (718) 838-7852.

Sincerely,

Robin G. Steinberg

Robin Steinberg
Executive Director
The Bronx Defenders

Lisa Schreibersdorf
Executive Director



Brooklyn Defender Services

Mr. Campbell
Chair
NYC Board of Correction
51 Chambers Street
New York, NY 10007

Comments on "Request for Variance: Enhanced Supervision Housing"

Dear Mr. Campbell:

Brooklyn Defender Services, a public defender office in Brooklyn representing more than 40,000 people annually strenuously objects to both the process and the particulars of the Department of Corrections (DOC) proposed variance to implement permanent restrictive housing that will not comply with the Minimum Standards of custodial care as determined by the Board of Corrections (BOC) most recently updated in 2008[1].

The violence at Rikers Island cited in both the DOC letter dated October 22, 2014 and the recent U.S. Department of Justice report[2] is of great concern to us, as our clients are among those most frequently victimized by assault while in DOC custody. However, it would be short-sighted to respond to the current management crisis at Rikers Island through the hasty establishment of overly broad, poorly defined policies that isolate, punish and restrict a larger portion of the population before the DOC completes its own review, the BOC completes its on-going revisions to the Minimum Standards, and the public, and more importantly those most directly impacted by these changes – the people to be incarcerated in the proposed housing units – have a meaningful opportunity to contribute to the process. We respectfully request that the Board of Correction vote "NO" on the requested variance.

The proposed DOC directive calls for 250 Enhanced Supervision Housing (ESH) beds, to be filled by a group of detainees that remains vaguely and overbroadly defined. The DOC has asked to place hundreds of New Yorkers, innocent in the eyes of the law, into housing units that closely resemble Punitive Segregation for indeterminate stays. In essence, this variance is a request by

[1] http://www.nyc.gov/html/boc/downloads/pdf/minimum_standards.pdf

[2] http://www.justice.gov/usao/nys/pressreleases/August14/RikersReportPR/SDNY%20Rikers%20Report.pdf

the DOC for increased discretion to isolate and sanction, stripping detainees of the formal protections embedded in the current law. We ask that the BOC consider the gravity of such a request. The Department of Correction has been the subject of numerous investigations by federal and local agencies and the media, which have uncovered a persistent culture of corruption, negligence, and abuse of discretion. These serious issues have not only been committed by line staff, but by management as well, reinforcing a toxic and dangerous culture. Given these findings, it is our position that more external oversight is needed at this time, not less. Any alterations to the minimum standard of care of incarcerated New Yorkers should therefore be thoroughly vetted through the public administrative process rather than be shepherded through backchannels.

A variance is not the appropriate mechanism for implementing the permanent changes sought by the DOC. The DOC has not met its burden under section 1-15 of the Minimum Standards to show that it is unable to comply with current law. The Board of Correction has not met its mandate under 1-15 to consider "the position of all interested parties, including correctional employees, prisoners and their representatives, other public officials and legal, religious and community organizations." The DOC, in its own letter, acknowledges that its top-to-bottom assessment of the agency remains incomplete, and therefore admits it has not explored and analyzed all the relevant possibilities for maintaining order in these facilities absent a variance from the Minimum Standards.

The Board of Corrections is currently in the middle of the rule-making process to clarify the Minimum Standards of care for solitary confinement and punitive segregation. As such, this DOC variance request, when viewed alongside the agency's correspondence with the New York State Commission of Corrections, gives the impression that the DOC is making an end-run around the administrative process and undermining the BOC's authority to set and enforce minimum standards. Given the permanent nature of the DOC's proposal, the BOC should consider it as a petition for amendment to the Minimum Standards and follow the procedures set forth in Section 1043 of the New York City Charter, which require notice, comment, and a full public hearing. Perhaps by the date of this future hearing, the DOC will have completed its review of its facilities and programs and be better situated to request relief from the current law on the basis of a proper, fact-driven assessment.

In addition to a fundamentally flawed petitioning process, several specific aspects of the proposed variance are overbroad, invite further abuses and should be rejected. As it is presently constituted, the DOC proposal is not narrowly tailored as to who it targets for inclusion in the ESH. While the DOC's October 22, 2014 letter claims that only "major figures" of Security Risk Groups will be targeted for such placement, the actual language in the proposed directive includes anyone who has "participated in inmate disturbances while in Department custody," as well as anyone who "presents a significant threat to the safety and security of the department." With no limiting language or objective review, this discretionary language would permit the DOC to put almost anyone into the proposed housing simply due to loose associations and

speculations – not actual evidence of violence within DOC custody, which, we believe, should be required as the lowest benchmark for the initiation of any hearing to consider restrictive housing within the DOC. The Department indicates that it needs specialized housing for repeat offenders, and references 42 individuals as those who were involved in multiple assaults during the past year. Nevertheless, the agency seeks 250 beds – not 42 – foreshadowing the type of mission creep that created the crisis of solitary confinement in this country in the first place.

While acknowledging the need for "the most rigorous procedural protections," the DOC actually seeks to undercut the few standards that protect incarcerated people. Only upon request will a person committed to ESH be afforded a hearing to challenge their housing designation; at this hearing they will not have an attorney or advocate present and will have their case reviewed by a DOC employee. This does not appear to be an independent, fair adjudication of the facts. More disturbingly, there is no mechanism in the proposed directive for getting out of the ESH once a person has been designated to the unit. A wrong designation is therefore permanent. Indeed, prior assignment to the ESH is reason enough for inclusion in the unit during a subsequent stay at Rikers Island. It is imperative that people be afforded counsel during a hearing that will impact them for literally the rest of their lives. The DOC proposal falls well short of sufficient process for such punitive action.

The DOC's variance request includes the provision of services, such as religious instruction, educational services and law library access that we know from experience have not been adequately made available in other restrictive housing units such as Central Punitive Segregation, despite DOC promises of compliance. We have little reason to believe the DOC will be able to honor such promises in yet another solitary confinement unit, given their well-documented failures to do so currently. Further proposed deviations from the minimum standards such as no contact visits, visitor lists and the investigation of written correspondence should not be established outside of a hearing process that is fair, open and at **minimum** includes a right to counsel. The Department of Investigation recently reported that contraband, including weapons, is secreted into city facilities not by the visitors of those people awaiting trial, but by the DOC employees.

To conclude, we find the attempt by the DOC to circumvent the authority of the BOC through the use of this variance wholly inappropriate. The proposal seeks to establish a permanent housing unit and the appearance of a new category of care that can only be characterized as the "below minimum standards" for an overbroadly defined group of individuals. It is the role of the BOC, not the DOC, to set and enforce minimum standards of care. The DOC should not be permitted to establish unilaterally a housing unit that greatly restricts the rights, responsibilities and freedoms of people who have been convicted of no crime and may not have ever participated in a violent action, outside a formal administrative process. Should the DOC, following its thorough review of its infrastructure, programming and personnel conclude that it cannot resolve the agency's historical inability to maintain safety for those in its custody under the protections outlined by the Minimum Standards, then a full administrative process to update the standards

should be commenced with adequate time for all stakeholders – especially those people potentially losing their freedoms – to participate, as contemplated under current law.

Sincerely,

Lisa Schreibersdorf

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November 10, 2014

By E-mail

Board of Correction
51 Chambers Street, Room 923
New York, NY 10007

To the Board of Correction:

The NYC Jails Action Coalition (JAC) opposes the adoption of the Department of Correction's (DOC) requested "variances" described in DOC's October 22 and November 4, 2014 letters to the Board. We are alarmed that the Board plans to vote on this request at its November 18 meeting in the absence of any meetings with stakeholders and without having a full public hearing at which the concerns of incarcerated people, their families, friends, experts, and advocates can be heard and considered. We set out our procedural objections to the DOC's proposal in our November 4, 2014 letter to the Board.

The DOC proposal, and the Board's contemplated vote on November 18, is even more disturbing given that the Board committed itself more than a year ago to addressing the human rights abuses occurring in the City jails by initiating rulemaking regarding solitary confinement. To date, the Board has not produced its proposed rules on the subject, and the formal rulemaking process has not commenced. We are shocked that the Board – without having taken any action to limit the use of solitary confinement – would consider actually rolling back the Minimum Standards, which have been in place for decades to protect the rights of people incarcerated in the City jails, for the purpose of enabling the DOC to create a new type of highly restrictive and punitive housing.[1]

The DOC ties its request for variances from seven of the Minimum Standards to its proposed changes to the use of solitary confinement but demands that it be permitted to depart from the Standards before any limitations on the use of isolation are formally enacted – and without public opportunity for comment and input into proposed changes that dramatically affect family members and incarcerated individuals. This piecemeal and exclusionary approach should be rejected by the Board.

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[1] The Board's current standards should be understood as minimal protections for the treatment of human beings incarcerated in the City jails. Weakening these standards sanctions inhumane treatment that may be deemed cruel and unusual.

The Board has an obligation to consider the human dignity and rights of the individuals who could be subjected to the deprivations of the enhanced supervision housing (ESH) units. The Board must not accept DOC's assurances at face value but must instead carefully scrutinize the rationale for stripping away protections that have been adopted as *minimum* requirements governing the treatment of people incarcerated in the City jails. As an independent oversight agency, the Board has a responsibility to question DOC's assertion that restrictions on lock-out time, religious services, law library, visits, packages, and correspondence beyond what is permitted by the current standards are "the key to reducing violence."

Incarcerated people, especially young people, have been scapegoated as the reason for the violence in the jails for years. The Department of Justice's (DOJ) careful investigation revealed that DOC staff engaged in the "rampant use of unnecessary and excessive force."[2] The DOJ identified systemic deficiencies that are not only "largely responsible for the excessive and unnecessary use of force by DOC staff" but also "lead to the high levels of inmate violence."[3] Identified systemic inadequacies included: failing to report and false reporting about the use of force, inadequate investigations and discipline of staff, an inadequate classification system, problems with the grievance system, and multiple supervision, training, and management failures. If one needed confirmation of one role that staff play in Rikers' culture of violence – introduction of contraband, including deadly weapons – it was provided by last week's disclosure that a Department of Investigation employee posing as a correction officer was easily able to smuggle drugs, alcohol, and a razor blade through multiple layers of security. Just as significantly, the DOJ identified punitive housing areas as part of the problem and called the DOC use of prolonged punitive segregation of adolescents "excessive and inappropriate."[4] The DOC proposed "variance" belies reality by laying the blame for increased violence solely at the feet of incarcerated people, and actually seeks to provide additional opportunities to subject detainees to harmful isolation.

The DOC proposal reflects a totally punitive approach toward the people incarcerated in the ESH with no concern for their well-being or respect for their humanity. Despite the DOJ findings, the DOC fails to acknowledge that some individuals who are convicted at disciplinary hearings for assaulting staff are actually victims of assault by correction staff, and it does not provide any procedure through which individuals can meaningfully challenge their placement in an ESH unit. The Board must not accept the DOC assertion that there are at least 250 people who are such extreme security threats that they must be deprived of all of their heretofore minimal protections, throughout the entirety of their jail stay, no matter the length of stay or their good or improved

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[2] CRIPA Investigation of the NYC DOC Jails on Rikers Island, U.S. Department of Justice, August 4, 2014, p. 3.

[3] CRIPA Report, p. 4.

[4] Although the DOJ focused on the adolescent population, it noted that its investigation "suggests that systemic deficiencies identified in this report may exist in equal measure at the other jails on Rikers." CRIPA Report, p.3. Indeed, an 11-month study completed by Department of Health and Mental Hygiene (DOHMH) found that 129 incarcerated people experienced serious injuries in altercations with DOC staff. In 80% of the cases in which incarcerated people were interviewed by DOHMH staff, the beatings reportedly occurred after the incarcerated person was handcuffed.

behavior. This is especially the case given that the DOC proposal does not require any showing that people held in the ESH actually pose an ongoing threat to any facility's safety and security.

The JAC rulemaking petition specifically provided for a disciplinary system that provided incentives for positive behavior and segregated housing in which programming was offered and was tailored to the individual's needs, designed to reduce violent behavior, and non-punitive in nature. JAC recommends a system that promotes behavioral change by reinforcing positive behavior rather than relying entirely on punishment. Implementation of progressive, positive reinforcement options should be part of the Board's deliberation. The Board's own experts endorse this view:

> One of the commonest mistakes made about punishment is that it prevents or deters violence. On the contrary, more than a century of research on the psychology of punishment has made it clear that punishment, far from preventing violence, is the most powerful tool we have yet created for stimulating violence. Repeated studies of child development, for example, have shown that the more severely children are punished, the more violent they become, both as children and as adults.[5]

We question whether creating restrictive units will actually reduce violence. These punitive units, in which everyone housed there is viewed as the worst of the worst, have the potential to breed more violence and increase conflict between staff and incarcerated individuals. People placed in these units have little incentive to comply with jail rules given that there is no mechanism for release from the ESH back into general population or any possibility of having even some of the restrictions lifted.

Before the Board can sanction punitive restrictions such as would be placed on the individuals in ESH, it must consider the following:

Overly Broad Commitment

The overly broad guidelines set by DOC to determine who is committed to the ESH invite the abuse of discretion from a City agency that, according to the DOJ CRIPA report, has a recent history of doing exactly that – specifically with regard to segregation. As noted above, the DOJ found that the DOC use of segregation and isolation to manage its adolescent population was "excessive and inappropriate." The criteria for being placed in the ESH as outlined in the proposed directive are so broad as to include any person that DOC staff finds to have participated in "inmate disturbances." The DOC plan proposes punishing people based solely on associations or information gleaned from "confidential informants" which people will not have the opportunity to dispute. We routinely see entire cellblocks assaulted by correction officers and written up for disturbances following a fight between only small groups.

Nowhere in the proposed directive does the DOC require a person to have actually engaged in violent behavior during his or her current incarceration in order to be included in the ESH. The

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[5] Report to the New York City Board of Correction by Drs. James Gilligan and Bandy Lee, September 5, 2013, p. 5.

adjudication hearings proposed as a suggestion for due process will be presided over by DOC employees and do not provide for counsel or any other advocate. We are not confident that the individuals who DOC claims pose "the most direct security threats" in fact do, and further submit that no actions, even violent ones, merit the life-long restrictions to civil rights and freedoms suggested in the variance without more robust due process that includes oversight from independent agencies. On the front end, the directive certainly does not require DOC to make any showing that a person proposed to be placed in ESH poses a security threat. And on the back end, the directive provides no path for a periodic review of whether the individual remains a security threat or whether the person could be transferred out of an ESH unit and back to general population. There is no mention of an appropriate and meaningful remedial process.

The proposed restrictions are substantial, seeking significant departures from standards of care that for decades have been considered the bare minimum of what is legally permitted. The Board must weigh the purported advantages of the restrictions for reducing violence against the costs of these deprivations to the individuals subjected to them. Such consideration should include an examination of exactly how the proposed restriction would achieve the purported goal. The Board must include, in weighing such cost, the concerns of the individuals who would possibly be subjected to them – incarcerated people, formerly incarcerated people, and their family members.

Religious Services

The proposed restriction on religious services is the same as that which is imposed on individuals in solitary confinement. The Board must consider whether it is appropriate to limit the exercise of religious expression without any specific documented act of misconduct. The Board should ask its staff to collect information about the difficulty of accessing religious services in solitary confinement. In considering the importance of congregate religious services and the practical realities of accessing religious services while in a restrictive unit, the Board should have the benefit of the views of the religious community, as well as, currently and formerly incarcerated people who can speak to the difficulty of accessing services.

Law Library

DOC proposes applying the law library restrictions in place in the solitary confinement units to the ESH units. DOC claims that "adequate services can be provided to inmates within their cells." Yet, that is not the reported experience of many individuals who have been in segregation.[6] The Board is certainly aware that services that are required to be provided in segregation – such as recreation – are not.[7] Before making any decision on restricting law library access in ESH units, the Board staff should gather data about the adequacy of the law library services currently provided to people in solitary confinement. In addition, receiving testimony

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[6] For example, in Michael Ellison's statement to the Board of Correction which was provided at the March 11, 2014 Board meeting, he described the inadequacy of law library in solitary confinement at Rikers Island as follows: "there is almost no access to the law library. We get copied papers out of the books but this is distributed at random. A guy comes around and distributes copies of pages of books. I think that the law library access should be taken a lot more seriously."

[7] *Barriers to Recreation at Rikers Island's Central Punitive Segregation Unit*, City of New York Board of Correction Staff Report, July 2014.

from people who have been placed in solitary confinement about their access to law library is vital.

Visit Restrictions

The Board certainly needs to hear from the community before taking away the ability for contact visits. Visiting incarcerated loved ones helps families stay together, promotes better reintegration into the community upon release, and reduces recidivism. DOC claims that the across-the-board ban on contact visits is justified by the need to keep out contraband but provides no data about the number of weapons that enter the facility through visitors. The DOC already subjects visitors to onerous search procedures. The DOC completely ignores the fact that contraband is more likely to enter the jails through the staff who are not routinely screened.[8] The DOC has the authority under the current standards to deny contact visits when there is evidence that it is warranted.

For DOC to create units in which no one can ever have contact visits, no matter the reason for their placement, their length of stay, or how well they follow rules is inhumane. The Board needs to hear from family members about what it means to see your son through a barrier and not be able to hug him no matter how long he is awaiting trial or what it is like for a child not to be able to touch her parent, child or other loved one.

Placing restrictions on who may visit an incarcerated person has the potential to deny some individuals of all family contact. Given the realities of mass incarceration, many people in this City have a criminal record. The Board should not accept the DOC assertion that it "has struck the proper balance between the security needs of a facility and the inmate' [sic] rights to maintain contact with family and friends" without hearing directly from incarcerated people, formerly incarcerated people, and their families and friends.

Packages

Performing thorough contraband searches is not that difficult. The DOC ignores the hardship that its proposed package restriction will have on poor families. Instead of being able to provide items that the family already owns, they will be required to purchase them (paying the price of the vendor) and pay for the shipping as well. Such a restriction should not be imposed without hearing directly from those affected and weighing their concerns.

Correspondence

Unfettered monitoring of all written correspondence of everyone placed in the ESH unit without some individualized suspicion that the correspondence is a threat to the safety or security of the

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[8] The *New York Times* reported on November 4, 2014, that a newly released Department of Investigation report indicates that visitors to City jails may be the source of some contraband, but that a large proportion of the illegal trafficking is carried out by uniformed guards and civilian employees: "Given the extent of smuggling that we know goes on and given what we know about what's coming in from visitors, a lot of stuff has to be coming in from guards and employees because this stuff doesn't magically appear," said Mark Peters, the Department of Investigation commissioner. The article is available at: http://www.nytimes.com/2014/11/07/nyregion/rikers-island-undercover-investigator-contraband-inquiry.html?hp&action=click&pgtype=Homepage&module=second-column-region&region=top-news&WT.nav=top-news.

facility entirely deprives individuals of any privacy in their communications and provides for the possibility of information obtained to be improperly used by correction staff.

Procedural Protections
The DOC proposed procedural protections are plainly inadequate. In the JAC petition to the Board, we proposed a hearing process that would remedy some of the deficiencies in the current disciplinary hearing process. Such proposed improvements included:

- Trained independent and impartial hearing officers who are not employed by DOC;
- Permitting the person facing a possible penalty of segregation to present evidence, and call and cross-examine witnesses; and
- Offering the person facing a possible penalty of segregation the services of an attorney or a trained and competent advocate familiar with the disciplinary hearing process and not employed by the DOC.

Before extensive indefinite restrictions are imposed on an individual, a fair process through which an individual can challenge the assertion that she or he is a security threat must be afforded.

Lack of Exclusion for Vulnerable Populations
The DOC proposal lacks specific protections for vulnerable populations, such as adolescents, people with mental illness, developmental and intellectual disabilities, and people with physical disabilities. Although DOC has promised to end the placement of 16 and 17 year olds in solitary confinement, the proposal provides no assurance that these individuals will not wind up in the ESH restrictive units. In addition, while DOC has promised to review the treatment of individuals with mental illness in the jails, DOC's draft directive actually states that incarcerated people with mental illness "are not automatically excluded from placement in ESH."

Lack of Services for People with Disabilities
We are deeply concerned that there are no specific provisions regarding mental health treatment in these units. Inadequate mental health treatment in segregation units has plagued the City jails, and the systemic neglect of people with mental illness in the jails has led to tragic deaths. In addition, we are concerned that DOC has not made any commitment to provide services and supports to people with disabilities who may be placed in ESH. The Department of Mental Health and Hygiene should be included in the design of these units. Moreover, the Board must take into account the views of treatment professionals, mental health advocates, educators, and people directly affected about necessary accommodations to ensure that the rights of individuals with disabilities are fully protected.

Lack of Procedures for Ensuring Access to Education
Young people are entitled to receive a free public school education until age 21, or receipt of a high school diploma, whichever comes first. This education must be offered in a *safe and secure learning environment.* Currently DOC does not provide adequate educational services in punitive

segregation. The draft directive does not describe how DOC will comply with its obligation to provide education in ESH.

Conclusion

The proper response to the DOC's "request for variance" is to deny it in full at the November 18 Board meeting; to expedite the Board's plan to regulate the use of solitary confinement; and to consider any proposed amendments to the Minimum Standards by following the procedures set for in Section 1043 of the New York City Charter, which require notice, comment, and a full public hearing.

Thank you for considering our comments.

Sincerely,

NYC Jails Action Coalition Members

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November 10, 2014

Gordon Campbell, Chair
Amanda Masters, Acting Executive Director
New York City Board of Correction
51 Chambers Street, Rm. 923
New York, NY 10007

Re: Department of Correction, Request for Variance: Enhanced Supervision Housing (Oct. 22, 2014); Department of Correction, Supplemental Information: Enhanced Supervision Housing Variance Request (Nov. 4, 2014); Department of Correction, Directive: Enhanced Supervision Housing

Dear Mr. Campbell and Ms. Masters:

Disability Rights New York (DRNY) submits the following comments regarding the New York City Department of Correction's (DOC) "Request for Variance" related to Enhanced Supervision Housing.

The "Request for Variance" implicates numerous significant issues of concern for incarcerated individuals with disabilities. As DRNY has already discussed in its November 5 letter to Chairman Campbell (a copy of which is enclosed), the process being used by the Board of Correction to address the "Request for Variance" is at odds with both good governance and basic fairness, given the short time period for comments to and public discussion before the Board. This letter discusses DRNY's substantive concerns with the proposed Enhanced Supervision Housing unit and identifies issues left unaddressed by the DOC, but which must be seriously considered by the Board in its evaluation of the DOC's "Request for Variance."[1]

DRNY is New York State's designated Protection and Advocacy system, with federal and state authority to ensure the protection of the rights of individuals with disabilities, investigate complaints of abuse and neglect, and pursue appropriate remedies under the Protection and Advocacy for Mentally Ill Individuals Amendments Act, the Developmental Disabilities Assistance and Bill of Rights Act, the Rehabilitation Act Amendments of 1992, and New York Executive Law § 558.[2] DRNY is currently monitoring and investigating DOC

[1] DRNY also supports the substantive arguments set forth in the comments submitted by the Legal Aid Society and the Jails Action Coalition.

[2] 42 U.S.C. § 10801 *et seq.*; 42 U.S.C. § 15041 *et seq.*; 29 U.S.C. § 794e; N.Y. Exec. Law § 558(b).

facilities and offers the following comments within the context of DRNY's determination that there is probable cause to believe that incidents of abuse and neglect, defined in DRNY's authorizing statutes and regulations, have occurred at Rikers Island.[3]

*

The DOC plans to establish a new unit called Enhanced Supervision Housing (ESH) to provide for the indefinite, segregated confinement of as many as 250 individuals. Thus, the DOC seeks authorization to scale back Minimum Standards governing the number of hours of cell confinement; social interaction during visitation; mail, library and ministerial services; and procedural protections regarding placement in segregation.[4]

DRNY understands that the DOC's plan for ESH is one of several reforms aimed at reducing violence at Rikers Island.[5] DRNY agrees that the reduction of violence must be a priority. Individuals with disabilities are generally deeply vulnerable to abuse in correctional settings.[6] More importantly, at Rikers Island, violence disproportionately impacts our clients.[7] Therefore, the DOC appropriately identifies violence-reduction as a goal. However, the expansion of segregation units raises serious concerns given that individuals with mental illness are overrepresented in segregation[8] and prolonged isolation causes severe harm to the emotional and physical well-being of individuals.[9]

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[3] *See* 42 U.S.C. § 10802 (defining abuse and neglect of individuals with mental illness); *see* 45 C.F.R. § 1386.19 (defining abuse and neglect of individuals with developmental disabilities).

[4] Letter from Joseph Ponte, Comm'r of the New York City Dep't of Corr. to Gordon Campbell, Chair of the Bd. of Corr., Request for Variance: Enhanced Supervision Housing (Oct. 22, 2014).

[5] Letter from Joseph Ponte, Comm'r of the New York City Dep't of Corr. to Gordon Campbell, Chair of the Bd. of Corr., Supplemental Information: Enhanced Supervision Housing Variance Request 1 (Nov. 4, 2014).

[6] As courts have recognized in litigation concerning the federal rights of individuals with disabilities, people with disabilities may be exploited by others or disciplined although they have been victims of neglect. *See generally Clark v. California*, 739 F. Supp. 2d 1168, 1201-1205 (N.D. Cal. 2010) (discussing the evidence in California prisons that individuals with developmental disabilities are vulnerable to abuse based on their disabilities and that prisoners participated in the prison economy when they were denied adaptive supports from staff).

[7] *See* Michael Winerip & Michael Schwirtz, *Rikers: Where Mental Illness Meets Brutality in Jail*, N.Y. TIMES, July 14, 2014 (explaining that 77 percent of serious physical injuries are suffered by individuals with a mental health diagnosis).

[8] *See* New York City Bd. of Corr., Fact Sheet No. 2014/01, Infracted Mentally Ill Prisoners in NYC Department of Correction Custody: One-day Snapshot (Jan. 13, 2014) (reporting that nearly 62.6 percent had received a mental health diagnosis).

[9] Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124 (2003); Fatos Kaba, Andrea Lewis, Sarah Glowa-Kollisch, James Hadler, David Lee, Howard Alper, Daniel Selling, Ross MacDonald, Angela Solimo, Amanda Parsons, & Homer Venters, *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 Am. J. Public Health 442, 445 (2014).

I. The Integration Mandate of the Americans with Disabilities Act

Based on information contained in the DOC's letters dated October 22 and November 4 and the draft Directive on Enhanced Supervision Housing, the DOC's proposal raises serious questions regarding compliance with the integration mandate of the Americans with Disabilities Act (ADA), because individuals with mental illness or other disabilities may be inappropriately placed in long-term indefinite segregation without access to needed supports and services.[10] As discussed below, we have particular concerns about the criteria for placement in ESH, the lack of exclusions for individuals with disabilities, the lack of mental health services and other services and supports, as well as the culture that the DOC is institutionalizing through the creation of this unit.[11]

Under Title II of the ADA, which applies to jails and prisons,[12] "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[13] In addition, housing must be provided in "the most integrated setting appropriate to the needs of individuals" with disabilities.[14] As Congress and the Supreme Court have explained, unjustified segregation when placement in a more integrated setting is appropriate and can be reasonably accommodated is a form of prohibited discrimination.[15] Jail systems are required to implement reasonable policies, including approaches that prioritize therapy and other appropriate services over punitive responses,[16] to ensure that individuals with disabilities have access to appropriate housing and services.[17] Jails

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[10] 42 U.S.C. § 12132. *See* 28 C.F.R. § 35.152(b)(1) ("Public entities shall ensure that qualified inmates or detainees with disabilities shall not, because a facility is inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of, the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity."); *see id.* § 35.152(b)(2) ("Public entities shall ensure that inmates or detainees with disabilities are housed in the *most integrated setting* appropriate to the needs of the individuals.") (emphasis added).

[11] We believe the discourse used by the DOC, which includes the implication that individuals who are placed in ESH are "presumptive predators," is counterproductive to the goal of reducing violence. Letter from Joseph Ponte, *supra* note 4, at 2. Given the culture of violence at Rikers Island, we believe that such language heightens the risk of abuse and neglect.

[12] *Pennsylvania Dep't of Corr. v. Yesky*, 524 U.S. 206 (1998).

[13] 42 U.S.C. § 12132.

[14] 28 C.F.R. § 35.152(b)(2). *See also id.* § 35.152(b)(3) (requiring implementation of "reasonable policies" to ensure that individuals are in accessible, safe, and appropriate housing).

[15] *Olmstead v. Zimring*, 527 U.S. 581, 588, 597, 607 (1999).

[16] *See Clark*, 739 F. Supp. 2d at 1179 (noting that the ADA "requires that prison staff try to counsel [inmates with developmental disabilities], rather than subject[] them to the disciplinary process, when they break prison rules they do not understand").

[17] *See* 28 C.F.R. § 35.130(b)(7) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public

are also required to ensure effective communication with individuals with disabilities, including by making available aids and services that will enable individuals to equally participate in programs and activities.[18]

II. Concerns

Indefinite segregation of a large group of people that may include individuals with mental illness and other disabilities under extreme restraints and punishing conditions raises concerns about compliance with the ADA's integration mandate.[19]

a. Criteria and placement procedures

The DOC's proposed procedures indicate that individuals with mental illness may be admitted to ESH.[20] There is also reason to believe that individuals with disabilities will be swept into the ESH under the DOC's broad criteria, because individuals with mental illness have been charged with and punished for "assaults" or "disturbances" and related conduct,[21] including in cases where therapy and other services, not punishment, for disability-related conduct is the response mandated by the ADA.[22] Most troubling in the DOC's October 22 and November 4 letters and accompanying Directive is the omission of any diversion for individuals with serious mental illness and individuals with other significant mental or physical impairments. In addition, though not explained in the letters to the Board, the DOC has informed the State Commission on Correction that it is considering abolishing a clearance procedure by mental health staff prior to an individual's admission to 30-day punitive segregation in the Central Punitive Segregation

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entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.").

[18] *See* 28 C.F.R. § 35.160(b)(1) ("A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.").

[19] 28 C.F.R. § 35.152(b)(2).

[20] The DOC's letter indicates that individuals with mental illness who have served punitive segregation sentences in the Restricted Housing Unit may subsequently be placed, on an indefinite basis, in the ESH. Directive: Enhanced Supervision Housing, pg. 2.

[21] *See* Winerip & Schwirtz, *supra* note 7 ("Inmates with mental illnesses commit two-thirds of the infractions in the jail, and they commit an overwhelming majority of assaults on jail staff members."); *see also* Department of Health & Mental Hygiene, Common Variables Associated with Splashing of Health Staff (n=37) 2014 (on file) (indicating that 89% of patients accused of splashing fluids on staff had a mental health diagnosis); Letter from Joseph Ponte, Comm'r of the New York City Dep't of Corr. to Thomas A. Beilein, Chairman, New York State Comm. of Corr. 1 (Oct. 24, 2014) (stating that 908 out of 1,054 individuals "waiting to serve punitive segregation time" have a mental health diagnosis).

[22] We are particularly concerned that individuals experiencing crisis face excessive force and discipline, rather than therapeutic intervention. *See, e.g.*, Winerip & Schwirtz, *supra* note 7 (noting that a prisoner, who attempted suicide and was beaten severely by staff, was then charged with "physically resisting staff").

Unit (CPSU) and the Restricted Housing Units,[23] despite the harm that even short periods of isolation may cause to a vulnerable individual.[24]

The ADA requires the implementation of reasonable policies that account for the severity of an individual's disability with respect to housing. The overly broad criteria for placement in ESH, lack of pre- and post-admission mental health assessment, lack of exclusion for individuals with a mental health diagnosis, and lack of a procedure requiring consideration of more integrated, less restrictive settings prior to admission to ESH is contrary to the integration mandate of the ADA and exposes individuals with disabilities to an unacceptable risk of abuse or neglect.

b. Mental health and other services and supports

The DOC's letters to the Board and the draft Directive provide no explanation regarding mental health or other supports and services to individuals who may be placed in ESH. There is only a notation that indicates the DOC will relocate individuals experiencing a severe mental health crisis requiring suicide observation.[25] The DOC has provided no information, for example, about mental health staffing, the frequency of mental health rounds, staff training, and the therapeutic programs or other supports that will available in the ESH. Because the DOC has indicated there is no exclusion for individuals with mental illness, we evaluate the DOC's proposal for the ESH on the assumption that our clients may be admitted to the ESH.

While conditions in the ESH differ from the isolation in the CPSU as far as lock-in hours are concerned,[26] the ESH may exact a psychological toll on individuals because of the indefinite nature of the segregation placement, which deprives individuals with stability, and because of the highly restrictive regime to which individuals will be subjected.[27] The absence of any discussion about mental health services and other supports is particularly concerning, given that individuals with disabilities are entitled to receive the supports that will enable them to participate equally in services, programs, or activities.[28] In the context of a segregation unit, there should be adequate

[23] Letter from Joseph Ponte, *supra* note 21, at 2.

[24] *See, e.g.*, Paul Grondahl, *Selkirk Man, 21, Takes Own Life in Prison Cell*, TIMES UNION, Nov. 5, 2014, *available at* http://www.timesunion.com/local/article/21-year-old-state-prisoner-from-Selkirk-hangs-5870531.php (explaining that a 21-year-old man committed suicide after several days of solitary confinement).

[25] Directive: Enhanced Supervision Housing, *supra* note 20, at 2.

[26] In the ESH, an individual will be confined behind a solid door that is equipped with a food slot for at least seventeen hours a day. Letter from Joseph Ponte, *supra* note 4, at 2; New York City Bd. of Corr. Minutes (July 8, 2014), *available at* http://www.nyc.gov/html/boc/downloads/pdf/Minutes/BOCMinutes_20140708.pdf. However, onerous restraints and searches may effectively deter people from seeking one hour of outdoor recreation. *Cf.* NEW YORK CITY BD. OF CORR., BARRIERS TO RECREATION AT RIKERS ISLAND'S CENTRAL PUNITIVE SEGREGATION UNIT 15 (2014) ("The cumbersome process of escorting prisoners to and from recreation, coupled with the small number of recreation officers on duty at a time, limits the number of prisoners who can participate in recreation on any given day.").

[27] Letter from Joseph Ponte, *supra* note 4; Directive: Enhanced Supervision Housing, *supra* note 20, at 5-7.

[28] 28 C.F.R. §§ 35.130(b)(7), 35.152(b).

supports to enable individuals with disabilities to cope with environmental stressors, such as isolation.[29] In addition, as written, the DOC's proposal places individuals at risk of harm, because while the DOC's proposes medical evaluation for the use of enhanced restraints,[30] there appears to be no provision for evaluation by a mental health professional regarding whether mental health recovery may be negatively impacted.[31]

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Thank you for considering the concerns shared in this letter. DRNY welcomes the opportunity to answer any questions you may have.

Sincerely,

Elena Landriscina
Staff Attorney

Mark Murphy
Attorney at Law
PAIMI Director

Encl: DRNY Letter November 5, 2014

cc: Gordon Campbell, Chair
Alexander Rovt, Vice-Chair
Greg Berman
Robert L. Cohen, M.D.
Hon. Bryanne Hamill
Michael J. Regan
Derrick Cephas
Jennifer Jones Austin
Steven Safyer, M.D.

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[29] *See* Haney, *supra* note 9, at 130-37 (describing the psychological effects of solitary confinement); *see also* Jo Nurse, Paul Woodcock, & Jim Ormsby, *Influence of Environmental Factors on Mental Health within Prisons: Focus Group Study*, 327 BMJ 1, 4 (2003) ("Long periods of isolation with little mental stimulation in a remand prison contributed to intense frustration and anger and may influence the use of drugs to relieve tedium.").

[30] Directive: Enhanced Supervision Housing, *supra* note 20, at 5-6.

[31] *See* Susan M. Gray, Christopher W. Racine, Christopher W. Smith, & Elizabeth B. Ford, *Jail Hospitalization of Prearraignment Patient Arrestees with Mental Illness*, 42 J. AM. ACAD. PSYCHIATRY LAW 75 (2014) (noting that restrictions, including daily and random room and person searches, shackling at wrists and ankles for all movement off the unit are "often countertherapeutic" for individuals with mental illness).

URBAN JUSTICE CENTER

[redacted]

November 10, 2014

By E-mail

Gordon Campbell, Chair
Members of the Board
NYC Board of Correction
51 Chambers Street, Room 923
New York, NY 10007

Re: Department of Correction's Request for Variance to Minimum Standards

Dear Mr. Campbell and Members:

The Urban Justice Center urges the Board to vote against the Department of Correction's (DOC) requested variances as described in the DOC's October 22 and November 4, 2014 letters to the Board. We have signed on to the letter submitted by The Legal Aid Society, and we endorse the concerns raised in the letters submitted by the New York City Jails Action Coalition and Disability Rights New York. We write separately to highlight additional concerns about the possible placement of incarcerated people with mental illness in DOC's proposed Enhanced Supervision Housing (ESH).

The Urban Justice Center Mental Health Project has focused on the needs of people with mental illness in the criminal justice system for more than fifteen years. We are deeply familiar with the difficulties people with mental illness have within correctional facilities and in accessing essential mental health services, housing, and benefits upon release. We regularly conduct interviews of individuals receiving mental health treatment in the City jails.

We are very concerned that DOC has no intention of categorically excluding people with mental illness from ESH. Although the DOC draft directive states that the ESH shall not be used as a "punitive segregation housing unit," the ESH is simply a different form of restrictive housing. Everyone confined there will have half as many hours out of cell as the general jail population and will endure significant restrictions on religious services, law library, visits, packages, and correspondence for the duration of their incarceration.

Placement in punitive, restrictive units puts people with mental illness at risk for abuse and neglect by DOC staff and inhibits their ability to receive appropriate mental health treatment. The history of providing mental health treatment in punitive units in the City jails is abysmal and should be considered by the Board in determining DOC's variance request.

The Mental Health Assessment Unit for Infracted Inmates (MHAUII), the solitary confinement units where most individuals with mental illness were placed before the units were closed at the end of 2013, was plagued by violence. (See attached testimony from April 4, 2013 City Council

hearing on violence in the NYC jails for a detailed description of the problems with MHAUII.) Despite Department of Health and Mental Hygiene (DOHMH) policy requiring that people in MHAUII receive individual and group therapy and psychotropic medication as clinically indicated, including no less than one individual interview per week, people in MHAUII rarely received such treatment on a consistent basis. DOC staff exercised complete control over the units, even determining which MHAUII detainees were allowed to come out of their cells to participate in group therapy.

The Restrictive Housing Unit (RHU), which was created as an alternative to MHAUII, has conflicting goals of punishment and treatment. The Board's own experts were highly critical of the RHU,[1] and it has been acknowledged as a failure by both DOC and DOHMH. These units are frequently locked down, and when they are, the people housed there regularly miss their medication and mental health appointments.

Non-punitive approaches have proven much more successful in addressing behavioral issues of people with mental illness. The Clinical Alternative to Punitive Segregation (CAPS) units, where some people with serious mental illness are transferred in lieu of being placed in disciplinary confinement, have succeeded because they are therapeutic environments. Steady mental health staff offer programming throughout the day. Problematic behavior on the unit is addressed and deescalated by mental health staff, with DOC staff becoming involved only in extenuating circumstances when necessary to respond to a potentially dangerous situation.

By including people with mental illness in the highly restrictive ESH, DOC completely ignores what has proven effective in working with people with mental illness – a therapeutic rather than punitive approach. The ESH units will most certainly be environments in which every person incarcerated there will be viewed as a threat. Because the purpose of the unit is to contain individuals who are considered security risks, DOC staff are likely to treat the people in the ESH harshly and view any misbehavior as willful. Given that people with mental illness in the City jails are more likely to be victims of DOC staff violence in general,[2] individuals with mental illness in the ESH are at even greater risk.

The composition and design of the units suggests that incidents between incarcerated people and staff and among incarcerated people will be common. Even if individuals with mental illness are not directly involved in these incidents, their ability to access mental health treatment is likely to suffer. Lockdowns on units prevent individuals from being escorted from the unit to mental health appointments in the clinic and keep medication from being provided on a timely basis. Even when mental health staff go to the units, they cannot provide effective treatment to

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[1] Report to the New York City Board of Correction by Drs. James Gilligan and Bandy Lee, September 5, 2013, pp. 10-11.

[2] DOHMH's 11-month study found that 129 incarcerated people experienced serious injuries in altercations with DOC staff. Seventy-seven percent of those injured had a mental health diagnosis. *See* "Rikers: Where Mental Illness Meets Brutality in Jail," *The New York Times*, Michael Winerip and Michael Schwirtz, July 14, 2014, available at: http://www.nytimes.com/2014/07/14/nyregion/rikers-study-finds-prisoners-injured-by-employees.html?src=xps.

individuals whom DOC will not permit to be escorted out of their cells to meet with mental health staff in a confidential setting.

The Mental Health Minimum Standards require that adequate mental health care "be provided to inmates in an environment which facilitates care and treatment, provides for maximum observation, reduces the risk of suicide, and is minimally stressful." § 2-04(a). The ESH is not such an environment.

The Board should deny the DOC variance request at its November 18 meeting and encourage DOC to move away from punitive approaches and towards trauma-informed correctional care.

Sincerely,

Jennifer J. Parish
Director of Criminal Justice Advocacy
Mental Health Project

Doug Lasdon
Executive Director

Enclosure

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New York City Council
Committee on Fire and Criminal Justice Services

Oversight Hearing – Examining Violence in New York City Jails

Thursday, April 4, 2013
250 Broadway, 16th Floor Committee Room

Testimony of Jennifer J. Parish
Director of Criminal Justice Advocacy
Urban Justice Center / Mental Health Project
JParish@urbanjustice.org
(646) 602-5644

My name is Jennifer Parish. I am the director of criminal justice advocacy at the Urban Justice Center Mental Health Project. I am also a member of the New York City Jails Action Coalition, which promotes human rights, dignity, and safety for people in the city jails.

The Urban Justice Center Mental Health Project has focused on the needs of people with mental illness in the criminal justice system for more than a decade. We are deeply familiar with the difficulties people with mental illness have within correctional facilities and in accessing essential mental health services, housing, and benefits upon release.

About one-third of the city jail population receives mental health treatment. More than 40% of those who receive such treatment meet New York State Office of Mental Health criteria for "Serious and Persistent Mental Illness."[1] People with mental illness are more likely to be victimized by staff and other incarcerated people,[2] have difficulty complying with jail rules,[3] and stay in jail considerably longer than people without mental illness.[4] Among incarcerated people

[1] Emily Turner, (2012), "Improving Outcomes for People with Mental Illnesses Involved with New York City's Criminal Court and Correction Systems" Council of State Governments Justice Center, http://consensusproject.org/documents/0000/1633/FINAL_NYC_Report_12_22_2012.pdf, p. 7 [hereinafter "CSG Justice Center Report"].

[2] According to an analysis conducted by the New York City Department of Health and Mental Hygiene ("DOHMH"), incarcerated people receiving mental health treatment were five times more likely to have an "injury visit" than the general jail population. The Department of Correction is required to bring incarcerated people to the clinic for an "injury visit" after a use of force by staff or involvement in a jail incident such as a fight. Andrea Lewis to Homer Venters, Memorandum, March 14, 2012, Medical Informatics, New York City Department of Health and Mental Hygiene/Correctional Health Services [hereinafter "DOHMH. Analysis"].

[3] Thirteen percent of those receiving mental health treatment spent some time in punitive segregation compared to six percent of the general population. DOHMH Analysis, p. 1.

[4] CSG Justice Center Report, p. 3.

receiving mental health treatment, those who were evaluated for injury after a use of force or involvement in jail incidents had significantly longer periods of incarceration than those without such evaluations.[5]

The New York City Department of Correction ("DOC") has a responsibility to create an environment in the jails that ensures the safety of everyone – both incarcerated individuals and staff members. By their actions and demeanor, correction staff can defuse tensions and prevent hostilities from boiling over into violence, or they can light the match. Currently provocation and abuse of authority seem to be the dominant approach.

Nowhere is this attitude more prevalent than in the solitary confinement units in the city jails.

DOC punishes people who violate jail rules by subjecting them to solitary confinement, isolation in a cell for 22 to 24 hours a day (what DOC refers to as "punitive segregation"). People with mental illness are not exempted from this practice. When an individual with mental illness is sentenced to solitary confinement, a mental health clinician determines whether he or she needs to be monitored by mental health staff while in "punitive segregation." If so, the person is transferred to a Mental Health Assessment Unit for Infracted Inmates ("MHAUII"). At the George R. Vierno Center ("GRVC"), MHAUII has capacity for 200 men convicted of infractions and sentenced to solitary confinement. In major respects, MHAUII is no different from the Centralized Punitive Segregation Unit. In fact, at Rose M. Singer Center ("RMSC"), women in MHAUII are on the lower floor of the two-story punitive segregation unit. The physical layout is the same: individuals are held in small cells with a bed, sink, and toilet; isolated from others; and condemned to idleness.

Limited mental health treatment is provided in MHAUII. According to DOHMH policy, people in MHAUII should receive individual and group therapy and psychotropic medication as clinically indicated, including no less than one individual interview per week. However, the increased availability of mental health treatment in MHAUII does not mitigate the punitive environment of these solitary confinement units.

Correction staff exercise almost complete control over what happens on the units, even determining which MHAUII detainees are allowed to come out of their cells to participate in group therapy. In these closed environments, there is little recourse for isolated individuals to make their needs known. They are at the mercy of the correction officers who staff the units. If the officers don't want to feed them, they don't eat. If the officers don't want to take them to sick call, they don't go.

People with mental disabilities should not be placed in such environments at all. There is much to be said about the need for a complete overhaul of the way in which solitary confinement is used in the city jails. The Urban Justice Center Mental Health Project and the Jails Action Coalition hope the Council will devote time to the important subject of solitary confinement in the jails in the near future.

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[5] CSG Justice Center Report, p. 16, fn. 9.

However, today we want to draw your attention to the connection between violence and solitary confinement. Based on my visits to MHAUII and interviews with individuals who have been incarcerated there, I believe that these units, especially the one at GRVC, fuel the level of violence in the jails.

The existence of such closed units sets the stage for hostilities. The very fact that a person is in a punitive segregation unit predisposes him or her to be viewed as a threat – despite the fact that punitive segregation sentences are not reserved for acts of violence but may in fact be imposed for conduct such as possessing tobacco. Moreover, because the purpose of the unit is to punish, creating a harsh environment gives correction officers an excuse to treat the people under their control as less than human.

For example, some correction staff who work on these units seem to take it as their personal mission to inflict further punishment on the people held there – interfering with minimum requirements such as outdoor recreation, phone privileges, and showers. People in MHAUII complain that to participate in the one-hour of outdoor recreation which DOC is required to provide, they have to be standing at their cell door very early in the morning when a correction officer walks past. No consideration is given to the fact that some people in MHAUII take psychotropic medications that sedate them or that others cannot sleep at night, making it difficult for them to arise on their own early in the morning. Therefore, they miss their only chance to leave their cells, to breathe fresh air for the day.[6]

People in MHAUII complain that their food is tampered with, their meals delayed, and the portion sizes reduced, and they cite weight loss while in the unit. While such complaints might seem minor, food – a basic necessity for all of us – is one of the few things that people in solitary confinement must be provided. It is served to them through a slot in their cell. One person described being fed through the slot as making him feel like a slave or a "filthy animal," not a human being.

Some complain of verbal abuse. A young man who has had mental health issues since he was a child – diagnosed with bipolar disorder and ADHD – reported being taunted by correction staff, being told that he is "ugly and will never be nothing and will always be coming back to jail." He spoke of the need for audio recording in these units, so that outsiders could see that when individuals incarcerated in MHAUII act out, it is not out of the blue for no apparent reason, but in response to correction officers' provocations.

Others speak of the denial of medical treatment. For example, a person in MHAUII requested medical attention because he was having chest pains and feared he was having a heart attack; his pleas were ignored.

A fatal example of this utter disregard of a person's pleas for help is the case of Jason Echevarria who died in MHAUII on August 19, 2012. He seems to have been someone the guards did not like. He wrote to his father Ramon Echevarria of being beaten by correction staff. We do not know exactly what happened the night before Jason Echevarria died. Without an official report,

[6] The hour of recreation provides little more than that as it occurs in a cage outside without any exercise equipment or physical contact with others.

the public must rely exclusively on press accounts of the incident, which have included inaccurate information. The one verified fact is that the city Medical Examiner ruled Mr. Echevarria's death a homicide because of neglect and the denial of medical care.

According to the most recent article regarding Mr. Echevarria's death, he ingested a toxic soap ball on August 18.[7] His requests for medical attention were completely ignored. Security video reveals that Correction Officer Raymond Castro stopped in front of Mr. Echevarria's cell multiple times but took no action. Captain Terrence Pendergrass refused to send Mr. Echevarria to the medical clinic. As a result of a power failure that affected only this jail, no video recording of what occurred from midnight until 8:00 a.m. exists.

Accounts from people incarcerated on the unit confirm that Mr. Echevarria pleaded for medical assistance to correction officers on the 3 to 11 p.m. tour because he could not breathe and that after the electricity on the housing unit went out, correction officers failed to make their required rounds. By the morning of August 19, Mr. Echevarria was dead.

Mr. Echevarria's death illustrates how dependent people in MHAUII are on the correction officers who staff the unit. Locked in their cells, they have limited ways to make their complaints known. At a minimum, they must shout from their cells to get a response. When pushed to their limits, these detainees, who have significant mental health concerns, can act in aberrant ways. This behavior often results in more infractions – longer stays in MHAUII – and violent retribution by staff. People in MHAUII are subjected to cell searches, and if they fail to leave the cell voluntarily, are physically removed by correction officers in a process known as "cell extraction." These physical confrontations between an incarcerated individual and DOC staff can result in correction officers using excessive force to the point of seriously injuring the incarcerated person.

One person who was incarcerated in MHAUII for almost 17 months and routinely had negative interactions with the correction officers complained of being sexually assaulted by a captain after he was extracted from his cell. He was placed on a gurney and taken to the decontamination room. Inside the room the captain reportedly flipped the gurney, told the person he was "a bitch" and touched his private parts. Before the incident could go further, another officer knocked on the door, and the captain pulled up his pants.

Another harrowing example of the violence that can be ignited in MHAUII occurred on the night of December 17, 2012. Several young men on the same cell block tried to get correction officers' attention because they had not been provided with phone access or hot food. Tensions escalated after two of the people splashed the guards, leading the officers to search several people's cells. As the individuals were forcibly removed from their cells, the correction staff became more violent. One of the young men estimated that he was beaten in his cell for about 45 minutes; they opened the right side of his skull and fractured his hand. The beating did not end on the cellblock but continued in the clinic. By the time he was taken there, the young man

[7] The description in this paragraph is based on "Bronx DA Will Not Prosecute Jail Guards in Inmate's Death Caused by 'Neglect and Denial of Medical Care' After Eating Soap," *New York Daily News*, Reuven Blau, Mar. 24, 2013, http://www.nydailynews.com/new-york/bronx/bronx-da-charged-jailers-inmate-soap-death-article-1.1298034.

was handcuffed to a gurney while the beating continued in the presence of mental health staff. Mental health staff were eventually able to intervene and end the assault. Similar accounts were given by two other incarcerated young men assaulted that night. The incidents are under investigation by the inspector general and the Board of Correction ("Board"). One of the young men was interviewed by the Department of Justice. I encourage the committee to request information from DOC, DOHMH, and the Board regarding these horrendous incidents.

Corrections staff on these units may feel justified in their responses. I have no doubt that working in MHAUII – where torture is inflicted upon people who have fragile mental health – is unpleasant. However, putting responsibility for the hostilities on the people confined there – people diagnosed with a mental illness, many of whom are adolescents and young people – is unreasonable.

We must insist on professional behavior and compliance with the rules by correctional staff. They are the public servants who do the people's bidding behind the walls. They insist on being called correction officers – not guards – and they should earn that title. Not only should DOC have a zero tolerance policy for physical abuse but verbal abuse should be prohibited.

To ensure the safety of incarcerated people who have mental illness, DOC should shut down MHAUII. And any alternative developed should eschew punishment and isolation and instead be built on therapeutic interventions and de-escalation of violence.

Although some people incarcerated in the city jails have been sentenced and are serving time for a criminal conviction, the vast majority are not. They are incarcerated while awaiting trial, primarily because they cannot afford the bail that has been set in their case. People with mental illness particularly have a difficult time posting bail.[8] Furthermore, most people will reenter our communities at some point; 75% are released directly from jail. Don't we want them to be better equipped to do so – not more traumatized and mentally damaged than they were when they went into jail? We must demand that DOC address violence in a different way, not by meeting violence with more violence.

DOC could more effectively address violence in the jails by moving away from the use of solitary confinement and similar punitive approaches and toward trauma-informed correctional care. There is a growing movement in corrections toward this innovative approach that is grounded both in mental health and corrections best practices and has evidence-based support.

Trauma among jail populations is high. A 2006 study by the TAPA Center for Jail Diversion demonstrated that 91% of women and 86% of men experienced physical violence during their lives; over 60% of both men and women witnessed a traumatic event; and 75% of women and 32% of men have experienced sexual trauma.[9] Other researchers have found significant rates of

[8] CSG Justice Center Report, p. 3.

[9] Niki Miller, (2011), "RSAT Training Tool: Trauma-Informed Approaches in Correctional Settings," http://www.rsat-tta.com/Files/Trainings/Trauma_Informed_Manual, p. 12.

post-traumatic stress disorder ("PTSD") among people on death row.[10] A study published in 2010 showed that people convicted of violent offenses are more likely than not to have PTSD.[11] It is an inescapable fact that most incarcerated people have histories of trauma.

People with trauma histories detained in jails or prisons can react erratically in the corrections environment. They can perceive certain aspects of incarceration – something as simple as a question from jail intake personnel to something more complex such as a fight among other incarcerated people – as threatening to their safety or personal integrity. This perception, whether accurate or not, can create a response by the person which may not be appropriate to the incarceration environment and which may escalate to behavior that creates a risk of harm to the person and/or to corrections personnel.

This is the reason that institutions of incarceration should employ trauma-informed care standards. Every person who works in the jail, whether they work as correction officers, treatment professionals, administrative staff, or maintenance personnel, should be trained on trauma and how to integrate trauma care into the jobs they perform. Jails and prisons that employ trauma-informed corrections care have seen significant reductions in use-of-force incidents, assaults on staff, and grievances by incarcerated people.[12]

The vast majority of prisons that employ trauma-informed correctional care are facilities for women; however, there are adaptations to trauma standards that make this approach effective in facilities for men.[13]

In addition, the prevalence of traumatic brain injury ("TBI") among the adolescent jail population is approximately 50% (60% for females), compared to 9% in the community.[14] TBI causes emotional dysregulation and impaired processing speed. Currently the jails are poorly equipped to handle individuals with TBI.

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[10] David Freedman & David Hemenway, (2000), "Precursors of lethal violence: A death row sample," in *Introduction to Forensic Psychology*, 2E: *Issues and Controversies in Law Enforcement and Corrections* (2005). Arrigo, B. & Shipley S. Elsevier: St. Louis, MO.

[11] Bonnie Carlson & Michael Shafer, (2010), "Traumatic histories and stressful life events of incarcerated parents: Childhood and adult trauma histories," *The Prison Journal*, Dec. 2010, Vol. 90, No. 4 475-493.

[12] *See Massachusetts Department of Correction Female Offender Panel Review and Strategic Plan Final Summary*, (2009), http://www.mass.gov/eops/docs/doc/research-reports/commissioner-summary-strat-plan.pdf. *See also Creating a Trauma-Informed Criminal Justice System for Women: WHY AND HOW*, (2011), http://gainscenter.samhsa.gov/cms-assets/documents/73437-12763.tic_forwmn-2.pdf.

[13] Niki Miller & Lisa Najavits (2012), "Creating trauma-informed correctional care: a balance of goals and environment," *European Journal of Psychotraumatology*, http://www.seekingsafety.org/7-11-03%20arts/2012%20miller%20naj%20trm%20corrs%20ejp.pdf. This article provides a good summary of the types of trauma-informed care, the role trauma plays in people's incarceration, and the adaptations that can be made to ensure the effectiveness of trauma-informed correctional care in particular corrections settings.

[14] Dr. Homer Venters, Department of Health and Mental Hygiene Assistant Commissioner for Correctional Health Services, presented this information at the March 11, 2013 Board of Correction meeting.

By employing a trauma-informed model of correctional care and other approaches informed by what is known about TBI and other disorders afflicting the jail population, DOC would be able to address the violence about which it complains in a constructive way, and not only decrease the levels of violence but also counteract or even eliminate the culture of violence that exists in the city jails today.

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November 5, 2014

Gordon Campbell, Chair
Board of Correction
51 Chambers Street, Room 923
New York, NY 10007

Re: Department of Correction, Request for Variance: Enhanced Supervision Housing (Oct. 22, 2014)

Dear Mr. Campbell:

We write in regard to the "Request for Variance: Enhanced Supervision Housing" submitted by the New York City Department of Correction to the Board of Correction on October 22, 2014. Disability Rights New York (DRNY) strongly urges the Board to consider the "Request for Variance" a petition for amendment to the Minimum Standards and to follow the procedural requirements of Section 1043 of the New York City Charter, which require notice, comment, and a public hearing.

DRNY is New York State's designated Protection and Advocacy system ("P & A"), with federal and state authority to monitor the safety and the protection of the rights of individuals with disabilities under the Protection and Advocacy for Mentally Ill Individuals Amendments Act, the Developmental Disabilities Assistance and Bill of Rights Act, and the Rehabilitation Act Amendments of 1992, and New York Executive Law § 558.[1] DRNY has an interest in the Department of Correction's request and in the Board's consideration of any long-term departure from the Minimum Standards,[2] because of the impact that changes to governing standards may have on the safety and the rights of individuals with disabilities.

The Department of Correction seeks authorization to alter seven Minimum Standards to establish a new unit where individuals may, based on a broad range of criteria, be held indefinitely in isolated confinement, with no exclusion for individuals with disabilities and no information about mental health or other supports and services available. Moreover, the Department of Correction indicates that some changes will eventually be applied permanently

[1] 42 U.S.C. § 10801 *et seq.*; 42 U.S.C. § 15041 *et seq.*; 29 U.S.C. § 794e; N.Y. Exec. Law § 558(b).

[2] The Board of Correction is seeking a continuing variance. Letter from the New York City Department of Correction to the Board of Correction, Request for Variance: Enhanced Supervision Housing (Oct. 22, 2014), at 2 n.4.

outside the unit.[3] The sweeping nature of this proposal warrants careful deliberation by the Board and the full participation of stakeholders, including, most importantly, those directly impacted by the new policies.

Given the breadth of the proposed changes and incidents of abuse and neglect of individuals with disabilities in isolation units during the last year, we find that the use of the variance process is inappropriate. The variance procedure is summary in nature and ill-suited to the goal of ensuring that new policies and procedures adequately protect the rights of individuals with disabilities, because there has not been adequate notice, comment, or a hearing. For example, the Board distributed the "Request for Variance" to a small group of recipients that excluded DRNY, even though we have attended the Board's meetings. Many others are likely in the same position and have been left with little opportunity to review and respond to the proposed changes. If the Board proceeds in its current plan to vote on the Department of Correction's proposal at the November 18 Board meeting, the meeting itself—where only fifteen minutes of public comments are generally permitted—does not represent a meaningful opportunity for interested parties to bring concerns to the attention of the Board for consideration.

Even if the variance procedure is appropriate, the Department of Correction has not followed the requirements of the Minimum Standards for seeking a continuing variance. The Department of Correction's letter does not substantiate its application for a variance with the "specific facts and reasons underlying the impracticability or impossibility of compliance" with the Minimum Standards. Minimum Standards § 1-15(c)(2).

We, therefore, urge the Board to reconsider its plan to vote on November 18 on the Department of Correction's "Request for Variance" and to entertain the letter instead as a petition to revise the Minimum Standards. Alternatively, if the Board decides that the Department of Correction's letter is a variance request, the Board should hold a hearing, with more than two weeks' notice, and receive testimony from all interested parties. § 1-15(d).

We thank you for considering the issues raised in this letter and request a response at your earliest convenience.

Sincerely,

Elena Landriscina
Staff Attorney

Mark Murphy
PAIMI Director

[3] *Id.* at 5.

cc: Alexander Rovt, Vice-Chair
Greg Berman
Robert L. Cohen, M.D.
Hon. Bryanne Hamill
Michael J. Regan
Derrick Cephas
Jennifer Jones Austin
Steven Safyer, M.D.
Amanda Masters, Deputy Executive Director

New York City Jails Action Coalition
c/o Urban Justice Center
40 Rector Street, 9th floor
New York, NY 10006
www.nycjac.org

November 4, 2014

By E-mail

Gordon Campbell
Chair
Board of Correction
51 Chambers Street, Room 923
New York, NY 10007

Dear Mr. Campbell:

The New York City Jails Action Coalition (JAC) urges the Board of Correction not to vote at its November 18 meeting upon what the Department of Correction (DOC) has styled as a "request for variance" in its October 22, 2014 letter to the Board. Although framed as a "request for variance," the DOC's letter actually seeks significant amendments to numerous standards that protect the human rights of individuals incarcerated in DOC facilities. Given the nature of the DOC's proposal, the Board should entertain the DOC's letter as a petition for amendment to the Minimum Standards and follow the procedures set forth in Section 1043 of the New York City Charter, which require notice, comment, and a full public hearing.

The DOC is asking the Board to revise its Minimum Standards under the guise of a variance request. The Minimum Standards allow variances only when compliance with the standards "cannot be achieved or continued." § 1-15(a). A "continuing variance" is intended to be limited in nature and is justified only when "full compliance with a specific subdivision or section would create extreme practical difficulties as a result of circumstances unique to a particular facility" and is permitted only when the variance "would not create a danger or undue hardship to staff or prisoners." § 1-15(b)(2)(i).

The DOC has not claimed that it cannot comply with the Minimum Standards, nor has the DOC specified, as required by § 1-15(c)(2), any circumstances related to a particular facility or specific facts and reasons underlying the impossibility of compliance with the Minimum Standards. Instead, the DOC has apparently decided to implement new policy that will have sweeping effects, altering how seven different rules apply in the Enhanced Supervision Housing Unit and possibly "throughout the Department." The DOC is inappropriately seeking substantial changes to the Minimum Standards through a request for variance. The Board has already provided a procedure for proposing revisions to the Minimum Standards. *See* N.Y.C. Rules & Regs. Title 40, § 4-03. The DOC should not be allowed to evade those procedures.

Furthermore, the DOC should not be allowed to do an end-run around the Board's rulemaking. The Board unanimously voted to initiate rulemaking regarding the use of solitary confinement in the NYC jails at its September 9, 2013 meeting and, for the last year, has taken a careful and deliberative approach towards rulemaking that has engaged the public, directly affected individuals, and experts on best practices. As of this date, the Board has not published its proposed rules or commenced the formal rulemaking process, and hundreds of people in the City jails remain in prolonged isolated confinement, "one of the most severe forms of punishment that can be inflicted on human beings short of killing them."[1]

The Board has undertaken a comprehensive process to develop its proposed standards on the use of solitary confinement. Such thoughtful, careful deliberation is certainly required in considering the DOC's present proposal given that it calls for significant changes to the standards and severely curtails the liberty of many people incarcerated in the City jails. Yet the Board is pursuing an absurdly truncated process in addressing this significant proposal.

To the extent that the Board disagrees and determines that the DOC request should be treated as one for a variance, the Board must follow the procedure for continuing variances set forth in Minimum Standard § 1-15(d).[2]

1) The Board must consider the position of all interested parties.

   a) Adequate public notice of the proposed variance has not been provided.

   The "variance request" and proposed directive have not been posted in a manner that provides all interested and affected stakeholders sufficient opportunity to comment. For instance, the variance request has not been posted on the Board of Correction website. To our knowledge, the variance request has not been distributed to individuals who have attended recent Board meetings or who met with the Board during its stakeholder meetings this year. Most importantly, incarcerated people have not been provided with an opportunity to express their positions.

   b) The Board has not provided interested parties with sufficient time in which to comment.

   The Board notified some interested parties of DOC's "variance request" and proposed directive after 5 p.m. on October 24, 2014, and requested written comments by November 10, 2014, a period of 11 business days. Although JAC will make every effort to meet this short deadline, many of our members will not be able to submit their own individual comments. In addition, more than 35 organizations that are deeply concerned about incarcerated people expressed their support for the Board of Correction to adopt

[1] Gilligan and Lee, "Report to the New York City Board of Correction," September 5, 2013, p. 6.
[2] The request clearly does not constitute an emergency variance as no "emergency situation prevents continued compliance with the subdivision or section." § 1-15(b)(3). Although the Department uses the language "current emergency" in its request that the "applicable variances immediately be issued," the footnote to that sentence states that "a continuing variance is appropriate." DOC October 22, 2014 Letter to Board of Correction, p. 2, fn. 4.

minimum standards regarding the use of solitary confinement. Very few of these organizations received the notice circulated by the Board and will not have adequate opportunity to comment.

2) The Board must hold a public meeting or hearing on the variance application and hear testimony from all interested parties whenever practicable.

   Providing an opportunity for interested parties to testify is not only practicable in this instance, but it is also absolutely necessary to provide the Board with a comprehensive understanding of all the implications of the proposed amendments to the standards. The Board made a point of conducting numerous meetings with stakeholders who had an interest in the rulemaking regarding solitary confinement. Undoubtedly, many stakeholders will have a position on changes to lockout time, law library restrictions, changes in religious services, denial of contact visits and other changes to visiting procedures, package restrictions, monitoring of correspondence, and the procedural protections provided to those who are subjected to these restrictions. Those stakeholders should have an opportunity to testify.

   At Board meetings the public comment period is limited to a total of 15 minutes, and individuals are generally permitted to speak for only two or three minutes. This public comment period is insufficient to enable the Board to hear testimony from all interested parties. Given the extensive nature of the changes to the standards, significantly more time is needed for public testimony. This cannot be accomplished by extending the time for public comment at the November 18 meeting, since the Board did not specify in its notice that there would be an opportunity to testify. Should the Board decide at the meeting itself to extend the public comment period, many individuals and groups with an interest in testifying may not be in attendance as no prior notice was provided. Further, we expect that much more time for comment would be needed than could reasonably be provided as part of a regular Board meeting.

Rendering a decision on the DOC's proposed changes to the standards at the November 18 Board meeting would contravene the variance procedures. Accordingly, even if the Board treats the DOC's proposal as a variance request, it should delay its determination of the "variances" until the public, including interested parties such as incarcerated people and their family members, have adequate time to comment on the changes and a public hearing can be held.

Thank you for considering our position. We request a response to this letter by Wednesday, November 12. Please contact Jennifer Parish at (646) 602-5644 or jparish@urbanjustice.org, Elena Landriscina at elena.landriscina@disabilityrightsny.org, or Eric Sarver at sarverlaw@earthlink.net with your response.

Sincerely,

NYC Jails Action Coalition Members

cc: Alexander Rovt, Vice-Chair
Greg Berman

Robert L. Cohen, M.D.
Hon. Bryanne Hamill
Michael J. Regan
Derrick Cephas
Jennifer Jones Austin
Steven Safyer, M.D.
Amanda Masters

The Bronx Defenders

redefining public defense.

VOICES FROM THE BOX

SOLITARY CONFINEMENT AT RIKERS ISLAND

SEPTEMBER 2014

The Bronx Defenders

The Bronx Defenders provides innovative and holistic criminal defense, family defense, civil legal services, and social work support to indigent people in the Bronx. Our staff of over 200 represents approximately 35,000 individuals each year and reaches hundreds more through outreach programs and community legal education.

The Bronx Defenders Solitary Confinement Project was launched in the summer of 2013 to document the experiences of Bronx Defenders clients currently or formerly held in solitary confinement and to develop strategies for effective advocacy on their behalf.

For more information visit:
www.bronxdefenders.org

For press inquiries contact:
Media@bronxdefenders.org

Cover art by Molly Crabapple

Out of the 59 clients interviewed, 54 were male and 5 were female. Over half of the clients interviewed were between the ages of 16 and 20 at the time of their placements in solitary. The median age for the clients interviewed was 20. The median number of days in solitary confinement to which clients were sentenced was 90. At least 72.9% of the clients interviewed suffered from mental health issues.[3]

Table 1: Overall Statistics

Total Number of Clients Interviewed		**59**
Male Clients	**54**	
Female Clients	**5**	
Median Age		**20**
Median Days Sentenced to Solitary Confinement		**90**
Percent of Clients with Mental Health Issues		**72.9%**

Although all of the information gleaned from the interviews was self-reported by clients of The Bronx Defenders, investigations conducted by the United States Attorney's Office for the Southern District of New York and the *New York Times* have confirmed that the interviews paint an accurate picture of our clients' experiences at Rikers. While the New York City Department of Correction refers to this policy as punitive segregation, the interviews conducted through the Project leave no doubt that this practice is in fact solitary confinement.

As a holistic, client-centered public defender office, The Bronx Defenders is committed first and foremost to direct advocacy on behalf of our clients. We consider it a victory that on 59 occasions and counting, we were able to have our clients produced from their cells to break the soul-crushing monotony of solitary confinement. We also count as victories each time that the filing of *pro se* Article 78 forms resulted in a reduction to a client's total days in solitary. Looking ahead, our hope is that this report will help bring about long-term reform by pushing policymakers in New York City and beyond to listen to the stories of people who have experienced solitary confinement firsthand and reconsider the use of this unimaginably devastating practice.[4]

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and or less and 47% of individuals charged with non-felony offenses for whom bail is set at between $501 and $1,000 are unable to post bail. *See* New York City Criminal Justice Agency, *Annual Report 2012*, (January, 2014), http://www.nycja.org/library.php.

[3] For the purpose of this report, a client is described as suffering from mental health issues if he or she was clinically diagnosed with a mental health issue or if he or she was receiving mental health treatment while in solitary confinement. The actual percentages of clients suffering from mental illness are likely higher than the figures included in this report due to undiagnosed and untreated issues. According to an internal study cited by the *New York Times*, approximately 40% of all inmates at Rikers Island suffer from mental illnesses. *See* Michael Winerip and Michael Schwirtz, "Rikers: Where Mental Illness Meets Brutality in Jail," (July 14, 2014), http://www.nytimes.com/2014/07/14/nyregion/rikers-study-finds-prisoners-injured-by-employees.html.

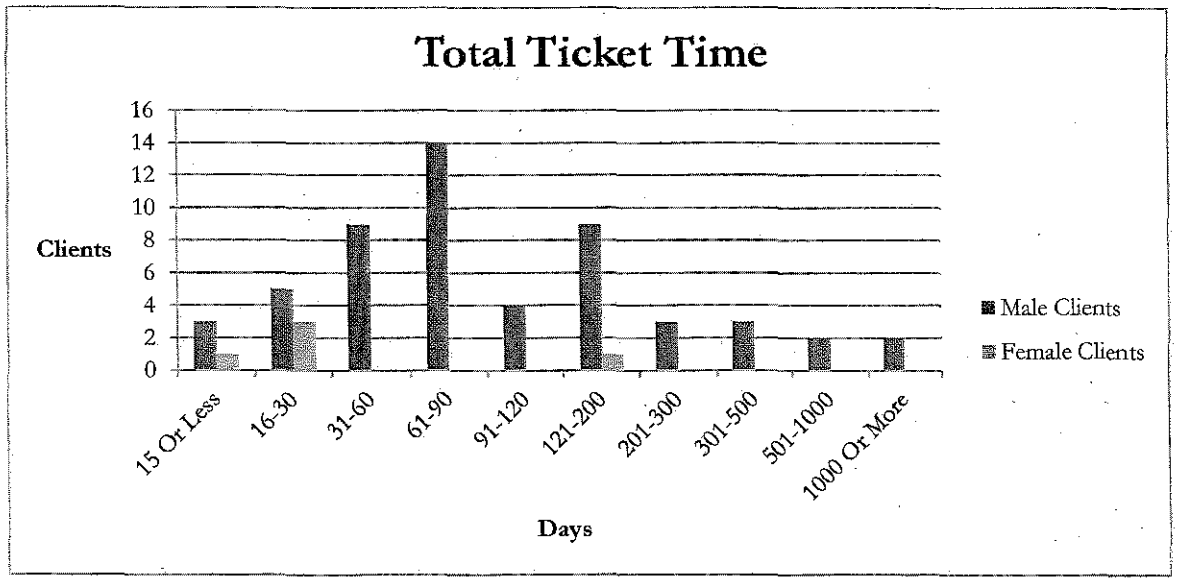
[4] The Bronx Defenders participates in the Jails Action Coalition (JAC) and collaborates with the New York Civil Liberties Union (NYCLU), the New York Campaign for Alternatives to Isolated Confinement (CAIC), and other groups

Duration of Confinement

The lengths of time for which individuals incarcerated at Rikers are sent to solitary confinement are egregiously disproportionate to their alleged infractions. As measured by total days and by hours per day, the duration of solitary confinement at Rikers is inexcusably extreme.

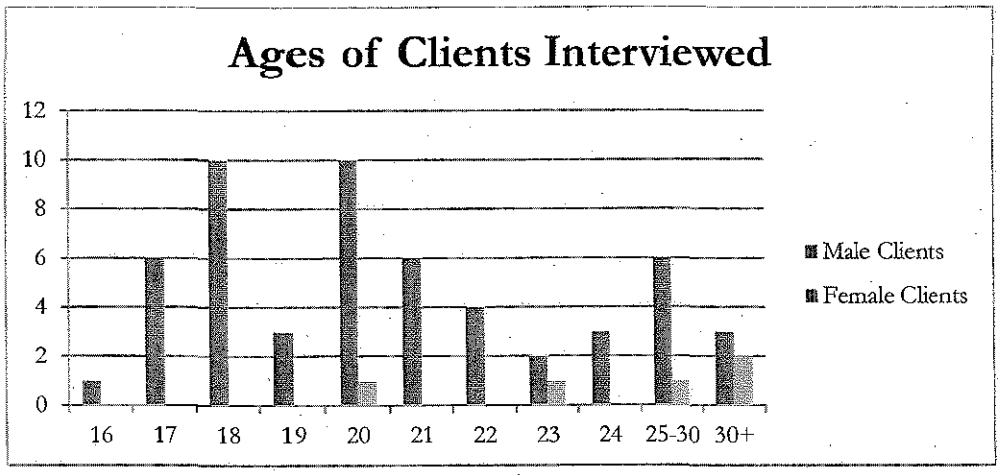
In October of 2011, United Nations Special Rapporteur on Torture Juan Mendez published a study in which he concluded that the use of solitary confinement for more than 15 days should be considered torture.[5] Out of the 59 clients interviewed through the Project, only four spent 15 days or less in solitary confinement. In other words, over 93% of the clients interviewed were subjected to punishments that a leading expert in the field would consider to be torture.

In fact, most of the clients interviewed spent much more than 15 days in solitary confinement. In a pattern that repeated itself many times over, clients recounted being sent to "the box" for an initial period that generally ranged from 30 to 90 days, only to find that once they were in solitary it became incredibly easy to receive additional tickets for minor offenses and various perceived slights against correction officers. As a result, many clients reported astoundingly high total ticket times that they had accumulated in large part from infractions that they were accused of committing while held in solitary confinement. Michael, an 18-year old client facing over 1,000 days in solitary, recounted how he received additional tickets each week but felt that he needed to act out in order to receive basic services.



[5] UN News Centre, *Solitary Confinement Should Be Banned in Most Cases, UN Expert* Says, (October 18, 2011), http://www.un.org/apps/news/story.asp?NewsID=40097#.U_YDbrxdXp4.

Solitary confinement presents special challenges for young clients. According to a 2012 report by the American Academy of Child & Adolescent Psychiatry, "juvenile offenders are at particular risk" of lasting psychological damage, such as "depression, anxiety, and psychosis."[6] This may be due in part to the fact that areas of the brain responsible for planning and for controlling impulses are not fully developed until individuals are in their twenties.[7]



These observations were borne out by the fact that younger clients appeared to be more likely to act out while in solitary confinement, thus leading to additional ticket time. All three of the clients interviewed with over 900 days of total ticket time are teenagers. This suggests that beyond the obvious humanitarian and moral reasons to refrain from placing teenagers and young adults in solitary confinement, there are also compelling psychological or neurological grounds to prohibit this practice.

Mental Health Treatment

Despite the New York City Department of Correction's pledge to end the use of solitary confinement as a punitive measure for individuals suffering from mental illness, the Project interviews revealed that at least 72% of the 54 male clients interviewed and four out of the five female clients interviewed had been diagnosed with or treated for mental health issues. During their time in solitary confinement, these clients received mental health services that were egregiously inadequate for treating not only preexisting mental illnesses but also the ongoing trauma brought on by extreme isolation.

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[6] American Academy of Child & Adolescent Psychiatry, *Solitary Confinement of Juvenile Offenders*, (April 2012), http://www.aacap.org/aacap/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx.
[7] American Civil Liberties Union, *Alone & Afraid: Children Held in Solitary Confinement and Isolation in Juvenile Detention and Correctional Facilities*, 3 (June 2014), https://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf.

virtually the same situation as they would have been in were they placed in other solitary confinement units. Moreover, even clients in RHU who believed that the group therapy and individual counseling sessions were helpful felt that the treatment still fell far short of their needs and did little to counterbalance the crushing isolation of solitary confinement.

The futility of RHU belies how misguided it is to expect any individual's mental health to improve or stabilize while in solitary confinement. No amount of mental health treatment can make up for the trauma that individuals experience while in solitary. Indeed, not a single client interviewed reported that his or her mental health had improved during his time in solitary. This is because solitary confinement causes and exacerbates mental health issues.[8] Kimorney, a 20-year-old client who had no history of mental health problems prior to entering solitary confinement, discussed the experience of feeling his mind begin to unravel. During his time in solitary, Kimorney became depressed, experienced suicidal thoughts, and was prescribed medication. Soon after returning to general population, Kimorney found himself back in solitary confinement for acting out. In the words of Patrick, a 29-year-old client who received a verdict of not guilty on all counts in his criminal case after spending 130 days in solitary confinement, "when people leave solitary confinement, they are never the same."

Basic Services

Individuals held in solitary confinement at Rikers struggle to receive even the most basic services, such as food, showers, and access to phones. In many cases, clients interviewed reported that they resorted to "sticking up the slot," meaning that they would refuse to move their hands or arms from the slots in their cell doors, in order to gain access to one of these services. Clients would then receive additional ticket time as punishment for "sticking up the slot," even though it was often used only as a last resort to receive basic services that they should have received in a timely manner.[9] Indeed, "sticking up the slot" was responsible for drastic increases in many clients' total ticket times.

The most common complaint voiced by clients regarding their experiences in solitary confinement at Rikers concerned food. Forty-four clients (74.6%) stated that they did not receive enough food or that the food made them sick. Particularly among younger

One client described his time experience in solitary as the hungriest that he had ever been in his life.

[8] American Civil Liberties Union, *Alone & Afraid: Children Held in Solitary Confinement and Isolation in Juvenile Detention and Correctional Facilities*, 3-5 (June 2014), https://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf. *See also* Jails Action Coalition, *Petition to the New York City Board of Correction*, (2014), www.nycjac.org/proposedrules/, 18-20.

[9] Similarly, a recent decision released by the New York City Office of Administrative and Trials Hearings (OATH) describes a situation in which a man held in solitary confinement at Rikers Island was beaten by multiple for correction officers after he stuck up the slot in response to being denied access to a phone. *See* Dep't of Correction v. Reid, OATH Index Nos. 1898/14 & 1901/14 (June 18, 2014), http://archive.citylaw.org/wp-content/uploads/sites/17/oath/12_Cases/14-1898.pdf.

explained that he had recently received an additional ticket for refusing to return to his cell, which he had done only after his demands for a shower and medical attention due to an abscess on his back were ignored.

Medical Services

Clients consistently reported that medical attention is only prompt when there is a significant amount of blood visible. In the words of one client, "You've got to be basically dead to go see the doctor." Shyla, a 17-year-old client, recounted how a correction officer watched her suffer through a severe asthma attack, but did nothing because the officer suspected that Shyla was faking the episode in order to leave her cell. "I had to find my pump before I died in my cell. I had to look for it," Shyla explained. "I didn't know where it was. I could have died." Multiple clients also stated that when they were able to receive medical treatment, it often consisted solely of pain pills.

Clients' accounts of the severe lack of access to medical services are consistent with the recent deaths of Andy Henriquez and Jerome Murdough, who both died from medical emergencies that did not involve visible wounds.[10][11]

Due Process & Other Legal Issues

The hearing process that the Department of Correction follows for ruling on placements in solitary confinement is indisputably and unfairly stacked against inmates. Despite the fact that solitary confinement is a much more severe punishment than regular incarceration and may cause lasting psychological damage, individuals accused of infractions at Rikers must face hearings without an advocate to argue on their behalf. Even worse, the "adjudication officers" who serve as the sole arbiters for these hearings are correction officers employed by the Department of Correction, colleagues of the same officers whose accusations lead to hearings.

The hearing process that the Department of Correction follows for ruling on placements in solitary confinement is indisputably and unfairly stacked against inmates.

Each infraction hearing involves only an adjudication officer and the accused. The adjudication officer begins by asking the inmate to state his name and book and case number, and then reads the incident report for the alleged infraction. The adjudication officer continues by asking the inmate if he would like to speak, and offers the following options for pleading: guilty, not guilty, and guilty with an explanation. Although the hearings are recorded, multiple clients recounted that the adjudication officers for their hearings stated before turning on

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[10] Dareh Gregorian, "Mother files wrongful death lawsuit over 19-year-old son who died on Rikers Island in solitary confinement," *New York Daily News*, (August 20, 2014), http://www.nydailynews.com/new-york/rikers-island-death-19-year-old-leads-lawsuit-article-1.1909832.

[11] Jake Pearson, "NYC Inmate 'Baked to Death' in Cell," *Associated Press*, (March 19, 2014), http://bigstory.ap.org/article/apnewsbreak-nyc-inmate-baked-death-cell.

creep, hold their keys to not make noise – quiet as a mouse! They don't say 'yard,' they turn off their radios. I've never seen nothing like it." Marlon, another 20-year-old client who experienced difficulties getting outside, said that the "yard CO" would retaliate against people who made noise to alert their neighbors to his presence by refusing to let those people go outside. If an individual asked to go outside after the "list" had been compiled, his request would be denied. Some clients interviewed for the Project reported that they had never gone outside while they were held in solitary confinement.[14]

Clients who were able to go outside discovered that "outdoor recreation" consists of standing in a small cage. Upon making this discovery, many clients declined to go outside in the future, explaining that the experience of standing outside in what looks like an animal cage was so degrading that it outweighed any desire on their part to leave their cells for an hour.

Organized Activities

Although individuals held in solitary confinement likely have the most to gain from positive, structured interactions with their peers, they have no access to organized activities or group programs, aside from a limited amount of group therapy for individuals in the Restricted Housing Unit (RHU).

Despite the fact that many of the clients interviewed for the Project were young enough to be in high school, not one of them was able to participate in group educational programs. Some clients' requests to participate in school programs were flat-out denied. Others found that "school" in solitary confinement consists of having educational materials dropped off through a slot in their doors, with no access to a teacher or to fellow students. Clients with learning disabilities or who otherwise struggled with reading were given absolutely no support, despite expressing their desire to learn.

Despite the fact that many of the clients interviewed for the project were young enough to be in high school, not one of them was able to participate in a group educational program.

Similarly, clients were unable to access any type of work, recreation, and self-help group programs. The absence of these types of organized activities is emblematic of the cruel indifference expressed by the Department of Correction toward individuals held in solitary confinement.

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[14] Similarly, the Board of Correction found that fewer than 1 in 10 people held in the Central Punitive Segregation Unit (CPSU) at Rikers are able to go outside while held in solitary. *See* New York City Board of Correction, *Barriers to Recreation at Rikers Island's Central Punitive Segregation Unit*, (July 2014), http://www.nyc.gov/html/boc/downloads/pdf/reports/CPSU_Rec_Report.pdf.

Recommendations

Eliminate or Drastically Reduce the Use and Duration of Solitary Confinement

The Department of Correction should eliminate the use of solitary confinement. Short of that, the Department should exclude all individuals under the age of 25 as well as all individuals suffering from mental health issues from solitary. The Department should also cease to use solitary confinement as a punitive measure for non-violent incidents and minor scuffles. When solitary confinement is used, it should be restricted to fifteen days per ticket, and 60 days in total duration per 180-day period.[15] Incarcerated individuals should enjoy at least four hours per day outside of their cells.[16] The Department of Correction should also end the practice of "owed time," whereby individuals are held in solitary confinement for infractions committed during previous stays at Rikers.

The Department of Correction should eliminate the use of solitary confinement.

Reform the Hearing, Appeals, and Notification Processes

Individuals accused of infractions that could potentially result in solitary confinement should have attorneys or advocates present for their hearings. These attorneys or advocates should not be employees of the Department of Correction; neither should the deciders of facts for the hearings. A court part with an in-person administrative law judge should be established in the Bronx to adjudicate these hearings.

Pre-hearing detention, the practice by which individuals are placed in solitary confinement prior to a hearing, should require written justification and the approval of the Commissioner of the Department of Correction. Pre-hearing detention should be capped at 24 hours.

Individuals' attorneys should be notified when infraction tickets are issued, when hearing dates are set, and when hearing outcomes are determined. Additionally, incarcerated individuals should be allowed to enlist the help of attorneys when filing appeals.[17] The Bronx Defenders also supports the full list of hearing and documentation reforms proposed in the JAC petition to the Board of Correction.[18]

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[15] Jails Action Coalition, *Petition to the New York City Board of Correction*, (2014), www.nycjac.org/proposedrules/, 4-5.
[16] *Id*, 2.
[17] Individuals held in solitary confinement at Rikers are currently able to consult with an attorney from the Legal Aid Society once they file Article 78 forms. However, they are not able to consult with an attorney for the internal appeals process, and are often unaware of the option to file Article 78 forms.
[18] Jails Action Coalition, *Petition to the New York City Board of Correction*, (2014), www.nycjac.org/proposedrules/, 4-6.

Correction immediately increase portion sizes and provide access to commissary for individuals held in solitary. Allegations of tampering with inmates' food should be taken very seriously.

Explore Alternatives to Solitary Confinement That Do Not Involve Isolation

In late 2013, the Department of Correction announced the launch of its Clinical Alternative to Punitive Segregation (CAPS) program. According to the Department, the program is "modeled on in-patient forensic wards." Project members were able to conduct two interviews with Bronx Defenders clients who participated in CAPS in early 2014. These clients' reports on CAPS are encouraging. However, the Department's previous attempts at providing care for individuals with mental health issues give plenty of reason for caution and skepticism. Moreover, the interviews indicate that very few individuals are participating in CAPS at this time.

The Department of Correction can create safe, controlled environments for individuals who might pose security issues without the use of solitary confinement.

The two Bronx Defenders clients who have participated in CAPS gave the program mixed reviews. One of the two clients had previously spent extended amounts of time in solitary confinement at Rikers and at a correctional facility in upstate New York. He reported that CAPS was a drastic improvement upon solitary confinement. Both clients had received clinical diagnoses of serious mental illnesses, and reported that they had access to adequate treatment in CAPS. Their primary complaints were that correction officers and civilian staff members played favorites with CAPS participants and that individuals could still be ejected from the program for poor behavior despite their mental health issues. While it is clear that CAPS is not a perfect program, it is equally clear that the pilot is a considerable improvement upon solitary confinement.

According to the interviews, there are currently three CAPS units at Rikers, with approximately 12 participants in each unit. Individuals in CAPS are only locked in their cells during nighttime hours. Each weekday, there are 2-3 group therapy sessions, which are part of a larger CAPS curriculum. Both clients felt that the group sessions were helpful. In their spare time, CAPS participants are allowed to watch television and play board games. Daily outdoor recreation occurs in an open yard, and participants are able to access additional food through commissary. Each CAPS participant is required to have a weekly one-on-one session with an assigned mental health professional, but additional appointments are also available. One of the two clients also reported that at least some CAPS participants were given special visiting privileges for an organized family day.

In order to graduate out of CAPS, participants must sustain good behavior through all four "levels" of the program. However, participants are also given the option of staying on in CAPS. One of the two clients interviewed about his experiences in the program stated that he would consider staying in CAPS because the large crowds in general population make him feel anxious.

multiple attempts to complete calls that go directly to voice mail, especially if correction officers are responsible for delays in providing access to phones.

Given the trauma of solitary confinement, it should be easier for family members to visit individuals held in solitary, not harder. The Department of Correction should take steps to ensure that the family members of individuals held in solitary are not turned away from Rikers.

Conclusion

Solitary confinement is a driving force in the cycle of violence at Rikers that has placed inmates, correction officers, and civilian staff in harm's way for much too long. This brutal practice inflicts severe harm on inmates and exposes correction officers to an increased risk of violence by forcing them to interact with individuals who have experienced serious psychological trauma. Solitary confinement also hurts the general public by greatly impairing incarcerated individuals' reentry into society. While it is clear that the Department of Correction must be able to address immediate threats to safety and security at Rikers Island, it is equally clear that extreme isolation is unnecessary and unproductive for this goal.[20] The Department of Correction must end or drastically reduce the use of solitary confinement.

We are proud to bring the voices of individuals who have experienced solitary confinement firsthand into the conversation concerning the urgent need for reforms to this practice. Their experiences offer a glimpse into the terrifying reality of solitary at Rikers. Moving forward, we are eager to work together with allied groups, the Board of Correction, and the Department of Correction to end the use of solitary confinement at Rikers.

[20] Atul Gawande, "Hell Hole," *The New Yorker*, (March 30, 2009), http://www.newyorker.com/magazine/2009/03/30/hellhole, citing Chad S. Briggs, Jody L. Sundt, and Thomas C. Castellano, *Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, Criminology Vol. 41, Issue 4, 1341-1376.

NYC Department of Correction

PRESENTATION TO THE BOARD OF CORRECTION

November 18, 2014

NYC DEPARTMENT OF CORRECTION

Agenda

- DOC Overview
- DOC Violence Over Time
- ADP ↓ : Violent Felons & Mentally Ill Inmates ↑
- The Drivers of Violence
- Tools for dealing with our most Violent Population
- Enhanced Supervision Housing

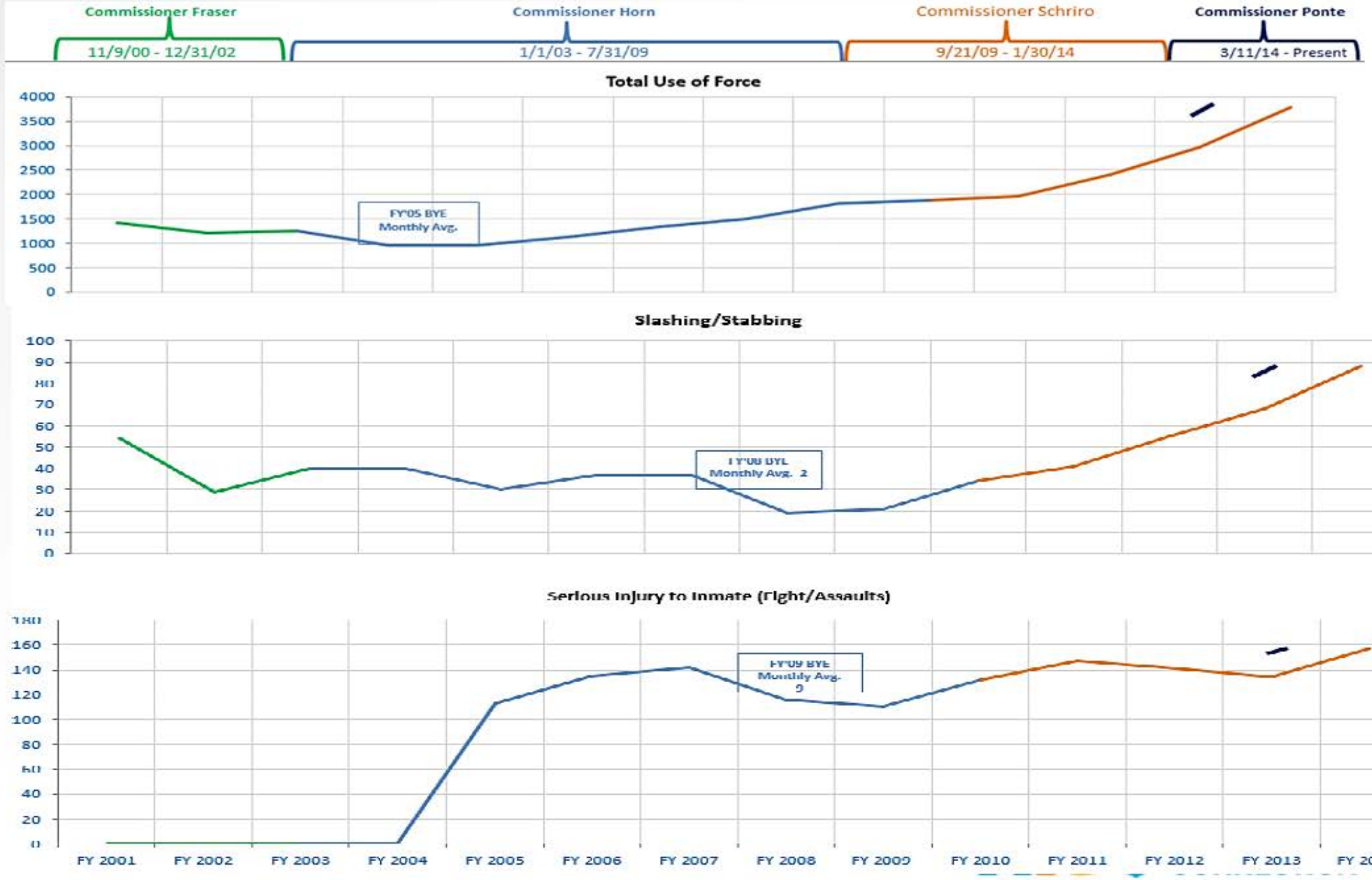
DOC Overview

Intro to DOC
Jail system – 77% of population is on trial
13 Jails (14 with JATC)
9 on Rikers (10 with JATC)
4 in boroughs
2 hospital prison wards
Court facilities in each borough

FY14 Numbers
Total admissions: 77,141 (56,217 unduplicated)
Average daily population: 11,408
Average length of stay: 54 days
Percent released to the community: 76%
Average age at admission: 35
Adolescent population (16-18): 5% of ADP
Female population: 7% of ADP

Every Day at DOC
Over 1,000 inmates are transported to/from the courts.
Transportation Division travels about 3,000 miles.
Nearly 44,000 meals are served to inmates and police prisoners.
Over 1,600 visitors come to Rikers Island to visit inmates.

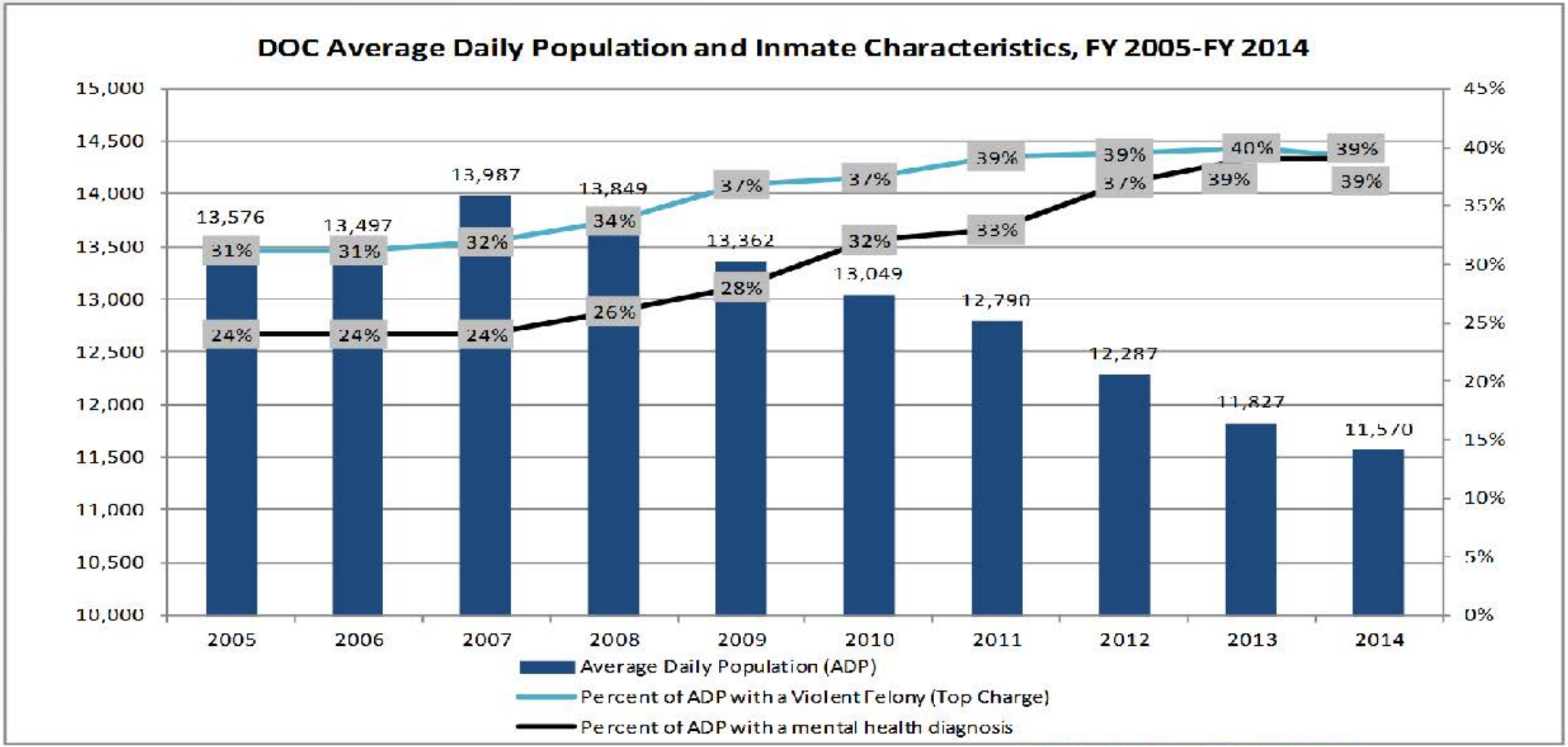
DOC Violence Over Time



Overview of Major Violence Indicators

Year	Stabbings/ slashings	Assault on uniformed staff	Assault on health staff	Assault on civilian staff	Total assaults
FY 2010	34	500	3	6	509
FY 2014	88	752	48	6	806
% Increase	159%	50%	1,500%	0%	58%

As ADP decreases, the concentrations of violent felons and mentally ill inmates increases



NYC DEPARTMENT OF CORRECTION

Specific sub-populations drive the violence in the jails

At-risk Populations	% of Average Daily Population	% Involved in Incidents
High custody	16%	61%
Gang-involved (SRG)	15%	25%
Mental Health Diagnosis	37%	59%
Adolescents [1]	6%	26%

1. Includes the 16-18 years old

With appropriate housing options, as many as 2,979 incidents could have been avoided in FY14

Categories	Number of incidents	# of incidents involving repeat offenders	% of incidents involving repeat offenders
Slashing/Stabbing	88	10	11%
Use of Force	3779	2694	71%
Assault on Staff	752	267	36%
Serious Injury to Inmate (Assault/Fights)	157	8	5%

Tools for dealing with our most violent population

	Segregation	Enhanced Supervision	Standard housing units
	▪ *Punitive Segregation (PS)*		▪ *General Population (GP)* ▪ *Enhance Restraint (ER)* ▪ *Protective Custody (PC)* ▪ *Mental Observation (MO)* ▪ *Administrative Segregation (AS)* ▪ *Clinical Alternative to Punitive Segregation (CAPS)*
Lock-in	▪ Up to 23 hours	▪ Up to 17 hours	▪ Up to 8 hours
Lock-out	▪ None except for services ▪ 1 hour outdoor recreation	▪ 7 hours/day min ▪ 1 hour outdoor rec	▪ Minimum of 14 hours per day ▪ 1 hour outdoor recreation
Lock- out Policy 1	▪ One inmate at a time	▪ ½ of inmates in unit out at a time	▪ All inmates can be out together
Mandated Services 2	▪ All activities happen in housing area ▪ Included in 23 hours of lock-in	▪ All activities happen in housing area ▪ Included in 17 hours of lock-in	▪ Escorted to all activities ▪ Not included in 8 hours of lock-in

1 Law library, commissary, barbershop, religious services
2 Showers, visits, attorney visits, phone calls, medical clinic

Proposed housing unit

The Case for Enhanced Supervision Housing

- Increased restrictions on violent inmates are necessary to keep staff and other inmates safe from jail violence
- DOC has a duty to protect inmates from one another when there are known violence risks
- **ESH is NOT punitive segregation**
  - **All ESH inmates will have at least 7 hours out of their cells per day**
  - **All ESH inmates will have access to all programs and services in the house**
- There will be no reduction in services for those with mental illness

Most inmates leaving punitive segregation return to GP

ESH is a necessary component of Punitive Segregation Reform to ensure those with the highest propensity for violence are safely managed

- Enhanced Supervision is targeted at inmates with demonstrated histories of serious jail-based violence and is not intended to manage rules violations or even most inmates who have been violent
  - Only 10% of inmates engage in rules violations while in custody
  - Only 6% commit violent infractions
  - Only 250, or 2.2% of the ADP, will be eligible for ESH at any time
    - Inmates who have committed a slashing or stabbing of another inmate
    - Inmates who have seriously injured a staff member during an assault
    - Inmates who have seriously injured another inmate during an assault
    - Inmates who are known to be initiators of violence caused by others

Misconceptions about ESH

- *Myth*: ESH is punitive segregation
- *Fact*: ESH seeks to impose minimal restrictions on inmates with demonstrated histories of violence in the NYC jails but will include 7 hours (or more) out of cell per day in congregate settings and access to all programs and services
- *Myth*: ESH inmates will be denied programs and services
- *Fact*: DOC has hired one legal coordinator, three chaplains, one social service counselor and one grievance coordinator specifically for the ESH units to ensure services are provided. They will be provided in the housing area where possible to avoid mingling ESH inmates with GP inmates but no service will be denied or reduced.

Thank You

NYC DEPARTMENT OF CORRECTION