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Via email

February 23, 2021

Jennifer Jones Austin, Chair
Margaret Egan, Executive Director
Members of the Board of Correction
New York City Board of Correction
1 Centre Street, Rm. 2213
New York, NY 10007

Re: DOC Emergency Declaration for the Use of Young Adult Enhanced
Supervision Housing

Dear Chair Jones-Austin, Members of the Board and Ms. Egan,

The Department of Correction's February 22, 2021 "emergency" variance declaration¹ is an abuse of the emergency variance process set forth in Minimum Standard § 1-15(b)(3), and the Board of Correction should issue a Notice of Violation. There is no "emergency"; the Department simply does not want to follow the rules the Board adopted years ago, through public rulemaking processes, and thus apparently made no plans to do so. The Department sought on February 9, 2021, to continue to depart from the Minimum Standards by housing Young Adults in Enhanced Supervision Housing ("ESH"), and their variance request was not granted. The Department then allowed nearly two weeks to pass before declaring an "emergency," with a document silent as to how the situation on February 22 was different than the situation before the Board on February 9.

Allowing the Department to force an "emergency" exemption because the agency made no efforts to comply with the variance procedures forged by public rulemaking processes undermines the rule of law and erodes confidence in the integrity of government oversight. The Board should not lend its authority to this patent abuse of an "emergency" mechanism.

Young Adults in ESH

In January 2015, the Department, defending the *Nunez* lawsuit demanding an end to solitary confinement of adolescents, announced with great fanfare that they had voluntarily ended "solitary

¹ Public Emergency Declaration – YA ESH, New York City Department of Correction, February 22, 2021, available at <https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2021/March/2021.02.22%20-%20Public%20Emergency%20Declaration%20-%20YA%20ESH.pdf>.

confinement” for people 21 and younger in the jails.² At nearly the same time, the Department created a new highly punitive lockdown unit, the “Enhanced Supervision Unit” for adults. The ESH replicates most of the punitive features of former punitive segregation units- indeed, it is housed in the same cell blocks – with the added twist that individuals in Level 1 ESH who are allowed out of their cells for several hours a day must be *chained to desks*.³ With assurances from the Department that the ESH would house *only* adults, the Board of Correction granted the Department authority to open the ESH in January 2015.⁴

Soon thereafter came the variances – an endless string of requests from the Department to house adolescents in ESH.⁵ These were the subject of enormous public opposition, testimony and debate, where the Board repeatedly informed the Department that the variance process could not be used to defeat the standards. When the Department again sought a variance to permit housing the youth in ESH on February 9, 2021, the Board did not grant it.

But the Department refused to give up on housing young people in lockdown units. Nothing on the face of the documents submitted by the Department on February 22, 2021 speaks to any “emergency” that has arisen since that time to warrant an exemption from the rules. The Department provides no additional, unique, or urgent facts to support its declaration—it only repeats in vague terms the purported security justifications it puts forth in every variance request it submits to the Board to house Young Adults in ESH.

You have heard years of moving testimony about the horrific impact of solitary confinement on any person confined in isolation. There is a plethora of documentation indicating the potential psychiatric consequences of prolonged isolated confinement, such as depression, anxiety and psychosis.⁶ Because these harms are more severe for young adults whose brains are still developing in key respects,⁷ the American Academy of Child and Adolescent Psychiatry as well as the United Nations opposes the use of solitary confinement in correctional facilities for young people. In the face of this evidence, we were heartened to see the most recent YA ESH variance request fail to come to a vote. It is unacceptable for the Department to subvert that decision by claiming emergency.

²Winerip, Michael, and Michael Schwartz. *Rikers to Ban Isolation for Inmates 21 and Younger*, THE NEW YORK TIMES, January 13, 2015, available at <https://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html>.

³ An Assessment of Enhanced Supervision Housing (ESH) for Young Adults, NEW YORK CITY BOARD OF CORRECTION, July 2017, available at <https://www1.nyc.gov/assets/boc/downloads/pdf/Reports/BOC-Reports/2017.07.24%20-%20FINAL%20YA%20ESH%20Report%207.24.2017.pdf#page=16>.

⁴ *Id.* at 3.

⁵ Variances, NEW YORK CITY BOARD OF CORRECTION, available at <https://www1.nyc.gov/site/boc/jail-regulations/variances.page>.

⁶ Mitchell, Jeff, M.D. & Varley, Christopher, M.D. "Isolation and Restraint in Juvenile Correctional Facilities." *J.Am. Acad. Child Adolesc. Psychiatry*, 29:2, March 1990

⁷ Variance - Young Adult Plan, NEW YORK CITY BOARD OF CORRECTION, available at https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/pre-2017/Variance_Young%20Adult%20Housing%20August%202014.pdf.

Recent Abuse of the Emergency Variance Process

Historically, the emergency variance mechanism in Min. Std. 1-15(b)(3) was used for just that: emergencies, events that were unforeseeable and required urgent deviation from the Standards. In 2004, DOC Commissioner Martin Horn acknowledged to the Board that he believed the emergency declaration process to be used for water main breaks that disrupted the ordinary operation of the facility.⁸ The Board has initially denied emergency variances for other foreseeable issues, like double-celling due to anticipated overcrowding during a public defender strike in 1982.⁹ Even emergency variance requests for lockdowns in 2011 and 2014—though there were certainly problems with using the emergency process in this way—had some indicia of immediacy related to safety.¹⁰

Recently, this Department has deviated from this historical use of Minimum Standard § 1-15(b)(3) and demonstrated a pattern of abusing the emergency variance process. In 2019, DOC began declaring regular “emergency” deviations from the Minimum Standards in the extreme deprivations of Separation Status. There, as here, the Department could foresee the planned use of Separation Status for individuals it deemed to have positive body scans for contraband—and there, as here, the Department did not adhere to the variance processes laid out in the Minimum Standards before commencing this practice, choosing instead to premiere Separation Status and simply declare emergencies every day that it did so.¹¹ Now, we see the Department again turn to “emergency declarations” for the purpose of imposing isolation on New Yorkers in custody in a departure from the Board’s Standards: this time, for Young Adults in a restrictive housing setting that shackles them to desks, and in defiance of recent Board action.

Conclusion

The Minimum Standards are there to protect the health and safety of everyone in the jails. They purportedly serve as the floor of humane treatment of people in New York City custody. We and other stakeholders have long urged the Board to avoid “governing by variance”—repeatedly granting variances that erode the integrity of the Standards—and to engage in meaningful, public rulemaking when repeated variance requests indicate that a change to the Standards is warranted. We look forward to participating in that rulemaking process for restrictive housing conditions like ESH, and examining how those proposed conditions will impact our young adult clients.

⁸ Minutes for May 20, 2004 BOC Public Meeting, NEW YORK CITY BOARD OF CORRECTION, *available at* [https://www1.nyc.gov/assets/boc/downloads/pdf/BOCMminutes%20\(5.20.04\).pdf](https://www1.nyc.gov/assets/boc/downloads/pdf/BOCMminutes%20(5.20.04).pdf).

⁹ Minutes for October 29, 1982 BOC Public Meeting, NEW YORK CITY BOARD OF CORRECTION, *available at* <https://www1.nyc.gov/assets/boc/downloads/pdf/1982-Oct-29.pdf#page=3>.

¹⁰ *See* Minutes for May 9, 2011 BOC Public Meeting, NEW YORK CITY BOARD OF CORRECTION, *available at* [https://www1.nyc.gov/assets/boc/downloads/pdf/BOCMminutes%20\(5.9.11\).pdf](https://www1.nyc.gov/assets/boc/downloads/pdf/BOCMminutes%20(5.9.11).pdf); Minutes for November 18, 2014 BOC Public Meeting, NEW YORK CITY BOARD OF CORRECTION, *available at* https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/bocminutes_11_18_14.pdf.

¹¹ Separation Status, NEW YORK CITY BOARD OF CORRECTION, *available at* <https://www1.nyc.gov/site/boc/news/separation-status.page>.

But as the Board works to commence that formal rulemaking, it cannot allow the Department to isolate by fiat with “emergency” declarations that are not emergencies—particularly when the isolation at issue is shackling young Black and Latinx people to tables during limited time out of their cells. That image invokes some of the darkest iconography in the history of our country, and we should never allow it in 2021 in New York City.

We urge the Board to immediately defend the Minimum Standards, and its role as an oversight body, and issue a Notice of Violation.

Regards,

/s/

Mary Lynne Werlwas
Veronica Vela
Kayla Simpson
Alexandra H. Smith

Prisoners’ Rights Project