

**NYC Board of Correction proposals
to amend Visiting Standard 1-09 (h)(5),
based on NYC Department of Correction requests to do so**

comments submitted pursuant to City Administrative Procedure Act

by

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These “public comments” concern amendments proposed to Visiting Standard section (h)(5).

The proposals posted by the Board of Correction track the language in requests made to the

Board in the Department of Correction’s rulemaking petition dated May 26, 2015.

The Department’s petition contains no explanation for these particular requests, no security-

related necessity or goal.

Similarly, the Board's published rulemaking notice contains no explanation for these proposals, which involve the appeal procedures to be used by visitors and inmates when their visits are restricted in any way, such as restriction to non-contact visits or to no visits.

The NY City Administrative Procedure Act (CAPA) requires that the public be given the "basis and purpose" for a change proposed to City rules and laws, and a "clear explanation of the rule", so the public so can evaluate comprehensively the value, quality and impact of a proposal.

CAPA also requires that each agency publish an annual regulatory agenda and, if the instant proposals were not included in such an agenda, that the agency's notice of proposed rulemaking include the reason the rule changes were not anticipated" by the agency.

BOC promulgated Standard 1-09 (h)(5) language in 1978, and retained this language and concept during the Board's intensive rulemaking process in Years 2006-8. Since then, did the Board not recognize a need to drastically amend (h)(5), or to initiate rulemaking involving (h)(5), until after the Department requested these amendments in May, 2015, specific DOC requests for which DOC also presented no basis or purpose ?

Again, the Board's posted rulemaking notice contains no CAPA-required

basis or purpose for each of the proposed amendments to Standard 1-09(h)(5),

no reason(s) for the Board proposing

- to bring the Department of Correction into the Standards' appeal-response procedure for the first time in the Board's history, or
- to make *DOC* be the *first-* responder to an appeal, during the time period when witnesses and evidence are more likely to be available than they will be more than 14-business-days later when the Board can *begin* to investigate *an appeal of the Department's appeal-decision*, or
- to extend the appeal-response time from the current 5-business-days to potentially more than 38 business days.

Has the Board come to believe that *the Department* is better able and willing *than Board staff* to

impartially and thoroughly investigate DOC incidents and staff, and DOC decisions, that impact

the provision of Standards' rights to inmates (which includes access to inmate-approved visitors) ?

If so, then this Board view of the Department is contrary to the public statements, reports and

evidence presented by the U.S. Attorney, the NYC Department of Investigation, Federal courts, the

City Council, and many others about the Department's ability and desire to investigate itself.

If so, then do Board Members believe that the original purpose of the Board's existence, and the

Public Referendum vote to make BOC an oversight agency independent of any City Hall

administration, are no longer valid or necessary ?

The Board's amendment proposal permits someone to appeal to the Board an unsatisfactory appeal

decision by the Department, i.e., a DOC decision not to overturn or to modify a visit restriction

decision *originally* made by DOC. The Board's proposal does not

- require that DOC appeal investigations and decisions be made by specialized staff outside the Command of the original decision maker(s) and
- stipulate that, after appeal to the Board, a Board decision *contrary to* the Department's appeal decision will be implemented by the Department immediately and exactly – so that the integrity of the procedure can be honored by inmates and visitors whose visits have been restricted in any way, and who could otherwise experience an unnecessary additional sense of injustice and disbelief in the value of the Board of Correction and of seeking solutions peacefully by means of formal procedures.

As to the time-frame for visit-restriction appeal response,

the fact that the Minimum Standards govern a detention system is not inconsequential.

Eight Standards now have an appeal procedure: five Standards have a 5-business-day response

time and three Standards have a 14-business-day response time.

During all *past Board* rulemaking processes, the Board retained a *short* turnaround for Board

response to appeals so that, if the Board overturns a DOC restriction, the appellant will not have suffered loss of the relevant Standard *for many days* of a conceivably *short* incarceration period. The Visiting Standard now has a 5-business-day term so that contact visits, or all visits, will not be lost for long by an appellant who "wins" an appeal to the Board.

The current *short BOC* appeal-response time frame is evidence of the importance the Board always placed on visiting.

Is the reason for the Board's proposed time *extension* the fact that Board staff in recent years have not complied with BOC's 5-day appeal-response rule, and have been threatened with law suits for consistent and lengthy non-compliance ?

Board response has been delayed by *Department* delay in giving relevant documents and tapes to the Board, and by the Board not assigning central staff to gather them and other evidence in the field such as by conducting interviews with potential witnesses and evaluating visit-incident sites.

If BOC *staff* delay in responding to visit appeals is the Board's reason for proposing this amendment, why isn't the Board simply proposing an extension from 5 to 14-business days for a *Board* appeal

response, especially since three other Standards *already* have a 14-business-day appeal response time (i.e., the Standards on Religion, Packages and Correspondence) ?

Does the Board believe that adding significant delay to an appellant's receipt of a visit appeal decision will not *add* anxiety and unrest to inmates *already* upset about their potential visitors, or themselves, having had visits restricted completely or to non-contact visits ?

Does the Board believe that it will not be more difficult for an appellant to trust calmly in the fairness of a Standard appeal procedure when the Board proposes that appellants submit the appeal to staff *of the Department*, the agency that made the original visit-restriction decision that the appellant already defines as unjust and/or based on inaccurate information ?

If Board staff delay in appeal-response is the Board's reason for these amendment proposals, are Board Members evaluating staffing decisions made by Board *executive staff* during recent years regarding the Visiting Standard ?

That is, for several years, no one BOC staff person has been trained and assigned to handle appeals: to steadily perform on-site investigation and interviews, and on-site document review and collection

and video observation, and then to prepare complete findings and recommendations for executive staff. Similarly, no one BOC staff person has been trained and assigned to consistently monitor on-site the Department's compliance with all aspects of the complex Visiting Standard even though posted Board meeting minutes reveal that, for years, the Board consistently found that DOC was non-compliant *and* that non-compliance often contributed to, or provoked, visit-related situations labeled "misconduct" by Department staff, which resulted in the Department imposing visit restrictions.

These Board minutes also reveal that BOC staff worked closely with DOC to develop new visit procedures that would improve safeguards against introduction of contraband, such as by expanded visitor-apparel and locker restrictions, and would impose deterrents to contraband introduction, such as 6-month contact visit suspension for inmates whose visitors are "arrested for possessing and/or promoting contraband".

Why is the Board bringing the Department into the appeal procedure at all,

and giving *the Department* **the first** response period ?

Does the Board expect that the majority of appellants will be satisfied with the Department's 14-business-day decisions and, therefore, relatively *few* will need to appeal to the Board and be impacted by additional loss of visits, or contact visits, during the lengthy appeal-response-time proposed *for the Board*, an *additional* 14 to 24 business days ?

Prior to recent years, Board staff was able to respond to appeals within 5 to 10 days, even when the number of inmates and appeals was higher. Now, when the Board has *more* staff *and* more pending, why does the Board propose that Board staff have from 14 to 24 business days to investigate and respond to an appeal, especially since the Board also proposes up to 14-business-days for DOC first to conduct a complete investigation *to which Board staff investigators will have access* ?

Please explain why the Board is proposing a complete revamp of the appeal procedure, incorporating the Department *and* making the Department the first responder, instead of simply proposing a short, reasonable extension of *the Board's* appeal-response time.

Again, since CAPA requires that the Board give the public the "basis and purpose" of *each* proposed amendment, we are requesting that the Board post complete explanations for each proposed amendment, particularly proposals involving Visiting Standard 1-09 (h)(5),

and a new comment period so that the public can have time to consider your explanations and to prepare formal comments based on your explanations, an opportunity that you have denied to the public thus far.

Additionally, please explain why the Board is not using this Rulemaking period to resolve a longstanding problem with *current* Standard-implementation by clarifying for potential appellants whether or not every Board appeal-decision will override a Department decision and, therefore, an appeal is worth pursuit by someone whose visits were restricted.