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Comments to the New York City Board of Correction
On Proposed Rule to Allow Changes to Visit and Package Policies,
Amendments to Due Process Requirements for the Enhanced Supervision Housing Units,
and Exceptions to Limitations on Use of Punitive Segregation

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The Urban Justice Center Mental Health Project opposes the proposed rule to change visit and package policies, to amend due process requirements for the Enhanced Supervision Housing Unit (ESHU), and to allow exceptions to the current limitations on the use of punitive segregation (solitary confinement). The Department of Correction (DOC) requested these rule changes to reduce violence, but since proposing the changes in May 2015, has supplied no evidence that these drastic measures will actually accomplish this aim. These changes are contrary to the goals of protecting the health and wellbeing of incarcerated persons, respecting human rights and dignity, strengthening community connections, and reducing recidivism.

The Minimum Standards are an articulation of the accepted limits on conditions and treatment of incarcerated persons in the City jails. They set the standard for humane treatment of individuals in DOC custody. As the body charged with adopting and monitoring these standards, the Board should not modify them without sufficient proof that the additional restrictions to incarcerated people and their visitors are necessary, narrowly tailored to produce the desired outcome, and outweighed by the increased safety that will result. The DOC has not provided such proof.

The Urban Justice Center Mental Health Project has focused on the needs of people with mental illness involved in the criminal court 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 represent the *Brad H.* Class, all incarcerated individuals who receive mental health treatment while in New York City jails. As Class Counsel, each week we conduct approximately 35 to 40 interviews of incarcerated individuals who have mental health issues. We are extremely concerned that the jail environment, especially placement in solitary confinement, harms these individuals not only while they are incarcerated but after their release. Our comments primarily focus on the rule changes regarding the punitive segregation standards as people with mental illness are disproportionately affected by these amendments.

The Board Must Uphold its Current Punitive Segregation Rules and Enact Additional Safeguards against the Harmful Effects of Solitary Confinement

In January 2015, the Board enacted significant limits on the use of solitary confinement, excluding adolescents and people with serious mental or physical disabilities from punitive segregation and limiting the number of consecutive days and total days in a six-month period that a person can be held in punitive segregation. The rules also mandate that a person who has served 30 consecutive days be released for at least seven days before the person may be returned to punitive segregation. These rules allow for an individual to be held in solitary confinement for twice as long as international norms dictate, and they afford DOC discretion to extend the maximum time limit in solitary under certain circumstances. But they represent a dramatic break from the past, when individuals were subjected to the torture of solitary confinement in DOC custody for months and even years on end.

Exception to Required Seven Day Release from Punitive Segregation

The requirement that a person be released for at least seven days after serving 30 consecutive days in punitive segregation was enacted to ameliorate the devastating impact of 23-hour isolation. When adopting the rule, the Board was well aware of the magnitude of the psychological harm caused by solitary confinement. That the specific conditions of isolation in the City jails provoke self-harming behavior in the individuals subjected to it was well-documented. A comprehensive study of more than 240,000 NYC jail incarcerations over three years found that individuals punished by solitary confinement were almost seven times more likely to attempt to hurt or kill themselves than other incarcerated people.[1]

The United Nations Special Rapporteur on Torture determined that "solitary confinement, when used for the purpose of punishment, cannot be justified for any reason precisely because it imposes severe mental pain and suffering beyond any reasonable retribution for criminal behaviour" and called for "an absolute prohibition on solitary confinement exceeding 15 consecutive days."[2] Since the Board adopted its rules regarding punitive segregation, the United Nations promulgated the Revised Standard Minimum Rules for the Treatment of Prisoners ("Mandela Rules"), which reinforced the understanding that solitary confinement beyond 15 days constitutes torture.

Given that the current rules allow for twice as many consecutive days of isolation as permitted by the Mandela Rules, the Board must not dispense with the seven-day respite period.

The current rules allow for a person who has served 30 days in solitary confinement to be returned to isolation for as many as 30 more days in a six-month period and even provide an extension beyond 60 days in a six-month period if the person continues to engage in persistent

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[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 (Mar. 2014) available at http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301742.

[2] *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, A/66/268, August 5, 2011, pp. 20-21 available at http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf.

acts of violence. If the exception to the seven-day release period is granted, there will be no relief from the torture of isolated confinement for some individuals.

In its Statement of Basis and Purpose, the Board claims that the proposed change would "clarify confusion surrounding the meaning of the 60-day limit." However, the rules are quite clear – the provision allowing at least seven days out of solitary confinement only affects those who will be returning to punitive segregation for a second infraction (as the maximum sentence is currently limited to 30 days). An individual who will be kept in solitary confinement for more than 60 days in a six month period is especially in need of the seven days out of solitary to counteract (to the extent possible) the effects of isolation.

The proposed exception will purportedly be applied to "a limited number of exceptionally violent and dangerous inmates." But extending these individual's period of isolation will not reduce their violent conduct. In May 2015, the Vera Institute of Justice reported that the belief that solitary confinement deters misbehavior and violence is one of the ten common misconceptions about solitary confinement. "Subjecting incarcerated people to the severe conditions of segregated housing and treating them as the 'worst of the worst' can lead them to become more, not less, violent."[3]

Rather than addressing the problem of violent conduct by those temporarily released from solitary confinement by eliminating the 7-day release period, DOC should transform punitive segregation from an environment of isolation and deprivation into a secure housing area where people who need to be removed from general population are allowed out-of-cell time and programming targeted at addressing aggression and violence.

Increased Solitary Confinement Sentences

The Board should reject the proposed rule change to allow a higher maximum sentence of 60 days of solitary confinement for an assault on staff that results in serious injury. The stated purpose of this rule change is "to serve as a deterrent to dangerous behavior." Yet the Vera Institute of Justice – which is currently partnering with DOC in its Segregation Reduction Project – reports that "empirical and anecdotal evidence suggests that segregated housing may have little influence on improving the behavior of incarcerated people."[4]

The Department has provided no rationale for doubling the maximum sentence for these infractions. In fact, the number of serious assaults on staff has dropped significantly from the number in the same period in FY 2014 – a reduction of more than 40% (from 27 to 46).

There is absolutely no reason for the Board to turn away from the maximum sentence adopted in January 2015, to double it for certain infractions, and to permit individuals to be confined for 60 consecutive days for these infractions. The current limits on solitary confinement sentences

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

[4] *Id.*

exceed the Mandela Rules adopted by the United Nations. Increasing the use of solitary confinement at a time when the rest of the world has recognized the need to limit it is unconscionable.

The Board should not support DOC's persistence in relying on solitary confinement as a sanction for misconduct. Instead, the Board should support DOC in developing a humane disciplinary system. Staff need to be given other methods for promoting good behavior and training in de-escalation techniques so that violence can be avoided altogether. If properly enacted, the reforms to be instituted as a result of the *Nunez* settlement will improve safety in the jails. The Board should give these new procedures time to work rather than rolling back recently enacted reforms.

Need for Monitoring and Enforcement of Existing Punitive Segregation Rules

We are deeply concerned that more than half of the individuals in punitive segregation receive mental health treatment and that the overwhelming majority (more than 85%) of those whose placement in punitive segregation has been extended beyond 60 days are individuals with mental illness.[5] The DOC, Department of Health and Mental Hygiene (DOHMH), and now Health and Hospitals Corporation (HHC) have failed to establish a unit in which people with mental illness who continue to receive infractions can be treated. Instead these individuals are left to languish in the toxic environment of solitary confinement. Rather than permitting extensions of solitary confinement sentences, the Board must require DOC and HHC to develop a unit in which this population can receive appropriate mental health treatment.

The current rules empower medical staff to remove an individual from punitive segregation when the placement poses "a serious threat to an inmate's physical or mental health." Yet the agencies have apparently given up any effort to develop a setting in which people with mental illness who have difficulty regulating their behavior can be safely managed. The Clinical Alternative to Punitive Segregation (CAPS) units have proven highly successful for the individuals who are placed there, but CAPS is not available to all individuals with mental illness.

The Restrictive Housing Units (RHU) were developed to deliver some therapeutic intervention in the punitive environment of solitary confinement. The failure of the RHU was predicted by Drs. James Gilligan and Bandy Lee in their September 5, 2013 report to the Board:

> As the RHU currently stands, these conditions violate the Mental Health Minimum Standards, and could be expected to lead to an exacerbation of psychiatric symptoms, since prolonged solitary confinement can induce psychotic symptoms, including hallucinations and delusions, and in some cases suicidality, even in those previously regarded as healthy. Those who are already 'mentally ill and have a history of suicidal gestures/attempts (or who are at risk for suicidal behavior or acute decompensation)' will be especially vulnerable to the harmful effects of solitary confinement. For them, the RHU will function as punishment, pure and simple, in a form that is virtually guaranteed to be anti-therapeutic and

[5] This information was discussed by Board members and Dr. Homer Venters at the October 13, 2015 Board meeting. Unfortunately the reports that include the specific data have not been published on the Board's website or released pursuant to a Freedom of Information Law request.

> even pathogenic. In other words, it is going down the same path that has been proven over and again to be a failed approach.[6]

Both DOC and DOHMH concede that RHU is a failed model. The agencies have repeatedly assured the Board that they were developing an alternative.[7] But the report from Dr. Venters at the October 13, 2015 Board meeting made clear that there is no treatment intervention being designed for those most in need of a unit where their mental health issues can be treated while providing for the safety of everyone on the unit.

The Board should not enable DOC to continue to rely on solitary confinement as the answer for managing this population. Nor should the Board allow medical staff to ignore their duty to remove individuals with mental illness from punitive segregation, an environment that threatens the health of people with mental illness. DOC and HHC must develop a more appropriate housing unit where these people can be engaged and treated, not discarded. The DOC has developed units – such as the Transitional Restorative Unit, Second Chance Housing Unit, and ESHU – where individuals who present safety concerns can be separated from the general population without isolating them in a cell for 22 to 24 hours. In fact, the Board requires programming in the ESHU for incarcerated people who "pose the greatest threats to the safety and security" of staff and other incarcerated individuals. Yet individuals with mental illness who are "violent and dangerous" are addressed only through extended isolation. It is imperative that people with mental illness be housed in an environment that provides for their treatment needs.

The Board Must Reject the Proposed Changes to the Visit, Package, and ESHU Standards

As with the removal of limits on solitary confinement, DOC has failed to provide any evidence that the proposed changes to visits and packages will accomplish its stated goals, while demonstrating reckless disregard for the detrimental impact of its proposed changes on the affected individuals. Once again, DOC seeks to extend its power beyond the reasonable limits already in place and demands exclusive oversight of the application and use of the additional authority that it would be granted.

Deprivation of Visiting Rights

The DOC is currently taking a positive step in reducing dangerous contraband – without a rule change – by subjecting staff to searches as they enter the jail facilities. These searches are actually resulting in the discovery of contraband. Moreover, they are likely preventing many others from even attempting to bring in drugs and weapons. The Board should allow thorough staff screenings to be fully implemented before undertaking any change in the visit rules.

The Board should certainly not adopt significant changes to the visit standards which will affect the hundreds of thousands of people who visit and are visited in the City jails each year by limiting the contact that 100% of them are allowed for the expressed purpose of detecting

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[6] Gilligan and Lee, *Report to the New York City Board of Correction* (Sept. 2013), p. 11.
[7] *See* February 10, 2015, March 10, 2015, May 12, 2015, and June 9, 2015 Board meeting minutes.

contraband brought in by less than 0.1% of the visitors.[8] The DOC already possesses the ability to detect contraband – visitors are subjected to three levels of searches before the visit and incarcerated persons endure a strip search after the visit. Extreme deprivations of the rights of incarcerated individuals, especially pre-trial detainees, should not be permitted where 99.9% of the visits pose no security risk and are beneficial for maintaining emotional health, family and community ties, and housing, education, and job opportunities upon release

• Restrictions to Contact Visits

The proposed amendments fundamentally redefine contact visits to impose an across-the-board restriction on *all* incarcerated individuals and their visitors. This restricted contact will be a hardship to incarcerated individuals and their visitors, who wait hours and endure multiples searches for the opportunity to have some physical interaction with their loved one. Depriving them of the right to express their support through a hug or other physical embrace without any evidence of an intent to pass contraband is far too restrictive.

In addition, the proposed change will likely result in increased hostility between incarcerated individuals, visitors, and DOC staff as staff will be charged with enforcing the limits on physical contact. Increased discretion for visiting room staff is likely to result in an even more unpleasant visiting environment than currently exists.

• Limitations on Visiting Rights

The proposed amendments are not narrowly tailored to achieve the stated purpose and provide for wide discretion in their implementation. The rule change allows DOC to consider a number of factors without specifying how they will be weighed other than to require that "such factors alone shall not form the sole basis for the Department's final determination."

The factors that DOC is allowed to consider are troubling. The DOC is in no position to evaluate the relationship between incarcerated people and their visitors. Many people in the City jails may no longer have blood relatives to visit them but instead rely on friends. Sometimes the person who supports an incarcerated person through this ordeal is not a mother or sister but a family friend or former teacher. The DOC should not be allowed the discretion to determine whether they have a close relationship.

Allowing DOC to consider pending criminal charges to limit visit rights is deeply concerning. The proposed amendments completely disregard the presumption of innocence.

Furthermore, all consideration of previous convictions must be tempered by the fact that as a result of the war on drugs, many people in the same family or social circle may have narcotics-related misdemeanor or felony convictions. The fact that a person has a criminal conviction does not mean that his or her visit would be "to engage in dangerous activing during a visit." A person who is out on parole most likely is visiting his incarcerated brother because he cares about him

[8] The amount of contraband discovered in post-visit searches (27 in FY14 and 23 in FY15) is miniscule when considered in the context of the total number of daily visits (257,101 in FY14 and 175,167 in FY15). Even if the contraband which enters the facility is ten times more than what is detected, only 0.1% of the visits in FY14 would have caused drugs or weapons to enter the jails.

and wants to support him, not because he intends to smuggle in contraband. Singling out individuals on probation or parole is perplexing given that these individuals are monitored to ensure that they do not violate the law and have much to lose if detected bringing in contraband.

The Board should not allow the exclusion of visitors based on their *status* of having a previous conviction, pending charge, or being on probation or parole. The current standards allow for exclusions of visitors and for non-contact visits, but they require a specific *act* by the visitor or the incarcerated person. Without a specific act that justifies a limitation on visits, there is no way for the rules to be applied fairly by DOC or for an appeal to be decided fairly by the Board. The current requirement of a specific act on which the visit restriction is based avoids the broad discretion permitted by the proposed amendments.

The proposed amendments to §§ 1-09(h)(2) and (3), which delete the word "serious" and insert the words "good order" without any definition of good order, contribute to the concern that the rules will be broadly construed. The amendment also eliminates the provision that visiting rights "may be denied only if revoking the right to contact visits would not suffice to reduce the serious threat." The existing rule is well-balanced to allow for some denial or limitation of visiting rights, but only if it jeopardizes safety and if less restrictive means are not effective. The Board should not adopt the proposed amendments to these subsections.

In the Statement of Basis and Purpose, the Board provides no explanation for adding an extra step to the visit appeal process. This added step will only serve to delay review of DOC's determination to restrict visit rights. The DOC administration should be involved in the first instance in any decision to deny or limit visits; adding an internal appeal process is unnecessary. The current DOC grievance system is ineffective at formally resolving the vast majority of complaints; there is no reason to believe that an internal visit appeal process will be any less futile. The Board must reject this amendment.

Prohibition on Packages

The proposed changes to the package rules must be rejected entirely. New York City should not promote profiting off the hardship of incarcerated people. The proposed amendment to the package standard does just that. Instead of being able to bring in socks, underwear, notebooks, and envelopes, families will be required to buy them from an outside vendor and pay to ship them to the facility.

The DOC promotes its plan to provide uniforms for all incarcerated persons as support for its effort to limit packages. However, DOC has not complied with the Board's standards in implementing the transition to uniforms, and it frequently fails to comply with the requirement that incarcerated persons be provided with clean clothing.

The DOC does not provide any evidence that incoming packages are a source of weapons that cannot be detected by DOC searches. The proposed restrictions on packages are unlikely to reduce violence but will be an extreme hardship for incarcerated individuals and their families and friends.

The DOC provides absolutely no justification for allowing additional time to deliver a package to an incarcerated person. This proposal is yet another example of the Department requesting a rule change for administrative convenience. The Board should not weaken the minimal protections of incarcerated people for such a reason.

Reduced Due Process Rights for Individuals Returned to ESHU

The DOC has failed to provide any justification for its request for an exception to the due process requirements for those who are removed from ESHU and then returned within 45 days. The DOC does not explain why eliminating due process is necessary to allow the Department to determine appropriate housing placements and incentivize good behavior. While it may be easier for the Department to eliminate the hearing requirements, DOC administrative convenience is not a legitimate reason to deny individuals returned to ESHU of due process. If an individual meets the criteria for placement in ESHU, it should not be difficult for DOC to establish that in an administrative hearing, and if the individual has a defense to being returned to ESHU, he should have the opportunity to be heard.

Conclusion

The Board must not countenance rule changes that make the jails *more* restrictive for incarcerated people when all evidence suggests that the jail environment is so turbulent in part because of the failure to provide for the basic human needs of incarcerated people. The Board's standards, which provide these protections, are routinely violated. Rather than allowing additional restrictions, the Board should be engaged in ensuring that the Department complies with the existing standards.