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TESTIMONY BY CORRECTIONS AND COMMUNITY REENTRY COMMITTEE OF THE NEW YORK CITY BAR ASSOCIATION

BOARD OF CORRECTION PUBLIC HEARING ON AMENDMENT OF CERTAIN MINIMUM STANDARDS FOR CITY CORRECTIONAL FACILITIES

OCTOBER 16, 2015

The New York City Bar Association's Corrections and Community Reentry Committee appreciates the opportunity to make a statement regarding the Department of Correction's proposed rule. The Association is an independent, non-governmental organization of 24,000 lawyers, law professors, and government officials from the United States and 50 other countries. Throughout its 144-year history, the Association has consistently maintained that an independent judiciary and respect for the rule of law are essential to all jurisdictions. The conditions of confinement in our state and local prisons and jails are a matter of long-standing concern of the Committee and the Association.

The Committee previously testified in opposition to the Department's proposed rule of May 2015, noting that the rule made significant changes to the Minimum Standards for visiting, sending and receiving packages, Enhanced Supervision Housing, and punitive segregation, but did not explain or justify these changes sufficiently.[1] The current rule proposed by the Department is a revision of the May 2015 rule. The Committee remains concerned that many problems still exist in the current version of the rule. Consequently, the Committee recommends that the Board of Corrections reject this rule.

THE MINIMUM STANDARDS FOR VISITING RIKERS ISLAND SHOULD NOT BE LOWERED

We recognize that the jails on Rikers Island, and all of the jails in New York City, are violent places. But when violence is spiking, people living at Rikers need more contact with their friends and family and greater access to their love, affection, and support, not less. When people feel isolated, hopeless, or abused, they lash out. People at Rikers need hope and comfort, and their families and friends give them that. In order to encourage these positive interactions, Rikers should become more open to visitors. Restrictions on visits will cause an increase in violence on

[1] Testimony by the New York City Bar Association Corrections and Community Reentry Committee, June 9, 2015 Board of Correction Meeting, available at: http://www2.nycbar.org/pdf/report/uploads/20072927-150609TestimonyBOC.pdf.

Rikers, not a decrease.

We applaud the Department for recognizing the key value of visits for individuals at Rikers, noting the "instrumental role" visits with family and friends play in an "inmate's ability to maintain positive social connections" and remarking that visits should be "encouraged and facilitated" by the Department. We are concerned, however, that the text of the proposed rule does not uphold the promise of this language. As explained in detail below, there are still insufficient procedures to prevent arbitrary or discriminatory restrictions or bans on visits.

Even as Revised, the Proposed Rule Provides Insufficient Procedural Protections for Incarcerated Individuals and Their Loved Ones

The current Minimum Standards already permit the Department to ban and restrict visitors. The proposed rule, however, will add a large number of new reasons to restrict or ban visitors, including the "lack of family relationship," the visitor's current probation or parole status, the "nature of the inmate's" or the visitor's convictions, and any pending charges or "violations of correction facility rules." Additionally, there is a catch-all clause that visitation may be denied simply because the visit would pose a "threat" to the "good order" of a facility.

These reasons are vague and could be interpreted in exceedingly broad ways. For example, while we praise the Department for noting elsewhere in the rule that the term "family" should be "construed broadly" to "reflect the diversity of familial structures and the wide variety of positive social relationships" an incarcerated individual may have, this laudable language does not limit the Department's authority to deny a non-family member a visit. Additionally, under the proposed rule, the Department would be able to:

- deny a visit because the visitor is HIV positive, or coughing excessively, because such visitation could cause a threat to the "health" of inmates;
- deny a visit because the visitor was arrested for, but not convicted of, a crime in the prior year;
- deny visits to all people at Rikers facing gun charges;
- deny visits to all people at Rikers facing drug charges.

There are no procedural safeguards in the rule that would prohibit the use of these factors in an arbitrary or discriminatory manner. Instead, under this rule, the Department would apparently have unfettered discretion to exclude visitors and prevent particular inmates from receiving any visits. There have been too many instances of employees of the Department abusing their discretion to allow this broad power to deny visits.

Furthermore, the rule still does not explain who would make these decisions and when. Would it be the officer in the visiting room? Will denial happen in advance of a visit? The rule also presents an obvious question about the logistics of investigating a potential visitor's background: How would the Department obtain an accurate criminal history for the visitor?

How would a correction officer determine which visitors constitute an inmate's "close" friends? The Department does not have access to modern computer-based record keeping. Given the Department's limited technological resources, it is entirely unclear how it will reach these determinations or store related information.[2]

The proposed rule also significantly alters the appeal process for visitors who have been rejected or banned. Currently, visitors can appeal directly to the Board, but the new rule inserts the Department as a quasi "intermediate appellate court" before an appeal reaches the Board. No reason is provided for this extra layer of bureaucracy within the same organization that makes the initial determinations. This extra step of appealing to the Department also increases the length of the appeals process from approximately 14 days to 30 days, much longer than the length of incarceration for the vast majority of people at Rikers. This change to the appeal process should be rejected.

Finally, the Department has also proposed limits on physical contact during visits, including a partition at the top of the visiting table. The Department has not put forth any justification for this change – would it not make more sense to place a partition underneath the table, where contraband is more likely to be surreptitiously passed? We know that many other groups will provide testimony regarding the already difficult process of maintaining a loving relationship with a person in a public jail visiting room, but we also note that this change does not appear warranted based on the information provided by the Department.

The Board Should Request More Data and Require Greater Justification before Considering These Changes

The Committee is also concerned that the Department has not provided sufficient information indicating that visiting rooms generally, or visitors or inmates with certain criminal records or pending charges specifically, are a significant source of weapons or that the proposed rule will have any ameliorative effect on violence at Rikers. The Board should, therefore, request that the Department provide more data and information indicating that this rule is necessary before considering approving the rule.

The statistics the Department has provided on weapons smuggling are not sufficient to justify lowering the visiting minimum standard. The Department states that it processes up to 1,500 visitors per day.[3] In the first six months of 2015, across all city jails, 29 visitors were arrested for attempting to introduce a "weapon" into a jail, and 24 "weapons" were found in

[2] Should the Board adopt any rule regarding the limitation of visits, clear procedures regarding how information will be gathered about visitors, on what basis the information will be evaluated, who will be making determinations about visiting restrictions, and when this determination will take place, should be clearly articulated in the rule itself. Including this procedural information in a "directive" is inappropriate, as directives are not available for review by stakeholders such as the Committee and other groups with concerns about incarcerated people, may be edited without oversight or public comment by the Department at any time, and are not legally enforceable.

[3] See "Visit Schedule", NY City Board of Correction, available at: http://www.nyc.gov/html/doc/html/visit-an-inmate/visit-schedule.shtml.

visiting rooms.[4] Accepting the Department's data, 53 weapons from approximately 270,000 visitors from January to May 2015 is a .00019 weapon-per-visitor rate.[5] The Department also does not explain what constitutes a "weapon" for these statistics, and whether or not any of the arrests were prosecuted or resulted in guilty pleas. Even if these statistics somewhat overestimate how many visitors are processed, it is reasonable to conclude that significantly less than 1% of all visitors bring in weapons. This statistic strongly suggests that visitors are not the source of the weapons at Rikers Island. Making visits more difficult for the 99.99% of visitors who are not carrying weapons is not only unreasonable, but also contrary to the recognized importance of encouraging visits.

Additionally, the Department's stated justification for lowering the visitation standard is to "bring the Board's Minimum Standards closer in line with New York State standards governing visitation" at prisons. Yet, this justification ignores the distinction between sentenced inmates in Department custody and pretrial detainees. The vast majority of people in the Department's custody have not been convicted of a crime.[6] These individuals awaiting trial possess a broader set of constitutional rights than people sentenced to a term of incarceration in state prisons.[7] Public policy is moving toward reducing the number of people in pretrial custody because stakeholders around the city and state are recognizing that custody is no place for the vast majority of people awaiting case disposition, all of whom are presumed innocent. The Board should reject the Department's request to make its jails more like prisons for sentenced individuals.

The Board Should Ask the Department to Consider Alternatives to These Changes

The Board should require the Department to consider alternatives to the restrictions on visits and explain why those alternatives would not address the problem of contraband in the facilities.

The Department states that it is "aggressively" addressing all avenues by which contraband might get into facilities, including by incarcerated individuals and staff; however,

[4] The Department also states that 23 inmates were found with a "drug or weapon" in post-visit searches so far in FY 2015. But, for this statistic to be meaningful to this analysis, separate statistics for weapons and drugs should be provided.

[5] Additionally, outrage over weapons left in the amnesty boxes is unnecessary – people leave weapons in amnesty boxes not only because of a "last minute" change of heart, but also because they learn which objects are not permissible when they arrive, or realize that they have an item they had not intended to bring.

[6] See, e.g., September 2011, Independent Budget Office Letter to City Council, available at: http://www.ibo.nyc.ny.us/iboreports/pretrialdetainneltrsept2011.pdf (reporting that approximately 75% of individuals in city jails are pretrial); "What Is Happening at Rikers Island?," N.Y. TIMES, Dec. 15, 2014, available at: http://www.nytimes.com/2014/12/16/nyregion/what-is-happening-at-rikers-island.html?_r=0 (estimating 85% are pretrial).

[7] James C. McKinley Jr., "State's Chief Judge, Citing 'Injustice,' Lays Out Plans to Alter Bail System," N.Y. TIMES, Oct. 1, 2015, available at http://www.nytimes.com/2015/10/02/nyregion/jonathan-lippman-bail-incarceration-new-york-state-chief-judge.html?_r=0 (Chief Judge Lippman noted that "[d]efendants who are unable to post bail serve a sentence before their cases are ever resolved. They do so regardless of innocence or guilt, and the harm that this injustice causes is intolerable").

such efforts appear to be failing. Last month a guard with eight years on the force was arrested for attempting to smuggle knives onto Rikers, and just this week a nine-year veteran guard was arrested for similar conduct.[8] And it was recently reported that the Bronx District Attorney's office will decline to prosecute Rikers rearrests because the Department's investigations of inmates suspected of committing crimes are so incompetently handled that individuals cannot be prosecuted.[9] Cases against suspected violent inmates often are not pursued because Department officers have failed to properly handle evidence, accurately fill out paperwork, appear as witnesses in court, and produce suspects for court appearances. The Board should ask the Department to propose revisions to its investigation process so that prosecutors are able to enforce existing laws against incarcerated individuals who possess weapons or use violence.

The Board should also ask the Department why its current resources and procedures, such as the four physical and magnetometer searches that a visitor goes through before entering the visiting room and the searches conducted on incarcerated individuals, could not effectively find any weapons entering the visiting room. If officers were diligent at all of these checkpoints, it seems likely the Department would prevent more weapons from coming into the jails. Similarly, the Department possesses body scanners that could also effectively reveal any weapons; all that is needed to use them is a change in the public health law to permit their use.[10]

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If these vague rules are adopted, it will be extremely difficult to change them. If the Department wishes to experiment with a particular strategy to address visitors smuggling weapons into jails, it can request a variance. But as written, the proposed rule grants a beleaguered, untrained and under-resourced Department broad discretion to make life worse for people living at and visiting the jails, with no attendant reduction in violence. The Committee, therefore, urges the Board to reject the proposed rule on visits and ask the Department to meaningfully develop its data and other avenues to achieve the goal of reducing violence in jails.

THE BOARD SHOULD REJECT THE PROPOSED CHANGES REQUIRING FAMILIES TO SEND ALL PACKAGES THROUGH A PRE-APPROVED VENDOR

The Department also proposes changing how individuals incarcerated at Rikers receive and send packages in two key ways. First, the proposed rule mandates purchases at entities on a pre-approved vendors list for all packages mailed to Rikers and prohibits any hand-delivered packages. A large proportion of people in city jails are incarcerated during the pendency of their cases simply because their families are too poor to pay bail. Poor families will be burdened by

[8] Reuven Blau, "Rikers guard nabbed for smuggling razor-edged tool into the prison", N.Y. DAILY NEWS, Oct. 12, 2015, available at: http://www.nydailynews.com/new-york/nyc-crime/rikers-guard-nabbed-smuggling-razor-edged-tool-article-1.2393666.

[9] See, e.g., Michael Schwirtz, "Prosecutors Struggling to Keep Up With Cases of Violence From Rikers," N.Y.TIMES, Sept. 25, 2015, available at: http://www.nytimes.com/2015/09/26/nyregion/prosecutors-struggling-to-keep-up-with-violence-cases-from-rikers.html?_r=0.

[10] See legislation currently pending in the NYS Legislature, A.8002/S.5828, which would amend Section 3502 of the public health law to permit the use of body scanners at local correctional facilities including Rikers.

having to buy clothing and other personal items anew, rather than sending their loved ones items they already own.

The Department claims that the burden on families will be mitigated by the use of uniforms in the jail system, but this ignores that incarcerated individuals still need undergarments, hygiene items and other basic necessities, in addition to a uniform. In winter, incarcerated people also rely on family members to bring or send thermal undergarments and outerwear that they own, and which are remarkably expensive when purchased from vendors such as JPay. The Department jackets provided in the winter are thin and many incarcerated people rely on additional layers of clothing from their families to stay warm. For families who cannot make bail, purchasing new clothing that they could otherwise supply from home, is a significant cost, particularly when pre-trial incarceration can last for years. It is irresponsible and discriminatory against poor families to require the purchase of new basic items for their incarcerated family members.

Second, the Department's proposal would limit even outgoing packages when there is a "[r]easonable belief that limitation is necessary to protect public safety or maintain facility order and security." This exceedingly vague standard would allow for arbitrary denials.

For both amendments, the Department states that its goal is "preventing the introduction of dangerous contraband through packages." But the Department has not provided any data on the amount of contraband that is actually entering the facility through packages, and it is unclear why the 48 hours the Department is already permitted to search all packages (and the additional 24 hours under the proposed rule) is insufficient to discover contraband. Additionally, the Department has not provided any support for the position that limiting outgoing packages will somehow prevent the introduction of contraband.

Absent further statistics and justification, the Board should reject these proposed amendments.

PROPOSED MODIFICATIONS TO THE MINIMUM STANDARDS RELATED TO LIMITATIONS ON THE USE OF PUNITIVE SEGREGATION

The Committee vigorously opposes any modifications to the recently enacted restrictions on the use of punitive segregation. The Department has failed to (1) present sufficient evidence that the changes are warranted or (2) employ existing measures to address any incidents of violence and thereby obviate any need for modifying the existing limitations. Moreover, the proposed changes fundamentally undermine the intent of the restrictions, enacted to reduce the harm caused by long-term isolation and to limit the use of punitive segregation. Punitive segregation is not effective in addressing the behaviors of those who experience it. Therefore, the practice fails to meaningfully promote safer institutions.

The proposed amendments entail two significant expansions on the use of punitive segregation: (1) elimination of the seven-day rule, which mandates both that people be released from punitive segregation after 30 days on the unit and that released people must remain out of segregation for seven days before they can be returned, and (2) replacement of the 30-day limit

on the maximum time a person can be sentenced to punitive segregation with a 60-day limit for a person who commits an assault on staff that results in serious injury. These modifications are counterproductive attempts to address aggression and violence in the jails.

Before addressing the specifics of each modification, we underscore that the proposed changes ignore the rationales for the limitations on punitive segregation: continued isolation is harmful and counterproductive for the person being segregated and fails to enhance the safety of the incarcerated population or the staff. The time limitation in punitive segregation derives from the overwhelming evidence that isolation poses a substantial risk of significant harm to those subjected to these conditions. In the Committee's December 19, 2014 testimony before the Board, we detailed the significant and potentially permanent mental and physical harm that can result from prolonged isolation.[11] Many of the other participants at that proceeding, including mental health experts, supported this assertion.[12]

Just recently, an international consensus has been reached, reinforcing the limitation on prolonged segregation of incarcerated people in any correctional institution. The United Nations Commission on Crime Prevention and Criminal Justice concluded five years of negotiation on revisions to the UN Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) and issued its recommendations to the UN in a May 2015 report in which the Commission specifically prohibited solitary confinement in excess of 15 consecutive days.[13] The United States was a party to these negotiations and its delegation of experts included correctional commissions from state prison systems. Clearly the world has declared that isolation beyond 15 days is a violation of basic human rights, and it is indefensible that the Board would enact measures that move in the opposite direction.

In addition to the harm of long-term isolation, authorities also acknowledge that segregation is counterproductive to reducing violence and enhancing safety within correctional systems. The recent Vera Report, *Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives*, challenges the notion that segregation deters misbehavior and violence, and cites several studies concluding that segregation and excessive controls do not reduce violence and serious misbehavior by those subjected to these conditions.[14] The Vera report also notes how

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[11] Testimony by the New York City Bar Association Corrections and Community Reentry and New York City Affairs Committees at the Board of Corrections Hearing about Proposed ESH Rules, Dec. 19, 2014, available at: http://www2.nycbar.org/pdf/report/uploads/20072828-TestimonytoBOConProposedRulesforEnhancedSupervisionHousing.pdf.

[12] See, e.g., Testimony of Dr. James Gilligan and Bandy Lee, available at: http://www.nyc.gov/html/boc/downloads/pdf/Variance_Comments/RuleMaking_201412/12-19-14%20Testimony%20for%20BOC%20Hearing.pdf; Testimony of Dr. Frances Geteles, available at: http://www.nyc.gov/html/boc/downloads/pdf/Variance_Comments/RuleMaking_201412/FrancesGeteles.pdf.

[13] United Nations Economic and Social Counsel, Commission on Crime Prevention and Criminal Justice, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), May 2015, Rule 44, available at: http://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_24/resolutions/L6_Rev1/ECN152015_L6Rev1_e_V1503585.pdf.

[14] Vera Institute of Justice, Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives, May 2015, available at: http://www.vera.org/sites/default/files/resources/downloads/solitary-confinement-misconceptions-safe-alternatives-report_1.pdf .

alternative responses to serious misbehavior, such as specialized programs, have been successful in responding to incarcerated people who have chronic behavior problems. Drs. Gilligan and Lee, who were the Board's experts on assessing solitary confinement in New York City jails, testified last December that isolation is counterproductive for reducing violence:

> Decreased interaction with other people, rather than decreasing violence, actually increases violent behavior and increases the need for more intensive measures. This is because solitary confinement, in which people are deprived of human contact, interactions, and relationships, actually increases violent behavior toward others and toward the self. This has been demonstrated in multiple studies, including a recent one specifically at Rikers Island. In the treatment of violent individuals in the correctional system, it is about time that we recognize that the only practices that have been shown to reduce violence in prisons and jails are the exact opposite: namely, maximal interactions and chances for socialization.[15]

It is extremely troubling that the Board would consider quickly retreating from the carefully crafted restrictions on punitive segregation, adopted in January 2015, after extensive input from the Department, experts, people who have experienced segregation and the public, and careful review by the Board. Modifications should be considered only if the Department can present overwhelming evidence that changes are needed to address unanticipated problems created by the new rules.

Modification of the Seven-day Rule

The Department proposes that people who have committed specified violent acts[16] while in punitive segregation can be retained in segregation beyond the current 30-day limit, and further, if a person recently released from segregation after 30 days commits such acts during the seven-day period they are required to be outside of segregation, they may be immediately returned to isolation for another 30 days. These rule changes are inhumane, unnecessary and counterproductive.

The 30-day maximum stay in isolation and seven-day respite from segregation are designed to limit the harm caused by long-term isolation. Keeping people whose behavior has not improved after a 30-day sentence in segregation longer does not mitigate this harm. In fact, evidence suggests that their stay in segregation might have enhanced the likelihood of their committing additional violent or otherwise inappropriate acts. A longer stay in solitary severely

[15] Gilligan and Lee BOC testimony, *supra* note 11, at 1.

[16] BOC Minimum Standards Section 1-17 (4) provides that this exception applies to rules violations that demonstrate "that an inmate's removal from the general population is necessary to protect other persons from physical harm, including stabbing or slashing, assault resulting in death or serious injury, sexual assault, and escape or attempted escape."

increases the risk of greater social isolation, anger and mental deterioration, leading to further acts of violence.[17]

Instead of keeping people in segregation or returning them to the unit, a more appropriate and effective remedy is to separate them from the general population, provide them with meaningful programs in a more secure environment and initiate an intervention that is designed to address their behavior. The Enhanced Supervision Housing Unit (ESH) was proposed by the Department and approved by the Board on January 13, 2015 to house people "having the most direct security threats," including those who have "committed slashing and stabbings or who have committed repeated assaults, have seriously injured another," have been found with a weapon or have "engaged in serious or persistent violence."[18] In the ESH, people get out-of-cell time and participate in programs addressing their behavior. The ESH programs include an interactive journaling behavior modification program and stress reduction and anger management workshops.[19] The Department has failed to explain why this unit – designed for people with problematic and violent behavior – is not appropriate for the people who commit such acts in or immediately after release from punitive segregation. This silence alone requires that any modification be rejected.

Moreover, it is unclear to what extent the Department has tried to develop an ESH program for people who are leaving segregation after having committed violent acts. According to the Board's May 6, 2015 Follow-up report on ESU, no person released from segregation had been transferred to the ESH during the seven-day respite period. During the June Board meeting, the Department reported that only four or five people had been sent to the ESH during the seven-day respite period. The Department did not discuss programs or integration into the ESH. No information on this issue was reported at the July 2015 Board meeting, but Commissioner Ponte estimated that between 22 and 30 people per year would be affected by the seven-day rule modification.

The Department has not provided sufficient information concerning the actions that would justify a premature return to segregation. In Commissioner Ponte's September 4, 2015 letter to the Board requesting a variance to the seven-day rule, he reported that of the 231 people released from punitive segregation after 30 days during the six-month period March through August 2015, nine people had a grade 1 infraction, a group representing 4% of all people released.[20] He further commented that not all of these individuals would necessarily be candidates for the proposed exception and then cited only two people who "might have been

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[17] Gilligan and Lee BOC testimony, *supra* note 11; see also Vera Report, *supra* note 13.

[18] NY City Board of Correction, Notice of Adoption of Rules, Statement of Basis and Purpose, Jan. 2015, at 1, available at: http://www.nyc.gov/html/boc/downloads/pdf/Variance_Documents/20150113/ESH%20Rule%20Revision%20FINAL.pdf.

[19] See DOCS 60 Day Report on the ESH, Feb. 23 – March 31, 2015, at 2, available at: http://www.nyc.gov/html/boc/downloads/pdf/reports/BOC_Rules_60_day_Report_-_ESH_Report_2015-4-24_FINAL.pdf.

[20] Letter of DOCS Commissioner Ponte to BOC Chair Stanley Brezenoff, Sept. 4, 2015, at 3, available at: http://www.nyc.gov/html/boc/downloads/pdf/Variance_Documents/20150908/90Day7DayOut.pdf.

approved to return to punitive segregation." He failed to explain why these people were not placed in a more restrictive housing area when they left punitive segregation and why there was not consideration of placement in the ESH before their release from solitary.

Based upon the information provided above, the Department has failed to provide the detailed data from which the Board could conclude that the rule change is needed. That the Commissioner mentioned only two examples in his September 4th letter suggests there is no immediate need for precipitous action. Moreover, there is no evidence that the ESH, or other secure units, such as those in North Infirmary Command, George Motchan Detention Center and the Brooklyn Detention Center, could not also serve as safe housing for people who have committed violent acts while still allowing those individuals access to programs. Until the Department has tried such interventions and clearly demonstrated they have failed despite all reasonable efforts, it is unreasonable and unfair to expose people to the obvious harm of even more solitary confinement.

Expansion of Segregated Sentences to a 60-day Limit

For many of the reasons presented in opposition to the override of the seven-day rule, the Committee also opposes the expansion of punitive segregation sentences to 60 days for people who are found to have assaulted staff causing "staff to suffer one or more serious injuries, as listed under the Department's definition of 'A' Use of Force Incidents." As with the other changes, this change also undercuts the premise for the Board's original limitation on punitive segregation, namely, that prolonged isolation beyond 30 days is harmful. The Department presents no evidence or explanation of why such harm does not result for people who are determined to have assaulted staff. Because the expanded time in segregation is not premised on any action while the person is in isolation, the Department appears to be proposing that the nature of the infraction justifies the additional harm inevitable with longer segregation. Has the risk of harm due to long-term segregation been reduced since January 2015 and if not, why is an increase in such segregation now appropriate? Unless and until these questions can be answered, no modification should be considered.

The Department also ignores that the ESH was specifically proposed and approved to house the same people who would be candidates for 60-day sentences in punitive segregation. In adopting the ESH rules, the Board specifically acknowledged that ESH was intended to house people who "engage in serious or persistent violence" and that the ESH would have "an increased level of supervision and control in order to ensure the safety and security of [incarcerated people] and staff."[21] No new evidence has been presented to suggest that there has been an unforeseen increase of staff assaults, or that after the maximum sentence of 30 days has been reached, the ESH is inadequate to house people who have assaulted staff. In fact, the level of staff assaults has declined in 2015.[22] Why would a declining rate of serious staff assaults justify a change in rules that were adopted during such decline? The record simply does not support a precipitous change toward more segregation.

[21] NY City Board of Correction, *supra* note 17, at 1-2.

[22] The Department's May 26, 2015 petition requesting modifications with the current punitive segregation rules noted that in Fiscal Year 2015 as of the date of the petition, 27 incidents of serious staff assaults had occurred, which was a 40% reduction from the 47 incidents that had occurred during the same period in FY 2014.

It appears that the real motivation for the request is to create the appearance to staff and the jail population that the Department is going to be more punitive with people who assault staff. This is short-sighted and ill-advised because prolonged isolation has the potential for increasing violence in the jails, not reducing it. More importantly, a response to violent behavior directed at addressing the underlying causes of such behavior is more effective in reducing the risk of future assaults than isolation. Although the ESH was ostensibly designed to serve this purpose, it does not appear that the Department has seriously attempted to implement such a program for this identified population. Until those efforts have been made and proven to be ineffective, any expansion of harmful isolation must be disapproved.

Finally, the current Board rules (Rule 1-17(d)(3)) already allow for extended segregation time beyond the 60-day limit in a six-month period for people "who engage in persistent acts of violence, other than self-harm, such that placement in enhanced supervision housing … would endanger inmates or staff." In his September letter to the Board, Commissioner Ponte reported that the Department has availed itself of this exception 35 times for the 90 people who have reached the 60-day limit since the new rule has been enacted.[23] This represents 39% of those reaching that limit. Of these 35 people, nearly 70% were involved in assaults on staff resulting in a range of injuries. While we are concerned about the frequency the Department has used this existing exception to the 60-day limit, it also demonstrates that the Department already has tools to address violence towards staff.

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We are also concerned about increasing segregation sentences when the Department has not been vigilant in the timely removal of people from solitary and has failed to monitor or report these cases to the Board. Specifically, the Board's May 8, 2015 "Report on the status of punitive segregation reform" found that more than 100 people were in segregation beyond the 30-day consecutive day limitation or the 60-day limitation within a six-month period, including 58 people beyond the 30-day limit and 53 people beyond the 60-day restriction. It appears the Board was not immediately informed of these violations of the rules.[24]

Given the lack of justification for significantly modifying the rules, the inherent conflict between extending prolonged-isolation and the fundamental purposes for approving the rules, and the failure of the Department to implement measures for the population it now proposes should stay longer in segregation, we urge the Board to reject these unnecessary and harmful exceptions to the current rules. Rather than endorsing further isolation and harm to people who violate jail rules, we urge the Board to mandate that the Department take a more humane and effective approach by creating safe environments in which people can have essential human contact and participate in programs designed to address aggression and violence. This approach

[23] Letter of DOCS Commissioner Ponte to BOC Chair Stanley Brezenoff, Sept. 4, 2015, at 3, available at: http://www.nyc.gov/html/boc/downloads/pdf/Variance_Documents/20150908/90Day7DayOut.pdf.

[24] Report on the status of punitive segregation reform, NY City Board of Correction, May 8, 2015 at 4-5, available at: http://www.nyc.gov/html/boc/downloads/pdf/reports/Punitive%20Segregatiion%20Report.050815.pdf.

will lead to real safety for those individuals, other incarcerated people and Department staff, and result in safer institutions.

THE BOARD SHOULD NOT DILUTE THE PROCEDURAL PROTECTIONS FOR INDIVIDUALS PLACED IN ENHANCED SUPERVISION HOUSING

The proposed amendments to the Minimum Standards supports the laudable goal of allowing people to be transferred out of Enhanced Supervision Housing ("ESH") based on good behavior. But at the same time, the rule would eliminate any form of due process if someone is returned to ESH within 45 days. The Board should reject this dilution of already limited due process standards.

The current standards dictating the procedure for placement in ESH already lack the precision and process to guarantee the rights of those being placed in those units. While individuals being considered for ESH may be notified of the grounds for their placement in the unit, and permitted to submit a response and request a hearing, they are not afforded counsel. In addition, the hearings are held before hearing officers, not neutral decision makers. This lack of procedural protection is particularly significant because there are no limitations on the duration of a person's ESH stay.

The only other mechanism to protect these people's due process rights is a 45-day status review, which is exceedingly limited in scope. In these reviews, the individuals in ESH are able only to submit written statements "for consideration," but they have no forum in which they might appear, nor may they present evidence or confront witnesses.

The proposed amendment would permit the return of a person to ESH with no review and will weaken a standard that is already lacking meaningful protections. The amendment neither describes how or why an individual might be moved out of ESH, nor does it explain what form of conduct might result in being sent back to ESH.

While the Statement of Purpose suggests the amendment would allow the Department to establish incentives for good behavior, it does not list any such potential incentives. There is no language regarding where those who leave segregation would be temporarily placed or how such placements would be less restrictive. The amendment also fails to delineate the projected length of such placements, when an individual continues to engage in good behavior. In short, the new language fails to support the stated purpose for its inclusion.

Furthermore, there is no language stating or even suggesting why a person would return to ESH in under 45 days. Presumably the amendment supposes that a person engaged in some form of misconduct, as the person is given a written notice of the basis for their return, but there is no mention of whether the conduct necessitating a return might include violence, a risk to safety, or a minor infraction. It is also unclear whether the reason for the return has anything to do with the reason the person was placed in ESH in the first instance.

By contrast, the one clear directive in this amendment is that if the Department decides, for any reason, that a person should return to ESH, that person has absolutely no right to contest

this decision. The amendment also fails to identify who will be making the decision to return the person to the ESH and whether that decision will be reviewed by any supervisory officials. The gravity of this absence of due process is apparent: in the proposed system a person may be returned to ESH without any ability to contest the basis for the return, which may bear no relation to the reason he was placed in ESH, and which may prolong his time in ESH. The lack of due process is especially unjust because, an individual's only way out of the unit is via a cursory 45-day status review.

The ESH units have existed for less than a year; thus experimentation with further amendments to the Minimum Standards that only decrease protections for those housed in the units would be both premature and ill-considered. We, therefore, ask that the Board reject the proposed amendments.