THE CITY OF NEW YORK

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Michael R. Bloomberg
Mayor

Thomas R. Frieden, M.D., M.P.H.
Commissioner

nyc.gov/health

TESTIMONY

OF

LORNA THORPE, PHD,
DEPUTY COMMISSIONER, DIVISION OF EPIDEMIOLOGY
NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE

BEFORE THE

NEW YORK CITY COUNCIL
COMMITTEE ON FIRE AND CRIMINAL JUSTICE SERVICES

ON

INTRO NO. 574: GIVING FREE BIRTH CERTICATES TO RELEASED INMATES

WEDNESDAY, JUNE 6, 2007

COUNCIL CHAMBERS. CITY HALL

Good morning Chairperson Martinez and members of the Committee on Fire and Criminal Justice Services. My name is Lorna Thorpe, and I am Deputy Commissioner of the Division of Epidemiology for the New York City Department of Health and Mental Hygiene (DOHMH). This Division oversees the Bureau of Vital Statistics, which is responsible for issuing all birth and death certificates in the City of New York. On behalf of Commissioner Frieden I would like to thank the Council for the opportunity to testify regarding Intro 574.

On an average day, the Bureau of Vital Statistics' 175 employees provide certified copies of birth and death certificates upon request to 1,700 customers, including 700 walk-in customers, 800 Internet and phone customers, and 180 customers via mail requests. The Bureau issues over 900,000 birth and death certificates annually, including the 125,000 birth certificates issued to the mothers of all newborn babies delivered here in NYC. The Bureau operates on a fee-for-service basis and places great importance on providing the best possible service to all customers. Indeed, for many New Yorkers, we are the first, and perhaps only, direct contact a person may have with the Department. With that in mind, the Bureau of Vital Statistics is continuously looking for ways to decrease our response times and increase our level of customer service. As a result, the public has come to expect, and we have been able to provide, services in an expedited and professional manner.

Intro 574 would require DOHMH to provide free birth certificates to all New York City-born inmates who serve more than 90 days in New York City jails or who serve a term of any duration in a New York State Correction Facility. It is important to note that the NYC Department of Corrections is currently providing this service by purchasing birth certificates for those inmates being released from City jails with discharge plans to help promote reentry for a percentage of those being discharged. While the Department recognizes that having a certified copy of the certificate upon release facilitates an inmate's transition to society, making it easier to obtain health insurance, state ID, a passport, to complete job applications, and ultimately to prevent re-incarceration, DOHMH opposes this legislation.

The Bureau of Vital Statistics does not currently provide any City or State agency with free copies of birth certificates for their clients. This includes agencies such as the Administration for Children's Services, whose programs provide social benefits as important as those being discussed today. In all situations, either the clients pay themselves or the agencies pay for official birth certificates via an intra-City or other governmental transfer. This bill would place the Department under increasing pressure to give clients of other agencies similar consideration for free birth certificates. In time this would severely weaken the Department's ability to provide the level and quality of services the public has come to expect.

Other governmental agencies incur costs in providing documentation to inmates upon or prior to release, yet they are compensated for their services. We understand that the New York State Department of Health (SDOH) provides free birth certificates prior

to release for DOCS inmates born in New York State but outside of New York City. It is our understanding that this agency-to-agency transaction is accounted for within the State's unified budget, however, and therefore has minimal financial impact on SDOH. Further, it is our understanding that the Metropolitan Transit Authority charges correctional agencies for Metrocards issued to inmates prior to release. And, the New York State Department of Motor Vehicles and the U.S. Department of State Passport Offices do not provide their services free of charge to any subgroup of customers, including those recently released from incarceration.

At the heart of this concern are the significant costs involved in producing every New York City birth certificate. Providing certificates at no cost not only impacts revenue and customer service but also overlooks the effort required to produce and maintain the City's vital registration and statistics systems that produce those certificates. These include infrastructure, development and maintenance, information technology, personnel, quality assurance, analysis and security.

I would like to reiterate that DOHMH is willing to engage in further discussions with the Council, advocates and the City and State Departments of Corrections to identify solutions to meet the needs of newly released inmates without the imposition of this precedent-setting legislation. Thank you again for the opportunity to testify. I am happy to answer any questions.

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The Rev. Dr. Earl Kooperkamp, Rector
St. Mary's Episcopal Church
521 West 126th Street
New York, NY 10027

June 6, 2007

Dear sisters and brothers:

Thank you very much for the opportunity to speak with you this morning. It is a true pleasure to come to you today and support Intro 574, a measure under consideration that is not only the right thing to do, but the smart thing to do as well. Removing barriers to employment and re-integration for formerly incarcerated persons is both right and smart.

St. Mary's Church is situated in West Harlem, in Councilmember Robert Jackson's district. Our neighborhood is characterized by some of the highest rates of incarceration in New York State. Yet each year thousands of men and women also return to our community and to their families. Most are ready for a fresh start. However, the barriers that they too often encounter lead to frustration, depression and all too often to a return to the life which brought them into the criminal justice system in the first place. I am sure we are all aware that about two of three released inmates return to prison within three years. It is time to break this cycle.

Making birth certificates available to released inmates so that they can begin the process of obtaining identification is a small, but significant step toward breaking the cycle and removing these barriers. With proper identification, former inmates can begin the search for employment and start the process of leading productive lives for themselves, for their families and for our community. During their term of incarceration, our community suffers the loss of the productive lives of our sisters and brothers who are shipped upstate. Upon their release, we need them to take up productive livelihoods to help our community move forward.

Some might say, "Why should these criminals get a break? Everybody else has to pay for a birth certificate." I do not think of this as giving former inmates a break, but instead as making a small investment in them with the aim that the community will also benefit. Providing a birth certificate as the first step in a path to employment is a small measure, but it can make all the difference in the world to the newly released inmate. Others may argue that the City will lose revenue if these birth certificates are provided without cost. The small amount of revenue generated in this way will be far surpassed by the taxes newly employed former inmates will pay into the municipal coffers. Also, removing the barriers to employment helps to reduce recidivism and thus saves New York City and New York State the tens of thousands of dollars annually that it costs to keep an individual locked away upstate, not to mention the tremendous stress on the families of our community.

If you will allow me a short personal comment: for the past three years, in additional to my duties at St. Mary's Church, I have taught a college level course at the Sing Sing Correctional Facility under the auspices of Rising Hope. The inmates in my class are the best students I have ever had in class. For these bright men to be denied a chance of employment and a chance to continue their rehabilitation all for the lack of fifteen dollars is a tragedy.

In conclusion, as I began, let me say again that it is so refreshing to urge your support for a measure that is both the right thing and the smart thing. Thank you for your time and attention, but most of all, may God bless you with wisdom and discernment in taking up the cause for our community.

Testimony of
Chris Policano
Communications Director
Phoenix House

- Good morning. My name is Chris Policano and I am the communications director of Phoenix House, which is one of the largest non-profit substance abuse treatment and prevention organizations in the country. Phoenix House currently runs more than 100 programs in nine states, including New York, California, Texas and Florida... and we also run programs throughout New England.

- Phoenix House has been helping substance abusers within the criminal justice system since 1968, when we created the first behind-the-walls treatment program, which was on Riker's Island.

- Since then, Phoenix House has designed... initiated... operated... provided training for... and evaluated both in-prison and post-prison treatment programs for men, women, and teenagers throughout the United States. We have also helped create in-prison and post-prison programs in England, Germany, and Israel.

- Nearly 70% of the 2,500 men and women we treat every day in New York State have spent time in jail or prison.

- Our treatment programs are comprehensive – and they are demanding. Not only do we help substance abusing criminal offenders move away from drug and alcohol abuse – we also help them catch up on the education they have lost and we provide access to the vocational training they need to take their places in the workforce.

- The men and women who are in our programs strive each day to overcome the past and start new, productive lives.

- But not having the proper identification can be an impediment to receiving treatment... getting a job... or receiving necessary benefits.

- Phoenix House strongly supports efforts that remove barriers to progress for the men and women who need to put their incarceration behind them and become productive citizens.

- So, on behalf of Phoenix House, I ask the Council to take the necessary step of making it easier for men and women coming out of prison or jail to obtain their birth certificates.

Interfaith
Coalition
of
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for
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and
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Testimony of the Interfaith Coalition of Advocates for Reentry & Employment (ICARE)
Re. Int. No. 574
Committee on Fire and Criminal Justice Services
June 6, 2007
Presented by Rima Vesely-Flad, Director of ICARE

My name is Rima Vesely-Flad and I am the Founder and Director of the Interfaith Coalition of Advocates for Reentry and Employment, also known as "ICARE." ICARE engages communities of faith in advocating for the Restoration of Rights of formerly incarcerated people, while assisting congregations in the development of prison and reentry ministries.

The member congregations and organizations of the ICARE coalition are pleased that the Fire and Criminal Justice Services Committee is considering Int. No. 574, which would provide birth certificates free of charge to individuals coming home from state prison and Riker's Island after 90 days. Congregations and organizations that have signed letters of support for this advocacy effort include: St. Mary's Church, St. Bartholomew's Church, St. David's Church, Bridgestreet A.W.M.E. Church, the Riverside Church Prison Ministry, the Women's Prison Association, the Center for Employment Opportunities, the National H.I.R.E. Network, the Center for Community Alternatives, the Fortune Society, and the Bronx Defenders, amongst many others.

As elected representatives, you have wide grassroots support for passing Int. No. 574. As the director of ICARE, I educate communities of faith throughout New York State about the high costs of incarceration and recidivism in impoverished communities of color. The response to the plight of people with criminal convictions is always the same: outrage at the failure of criminal justice public policies, and empathy for the individuals and their families who are subjected to these policies.

Men and women returning home need basic opportunities for housing, employment, health care, and obtaining identification cards. Abolishing the fees for certified birth certificates will remove great obstacles in the reentry process: the cost of getting them is prohibitive to many individuals, and yet they are often required by employers and government agencies. For example, in order to receive a non-driver's identification card, the New York State Department of Motor Vehicles stipulates the following rules.

A prison ID alone has no points towards a NY ID.

An applicant must present all of the following documents to be approved for a NYS non-driver identification card:

1. U.S. Birth Certificate issued by a Board of Health, Bureau of Vital Statistics, or U.S. State Department. Birth certificate must be an original document or a document certified by the issuing agency.

2. Temporary Photo Identification Card issued by the (DOC) Department of Correctional Services. Card cannot be expired.

3. Parole papers issued in the same name as the DOC temporary Photo Identification Card.

4. Social Security Card issued in the same name as the DOC temporary Photo Identification Card.

*** The DOC temporary Photo Identification Card and/or Parole papers are NOT acceptable proof of name if used independently and they cannot be combined with any proofs of identification other then those listed above.**

The vast majority of individuals released from state prisons and New York City jails seek to obtain a non-driver's state ID soon after returning to the community. The office of transitional services in state facilities assists in preparing individuals to apply for state identification; however, men and women face unnecessary barriers in obtaining official birth certificates. Ironically, the current practice of New York City's Bureau of Vital Statistics of the Department of Health and Mental Hygiene is to provide state correctional facilities with "Government File Copy: Not for Personal Use" stamped birth certificates [**See appendix A**]. These unofficial birth certificates are not supposed to be distributed to incarcerated men and women due to the fact that Vital Statistics is a revenue-generating agency and does not provide free birth certificates to individuals [**See Appendix B, letter from Assistant Commissioner Steven Schwartz**].

However, a birth certificate is a necessary document for formerly incarcerated men and women seeking a non-drivers identification card upon their release from prison or jail, enrollment into health care and benefits programs, and employment. An official birth certificate is a necessary document for all stages of the reentry process.

The cost for birth certificates is $15. However, because people in prison are allocated only $40 upon release, this cost is prohibitive.

Often individuals will seek assistance from New York City direct service providers, which receive funding from the City of New York to assist formerly incarcerated persons. The length of time it takes a staff member to go to the Office of Vital Records with a client, as well as to pay the $15 cost of the birth certificate, results in the City of New

York unnecessarily compensating for a process that can be eliminated with Int. No. 574. This bill, in abolishing fees for official birth certificates, allows the time and resources of direct service staff and formerly incarcerating individuals to be used more efficiently while removing unnecessary barriers to reentry.

Therefore, we stand in strong support of Int. No. 574.

The benefits of this bill far outweigh the costs. If all of the 25,000 men and women leaving New York State prisons this year returned to New York City—and of course, not all of them do—it would cost the city $375,000. If the 14,000 men and women incarcerated at Riker's Island for more than 90 days received free birth certificates, it would cost the city an additional $210,000. The sum total of our projection is $585,000, a small amount in the face of enormous obstacles faced by reentering individuals and the significant, unnecessary, expenses of service providers' resources, which are ultimately the expenses of the City of New York.

Thus, abolishing the fees for official birth certificates is a pragmatic step that would facilitate a better use of everyone's resources and time while facilitating a smoother reentry process. As a coalition in support of individuals who are leaving state prisons and Riker's Island, we seek for each person to have all the necessary documents to apply for a non-driver's state ID card, gain employment, and enroll in necessary programs, thereby enabling individuals to succeed after returning home.

Re. Oversight: New York City Board of Correction Proposed Amendments to the Minimum Standards for New York City Correctional Facilities

ICARE opposes the New York City Board of Correction's proposed amendments to the "minimum standards." We join the coalition of advocates in urging the BOC to withdraw the proposed amendments.

THE CITY OF NEW YORK

VITAL RECORDS CERTIFICATE

CERTIFICATION OF BIRTH

This is a certification of name and birth facts on file in the Office of Vital Records, Department of Health and Mental Hygiene, City of New York.

DATE OF BIRTH: OCTOBER 02, 1954

CERTIFICATE No.: 156-54-139727

BOROUGH: MANHATTAN

DATE FILED: 10-05-54

DATE ISSUED: 08-02-05

NAME: WILLIE THOMAS JR.***

SEX: MALE

MOTHER'S MAIDEN NAME: MARIE MURRAY

FATHER'S NAME: WILLIE THOMAS

Government File Copy
Not for Personal Use

Steven P. Schwartz, Ph.D.
City Registrar

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13154454 Doc. No. L010145

ANY ALTERATION OR ERASURE VOIDS THIS CERTIFICATE

THE CITY OF NEW YORK

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Michael R. Bloomberg
Mayor

Thomas R. Frieden, M.D., M.P.H.
Commissioner

Bureau of Vital Statistics 125 Worth Street- CN7 New York, New York 10013

nyc.gov/health

August 16, 2006

The Rev. Dr. Earl Kooperkamp, Rector
St. Mary's Episcopal Church, Manhattanville
6 Sylvan Court
New York, New York 10035

Dear Reverend Kooperkamp:

This is in response to your letter to Commissioner Frieden in which you request that New York City's Bureau of Vital Statistics provide official copies of birth certificates to incarcerated persons at no charge.

As you know, New York City Vital Statistics currently provides "for government use only" copies to the New York State Department of Correctional Services. They are intended for use by Correctional Services and not for distribution to inmates. We understand the need of individuals leaving state prisons to have official birth certificates upon their release. And we agree that correctional facilities are logical agents to provide the birth certificates to the formerly incarcerated individuals. However, New York City Vital Statistics does not subsidize any city or state agencies with free copies of birth certificates for their clients. The clients of other city and state agencies pay for official copies of birth certificates, and the social benefits of their programs are as important as the ones you describe.

The New York City Bureau of Vital Statistics is a fee-for-service program. A decrease in revenue will directly affect our ability to operate our program, provide customer service and essential public health data and analyses. We would be pleased to work with the Department of Correctional Services on a payment transfer system so that they may be able to include official birth certificates in each person's release package.

Sincerely,

Steven Schwartz, PhD, Registrar and
Assistant Commissioner, Bureau of Vital Statistics

TESTIMONY FOR FREE BIRTH CERTIFICATES FOR PEOPLE RETURNING TO NYC AFTER PRISON AND LEAVING RIKER'S ISLAND AFTER 90 DAYS

ICARE- supported bill Int. No. 574

It is imperative that inmates who are released from state prison or at Rikers Island for more than 90 days be provided free birth certificates. In this day and age of documentation in the United States, lack of such a document becomes a handicap for anyone, but a barrier to re-entry into the community for a formerly incarcerated person.

A birth certificate is a practical pathway to obtain services, whether the services are medical, employment, social security, or symbolic, indicating the essence of life, that one has been birthed and is in the world. Without a birth certificate, it is as if one does not exist in our society!

I support bill Int. No. 564 to enable people who have been incarcerated the opportunity to re-enter into the community to begin to regain their life starting with an important piece of documentation: Their birth certificate.

Please vote for this bill so that we can move forward in the 21st century in changing our perception of "inmates" to that of human beings, who try to re-enter society, obtain employment, and get on with their lives, but find barriers to this end. Let's move our society from the concept of MOST restrictive to easing the transition for people who have been formerly incarcerated, so that they are able to re-start their lives. This is not a huge request, but an adjustment in policy which can change the direction of the lives of many people. It will provide people with the chance to obtain employment, housing, treatment programs, and other services which now present barriers to obtain these necessary services due to lack of identification: the birth certificate, a significant document.

I would further entertain that if anyone is uncomfortable with this change, to start the process as a small project with phase-in development, but let's just get started doing something meaningful for others who need our support.

I thank you for this opportunity to speak on behalf of people who are unable to speak for themselves in this humanitarian effort.

Barbara Sherman, MSW, CFC, LMSW, BCD, CSSW, QCSW, CAC, LCSW, ACSW

Testimony of Vonda Seward, Executive Director, ComALERT

Office of the District Attorney, Kings County

Today I would like to talk to you about ComALERT, which stands for Community and Law Enforcement Resources Together, and how a strategy of collective integration amongst our agencies can have a beneficial impact upon our program's short and long-term goals. Our re-entry program, created by Kings County District Attorney Charles J. Hynes, aims to ensure that individuals being released from prison successfully transition back to their Brooklyn communities and attain the goals of self-sufficiency, sobriety, and civic responsibility. The successful re-integration of these parolees, many of whom have children, is absolutely vital for the social well-being of our neighborhoods. If parolees return to communities without appropriate supports in place, the rates of drug use and criminal recidivism rise; the physical and mental health of the parolees deteriorate; and the parolees' families and communities suffer.

In 2000, District Attorney Hynes launched ComALERT, the nation's first prosecution-run re-entry program, to provide substance abuse treatment as well as employment, health-care, and educational assistance to Brooklyn's formerly incarcerated individuals. Over the years, the program expanded, and in 2004 it moved to its present location at 210 Joralemon Street in downtown Brooklyn. ComALERT has demonstrated that when law enforcement and social service providers collaborate to monitor a parolee's re-entry into his or her community, and coordinate to deliver critical social services, especially substance abuse treatment and employment assistance, criminal recidivisim rates drop and employment rates increase.

Preliminary research on ComAlert shows that just 21% of program graduates are rearrested within two years of their release from prison, as compared to 59% of parolees nationally. Additionally, approximately 50% of ComAlert clients are unemployed when

they enter the program, 26% are in transitional employment and only 19% have full-time, non-transitional employment. Upon graduation, the employment status of these clients changed dramatically: only 18% are unemployed; 32% have transitional employment and 37% now have full-time, non-transitional employment.

The ComALERT staff and our service provider partners represent a vast array of experience in both administrative and direct reentry services. They are exceptionally well qualified in identifying certain administrative and procedural service barriers that, once removed, will enhance the programmatic success we have thus far enjoyed. The removal of these barriers will then allow our counselors to more fully address the needs of our recently released consumers who sincerely wish to make a positive difference in their lives.

The immediate access to a certified copy of one's birth certificate, we have learned, is a piece of documentation that becomes absolutely essential once a person is released from incarceration and attempts to successfully transition back into the community.

The birth certificate plays a vital role and becomes the gateway, if you will, for the parolee's quick access to legitimate employment, job training programs, educational and substance abuse treatment programs, health entitlements including managed care, and to facilitate processing of state identification cards.

The reality we face, however, is the fact that the average person returning from prison arrives to the community with extremely limited financial resources, if any. Furthermore, it's also a fact that most grant-funded programs including ComALERT do not have budget lines that allow for payment for fees associated with the acquisition of birth certificates or for state identification cards.

The effectiveness of ComALERT's wrap around service strategy also requires a clear understanding of the needs and effects of families in the re-entry process. The

submission of a birth certificate, in addition to state identification, is almost always the first significant step a transitioning person takes in qualifying for immediate family-related referral services. These services include classes that transform our ComALERT consumers into responsible family breadwinners, better parents, and people in better control of their anger. These services, all requiring the submission of a birth certificate to confirm the consumer's eligibility, also strengthen the parolee's sense of self efficacy as well as strengthening the family support system. Immediate access, however, is the key. The connection between the creation of a barrier to essential services caused due to financial inability to purchase this vital document and its long-term influence upon criminal activity and recidivism becomes all too obvious.

It is important to note that ComALERT is a prosecution-run program whose first and foremost goal is the public safety of the citizens of Kings County. A district attorney's office has a vested interest in the successful re-entry of parolees because a reduction in criminal recidivism means a reduction in crime, resulting in an increase in public safety—the ultimate goal of all law enforcement agencies. This is why it is so important for our agency to take full opportunity to share our program's observations, experiences and opinions on this important issue at this hearing. We respectfully request, therefore, that this special Committee take note that an amendment of the city charter abolishing birth certificate fees for this special population is essential for programs like ComALERT to facilitate a smooth delivery of these essential services to our transitioning consumers. The passing of this amendment will have a positive long-term impact for our consumers, their families, and for the entire community who will see reductions in both crime and recidivism. It would be extremely difficult to suggest a better, more cost-effective investment of taxpayer dollars than to amend a law that will greatly assist transitioning ex offenders who sincerely embrace their second chance at

building productive lives while simultaneously setting the foundation for increased safety in our communities.

WOMEN'S PRISON ASSOCIATION

Testimony of Tamika Lisbon, Women's Prison Association
Before the Fire & Criminal Justice Services Committee (Miguel Martinez, Chair)
Regarding Int. 574

June 6, 2007

Good morning ladies and gentleman. Thank you for allowing me the opportunity to testify before you today on the very important issue of free birth certificates for people leaving prison or jail.

My name is Tamika Lisbon. I am a Transitional Planner at the Women's Prison Association, also known as WPA. For over 160 years, WPA has worked with women at all stages of involvement in the criminal justice system. In my job, I help women leaving Rikers Island to transition back into the community.

Women come to WPA with many needs including housing, entitlements, employment, and family reunification. The women cannot obtain any of these things without a valid birth certificate. Women need a birth certificate to get a state ID from the Department of Motor Vehicles. Without a valid ID, you cannot get shelter, get a job, or even legally walk down the street. As a result, I spend a significant amount of my time escorting women to Vital Records to obtain a birth certificate. WPA pays the fee, because the women cannot afford to pay. This is valuable time that the woman could be using to work on her other goals – things like maintaining sobriety or getting housing – things that really influence whether or not she returns to prison or jail.

When I first started working at WPA almost three years ago, the Department of Correction was not providing free birth certificates to people leaving Rikers. Now, having recognized how important birth certificates are for the reentry process, DOC makes them available. However, the birth certificates that women get have a stamp on them that reads, "Government File Copy, Not for Personal Use." This means that when a woman tries to present this certificate to the DMV to get ID, for employment purposes, or to access benefits from HRA or SSA, it is not accepted as valid.

Birth certificates are just one more obstacle for women who are trying to make positive changes in their lives after prison or jail. I have also seen this barrier make women feel stigmatized and defeated.

This legislation would remove a very real barrier to successful reentry. And, an investment in a smoother reentry is an investment in safer communities and healthier families.

Thank you for your attention to this very important issue, and thank you for allowing me the opportunity to testify before you today.

TESTIMONY OF
HEIDI VAN ES
ON BEHALF OF THE
OFFICE OF THE APPELLATE DEFENDER
BEFORE THE
STANDING COMMITTEE ON FIRE & CRIMINAL JUSTICE SERVICES
OF THE
NEW YORK CITY COUNCIL

The Office of the Appellate Defender (OAD) is a small, nonprofit law firm dedicated to providing high quality representation to indigent persons in appeals from their felony convictions and in other post-conviction collateral litigation. Our social work program focuses on assisting men and women with the difficult process of returning to the community following incarceration. I am the Director of the Social Work Program at the Office of the Appellate Defender and our unit works has worked with hundreds of individuals being released from New York State prisons. We assist our clients by preparing them for the challenges that they will face in their post-prison lives, enhancing their positive coping skills and increasing their access to community based resources. We are strongly in support of Int. No. 574, and we believe that this law benefits both the individuals returning home and the greater New York City community.

Not surprisingly, our clients generally face post-prison life with virtually no money and few resources. They frequently have histories of substance addiction and of violent trauma, and they suffer from mental health and medical conditions. Additionally, these same individuals oftentimes lack housing, family support and community ties. Our at-risk clients are the **very** individuals who are the most dependent upon and in need of seamless community resources to successfully transition to post-prison life. If an individual is released with $40 to negotiate survival in New York City, spending $15 on a birth certificate is an impractical and an unreasonable expectation. I have personally worked with dozens of clients who cannot afford the $15 for a certified New York City birth certificate.

The difficulties that people face who do not have proper identification upon release from prison are well-documented. Our clients who lack a certified birth certificate to prove their citizenship are not eligible to access many of the public benefits and community resources that are available upon release, including emergency food stamps, public assistance, medical coverage under Medicaid, Social Security Income (SSI) and Social Security Disability (SSD). Additionally, many social service providers that serve individuals who have been released from prison, such as substance abuse treatment programs, educational and vocational services, and mental health and housing providers also require a certified birth certificate, or proof of Medicaid (which, again, requires a birth certificate to obtain) in order for an individual to receive services.

The vast majority of our clients aim to immediately join the workforce upon release to support themselves. However, if they are unable to prove their citizenship status to an employer, they do not get hired. Oftentimes, their only form of identification is a Released Prison Inmate I.D. card. Needless to say, this does not open many doors of employment. Of course, the ID situation is a vicious circle: without a birth certificate, our clients cannot obtain legal employment and without employment, our clients cannot earn money to obtain a birth certificate. Many of our clients who lack proper identification must scramble to find off-the-books employment in order to support themselves because they have no legal options. These off-the-books jobs are not approved by their parole officers and are not appropriate employment.

In essence, those who are most vulnerable by virtue of poverty and a lack of community supports, and, therefore, **most** in need of community services, public benefits, medical coverage and immediate employment are hurt by the current practice of charging $15 for birth certificates. Our experience shows that the first month after a person is released is a high-risk time in a person's reentry. Our clients squander a great deal of time and effort attempting to gain access to the vital services that allow them the possibility of a smooth transition into the community at the very time that they should already be receiving these services. Currently, our clients are facing yet another barrier in their reentry process that certainly increases the likelihood of recidivism.

For these reasons, and on behalf of our clients, the Office of the Appellate Defender strongly urges the Council to enact Int. No. 574 to the benefit of both the individuals returning home and of the greater New York City community.

My name is Porsha-Shaf'on Venable, and I am a Licensed Social Worker and Client Advocate at The Bronx Defenders.

I submit this testimony in support of Intro #574, which would abolish fees for the certified birth certificates for any person born in New York City and returning home from a New York State Correctional facility, after any duration, and any person who is being released from a New York City jail at least ninety consecutive days of incarceration. I also want to talk about the widespread need for identification documents among all of our clients.

The Bronx Defenders is a community-based public defender that provides fully integrated criminal defense, civil legal services, and social services to indigent people charged with crimes in the Bronx. The Bronx Defenders views clients not as "cases," but as whole people: caring parents, hard workers, recent immigrants, native New Yorkers, and students with hope for the future.

Client Advocates at the Bronx Defenders have a variety of roles. Client Advocates work collaboratively with attorney's to get the best disposition in a legal case. This could include but is not limited to Referrals to Community Based agencies of all types, Counseling, Advocating for clients on all forums, Psychosocial Assessments and Crisis Intervention.

In the work that I do, a client having a valid form of identification – for most of our clients this means a birth certificate - can make the difference between a client spending one extra week or two additional months in jail. Many programs such as substance abuse, counseling and shelter program require my clients to have a copy of their birth certificate in order to enroll. This affects individuals who are currently incarcerated and need to access treatment to divert them out jail or prison, clients returning from prison and trying to access services, and individuals at risk of returning to jail or prison.

As an example, we currently represent a client that was afforded the opportunity to complete a residential drug program by the court, instead of a jail sentence. This client has a 26-year substance use history and this will have been his first time in treatment. The client has been incarcerated for an additional three weeks because no treatment facility will accept him because of his lack of identification – namely, a birth certificate.

Often times what happens in these cases is that client wind up not being able to get the help that they need and they are released from prison or jail under the same circumstances in which they went in. Entry into a residential program of any kind is an

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opportunity for the client to get the assistance, stability and structure that they did have prior to their incarceration.

Although this may appear to be a minute solution to such a wide problem, not having a birth certificate acts a barrier to services that many of my clients so desperately need. It can be the difference between access appropriate services and continuing on a self-destructive path.

In closing I want to thank the Council for addressing this important issue, encourage all of you to support the current legislation, and to consider expanding this amendment to people that have been incarcerated for less than ninety days in a New York City Jail.

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The Council of the City of New York
Committee on Fire and Criminal Justice Services
Public Hearing on Board of Correction Proposed Amendments to the Minimum Standards for New York City Correctional Facilities

Hearing Date—June 6, 2007

Testimony of Michael B. Mushlin

My name is Michael B. Mushlin. I am the James D. Hopkins Professor of Law at Pace Law School where among other things I teach the law of prisoners' rights. I have been involved in prison reform in a number of capacities both locally and nationally for over three decades. I am the author of **Rights of Prisoners (3d ed)**, a three volume treatise, a member of the American Bar Association's Task Force on the Legal Status of Prisoners, and a Board Member and former chair of the Correctional Association of New York. I also have served on and chaired the Committee on Correction of the New York City Bar Association, and am a former chair of the Osborne Association. For seven years, I was staff counsel and then the Project Director of the Prisoners' Rights Project of the Legal Aid Society.

In my testimony I would like to offer a national perspective about the issue that you have chosen to address today. I also want to briefly describe why the failure of the Board of Correction to consult anyone other than the Department of Correction in the course of comprehensively reviewing proposed revisions to its minimum standards violates best practices for oversight by administrative bodies outside of the prison arena.

New York is a national leader in human rights. This is a city that has historically distinguished itself by its concern for civil liberties and human rights. What happens here is watched carefully. In that connection I have to report to you that what has occurred to date concerning the New York City Board of Correction's proposals to dilute its minimum standards --taken without any consultation from interested parties other than the Department of Correction --is deeply troubling. If it is not reversed and a new course taken, these actions threaten to setback ongoing national efforts to establish effective prison oversight mechanisms for this county's jail and prisons.

Last year I served as one of the organizers of a national conference on prison oversight held in Austin, Texas at the LBJ School of Public Administration of the University of Texas. [1] Entitled "*Opening A Closed World: What Constitutes Effective*

[1] I also organized another national prison reform conference before the Austin conference. The first conference entitled *"Prison Reform Revisited: The Unfinished Agenda"* was held at Pace Law School in October 2003 and was attended by over 125 specially invited leaders in the field including academics, judges, attorneys corrections officials (including the Commissioner of Correction of the City of New York),

Prison Oversight," that conference drew experts in the field of corrections and human rights from twenty two states and five foreign countries. It was diverse group. Participants included 20 percent of the nation's corrections commissioners and directors as well as the country's leading prisoners' rights advocates, scholars, journalists and judges.[2]

The conference established that there is very little effective oversight of U. S. prisons and jails, but that oversight is desperately needed for a host of reasons and essential if prison conditions in this country are ever to be humane and decent. Indeed, a remarkable consensus developed at that conference that it is imperative to strengthen and expand prison and jail oversight in this country. Penal facilities, after all, are what Justice Brennan once called a "shadow world."[3] Without oversight in these closed places abuses and violations of fundamental rights can easily occur.

At the conference, many speakers held up New York as a model. In particular the New York City Board of Correction was used as an example of what can realistically be accomplished in this field. Richard Wolf, the Executive Director of the New York City Board of Correction, wrote one of the important papers presented at the conference. In his talk, entitled *Reflections on a Government Model of Correctional Oversight,* Mr. Wolf described the important work of the Board of Correction and stressed the significance of independence to the effectiveness of its work.[4] Mr. Wolf elaborated that independence is not possible unless the oversight body formally establishes ": . . . and maintain[s] an arms-length relationship" between itself and the Department of Correction."[5]

I can tell you that Mr. Wolf's testimony made a powerful impression on persons who attended the conference. His paper and talk made clear that the *sine qua non* of effective oversight is independence. Without it none of the other aspects of oversight can be achieved. As Mr. Wolf recognized, the oversight body must operate in a manner that demonstrates that it is not a captive of the very agency that it is suppose to monitor. This does not mean that the Board of Correction should not consult with the Department of Correction. But it does mean that when, as here, the Board embarks on the first comprehensive review of its minimum standards in nearly 30 years and consults only

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and leaders of prison oversight agencies. At the conference these persons took stock of the effort to reform prisons through judicial oversight and noted the diminished, though still critical role, of the courts in that effort. The conference and its resulting papers, which are published in a special issue of the Pace Law Review, *Prison Reform Revisited,* 24 Pace L. Rev. 395-855 (2004), document the importance of this issue and the need for vigilance if the rule of law and simple decency is to prevail in American prisons.

[2] Because of its significance, the Texas House of Representatives passed a resolution praising the conference. H.R. 223 (Texas House of Representatives, April 27 2006).

[3] *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 354-55 (1987) (Brennan, J., dissenting).

[4] Richard Wolf, *Reflections on a Government Model of Correctional Oversight* at 1 (April 24, 2006)

[5] *Id.* At 2. Mr. Wolf's powerful testimony of the importance of independent oversight finds support in the findings of Commission on Safety and Abuse in America's Prisons. Last year that distinguished group also concluded that "independent inspection and monitoring" is critical to the urgent task of prison reform in this country. Commission on Safety and Abuse in America's Prisons, *Confronting Confinement,* 15 (June 2006)

with the very Department it is obligated to oversee, it mocks the very idea of independence upon which it depends for its effectiveness. Indeed, by not consulting widely with knowledgeable, credible and committed persons before formalizing its proposals for change, the Board squandered the independence that its Executive Director described as so essential to its success.

The Board's actions also are counter to best practices outside of the prison arena for achieving effective oversight by administrative bodies. As Chairman Martinez pointed out in his letter to the members of the Board of Correction, "other city agencies, such as the Fire Department and the Department of Buildings have sought out and considered input from a wide range of interested parties" before proposing rules regulating their respective areas. At the federal level, too, advance consultation and discussion have been mandated. An important example of this is Executive Order 12,866, issued first by President Clinton and then adopted in relevant part by President Bush. That directive provides that:

> Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials) . . .. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

These unfortunate actions by the Board of Correction have not gone unnoticed. I have heard from people around the country who have told me that they are aware of the struggle underway now to persuade the Board to reverse the course of action that it has chosen for itself, and that they are disheartened by what they have seen so far. Let me give you one example. An internationally recognized leader in the field, Dr. Andrew Coyle, wrote me this week that "[t]his is very disappointing news, particularly in view of the positive words we heard in Austin about what was going on [New York]."

Thus, the actions of the Board threatened not only the welfare of the citizens of New York; they also jeopardize the standing of the City of New York among persons who look to it for guidance in the field of human rights. For these reasons, the City Council is providing an important service by giving attention to this important issue. I hope that in addition you will urge the Board to rescind its proposed standards and remit this matter to informal consultation with all relevant parties. By doing so you would help return the Board of Correction to its rightful and crucial role of being an independent monitor of the New York City corrections system, and a model for the nation.

Thank you. I am happy to answer any questions.

TESTIMONY OF THE
NEW YORK CITY BAR ASSOCIATION
BEFORE THE NEW YORK CITY COUNCIL
COMMITTEE ON FIRE AND CRIMINAL JUSTICE SERVICES

REGARDING PROPOSED REVISIONS TO THE
BOARD OF CORRECTIONS
MINIMUM STANDARDS FOR NEW YORK CITY
CORRECTIONAL FACILITIES

JUNE 6, 2007

The New York City Bar Association welcomes this opportunity to testify about proposed revisions to the Board of Correction's Minimum Standards for New York City Correctional Facilities. I am Alex Jonatowski, a member of the City Bar's Corrections Committee and a staff member of the City Bar Justice Center, where I focus on prisoner re-entry issues.

Founded in 1870, the Association is a private, non-profit organization of more than 22,000 attorneys, judges and law professors, and is one of the oldest bar associations in the United States. Over the years, the Association has promoted reform in the law and improvements in the administration of justice through its more than 160 committees. The Association also seeks to promote fair and humane treatment of incarcerated persons through the contributions of these committees.

Many other groups are testifying in opposition to specific aspects of the revisions to the Minimum Standards. The Association shares many of their

concerns, particularly with respect to proposed revisions that would alter the standards for overcrowding, lock-in, telephone calls and correspondence, personal hygiene, interpreters, and access to courts and legal services.

The Association offered comments to the Board at a public meeting held April 17th. We urged the Board to reject nearly all of the proposed revisions. The Association will soon submit written comments to the Board detailing its objections to specific proposals, which we will be happy to share with the Committee when they are completed. Our testimony today will therefore address solely the process by which the proposed revisions were created and their overall effect.

The Association is disappointed by the process the Board utilized to create the proposed revisions. This process reflects standard-setting methodology contrary to the concept of open government. The Board did not seek or obtain the consensus necessary to promote equitable standards. The opportunity for public comment, coming two years after these changes were first considered and well after they were drafted in the detail now presented, is not adequate to make this the open, deliberative process that good government requires. We indeed welcome the Board's decision to extend the comment period and its agreement not to vote on the standards until the fall. However, these changes do not alter the fact that the

proposed revisions were drafted outside of public view and without contribution from people and groups who will be most affected.

The Board of Correction meets on a monthly basis. Its meetings are open to the general public. The fact that the Board was considering whether to revise the existing Minimum Standards was raised at numerous meetings over the last two years. However, the actual substance of the proposed changes was never discussed, debated or revealed to anyone other than the Department, despite requests by various organizations and community stakeholders.[1] There was thus no opportunity for input from persons affected by, or working within, the correctional system, and no attempt made to seek such input. Since they were not drafted based on any kind of outside input or consensus process, the proposed revisions are not comprehensive and lack balance.

The public comment period now offered is not adequate to transform this into an open or fair standard-setting process. It appears as if there still will be no opportunity for a meaningful dialogue between the Board and interested parties about the need for revisions or the appropriate balance of security concerns and inmates' rights. But such a dialogue is necessary and fundamental. It is the Association's view that proper Minimum Standards should represent neither

[1] The Association's request to meet with the Board to discuss the proposed revisions was refused.

ceiling nor floor, and must be developed by means of a collaborative process and confirmed on a foundation of common agreement.

Therefore, we urge the Board, and hope this Committee will urge the Board, to withdraw its current draft and begin process anew. We would then look forward to working with the Board and other concerned organizations to collaboratively consider possible revisions to the Minimum Standards.

STATEMENT OF JOHN M. BRICKMAN
BEFORE THE NEW YORK CITY BOARD OF CORRECTION
April 17, 2007

Good morning, Ms. Simmons and members of the board. I am John Brickman, and I am Chairman of the Board of Directors of the Correctional Association of New York. I am pleased to speak to you today on behalf of the Correctional Association, to offer our views on the proposed changes to your minimum standards.

But I have another voice, one that I hope gives particular resonance to my statement today. From 1971 until 1975, I served as your first Executive Director. My appointment followed the revitalization of the board, in the aftermath of riots that paralyzed facilities in Queens, Manhattan, the Bronx, and Rikers Island. That was the beginning of the board's function as an independent monitor, with the intention of opening the jails to outside scrutiny in the hope of staving off further disorder.

This was before the City Charter gave the board the right to set minimum standards for the Department of Correction. As a consequence of what the board and staff observed, and our conclusion that the board's historic monitoring role needed teeth, we conceived the proposal to amend the City Charter to empower the board to set minimum standards. In the buzz words of today, we looked to go beyond transparency, which characterizes the watchdog function, to assure accountability. The inclusion of the standards in the 1975 charter revision referendum was a direct result of the board's

request to the Charter Revision Commission, our considerable lobby efforts, and consequent voter approval. I was, indeed, there at the beginning.

At the Correctional Association of New York, our history dates to 1844. Since 1846, by legislative mandate, we have enjoyed the right to visit New York State prison facilities, and for more than 160 years, we have done just that, reporting to the public, to prison operating authorities, and to the state legislature. We are, in every respect, the paradigm of the civilian prison oversight agency.

I think it is no stretch to suggest that when the City created the board of Correction during Mayor Wagner's administration, the monitoring activities of the Correctional Association stood as a prime example that drove the establishment of the board as an independent force in the city's criminal justice system.

In nearly two centuries of prison work, we have learned a key lesson, one reinforced by my four and a half years as your executive director: there is an inevitable tension between prison administrators and those charged with civilian oversight. That tension is both necessary and healthy. It is no less than vital. The administrator can run the jail, with or without you, wherever you stand. But without independence, without plenty of daylight, you aren't doing your jobs. When the watcher and the watched become too close, when they share not simply common goals but common activities, the oversight agency no longer acts independently, and it fails in its purpose.

That means there is a necessary distance between the monitor and the operating agency. Yes, it is appropriate to consult and, where appropriate, to collaborate, and since civility is a civic virtue as well as an admirable human trait, we all wish for a good working relationship.

With regret, I believe that your proposals to revise the minimum standards reflect your loss of independence and, accordingly, your failure to fulfill the purpose for which the board was created some 50 years ago, and to follow the example created by the board during the years in which it had its most sustained impact on the Department of Correction. Here, you give the appearance of a behind-the-scenes partnership with the Department of Correction, to the exclusion of other stakeholders, and in the process you seem to depart, in appearance and in fact, from the principle requiring distance.

- The board is a civilian, and I stress the word, independent, agency. The department is only one agency to which you should go for counsel. You represent, in every respect, the presence and the conscience of the community in our jails and prisons. The community cannot enter and leave the jails; you can. Yet where was any consultation with any community groups or representatives in the formulation of your proposals?

- Yes, you are an agency of the city government. But your watchdog role depends in no small part on your independence from the agency whose performance you are charged with monitoring and whose activities must meet your requirements. You are independent of the department. You are independent of the mayor and his administration, as evidenced by the fact that a majority of you are selected by others. The fact that two-thirds of you owe your appointments to the courts and the city council reaffirms the proposition that your loyalty must be to the city, and not the incumbent administration.

- The suggestion has been raised that because the standards are 30 years old, they require revision. Review, certainly. But revision? If it ain't broke, why fix it? Where is the proof that anything is broken? If in 1978, 60 square feet per inmate was the appropriate statement of the minimum space that the community would allow to someone whom we have decided to deprive of liberty, what has happened since then to shrink the minimum acceptable area to 50 feet?

- Throughout the proposed amendments, you offer examples of practices in other jurisdictions. While I'm sure that others will speak to this in more detail, I cannot accept the proposition that the Los Angeles County jail is a model for what we should have in New York City when we lock up our citizens. But more to the point, the effort to reduce minimum rights seems to abandon best practices, the most desirable goals, for the least we can get away with – what the Legal Aid

Society aptly calls the "race to the bottom." The proposed standards have the effect of relinquishing the leadership role of New York City in promoting enlightened corrections practice. Does this board want to be the first in three decades to do that?

- The issue is not what the law requires. As Justice Anthony Kennedy has suggested, because the Supreme Court says that the constitution may not require something doesn't mean that it is not enlightened correctional practice to insist upon it. The issue should be what is good, and sensible, and humane, beyond constitutional minimums. What do we, in this city, exercising our role as national leader, see as the best practices?

I want to make an important point. Our issue is with the performance of your duties as independent monitor and rule-maker. It's not about how this Department of Correction, or this Commissioner, conduct themselves. In fact, at the Correctional Association, we have considerable admiration for the administration of the Department. Personally, I am a big fan of Marty Horn. Prison and jail administrators around the country should have his common sense, political savvy, and human qualities. But none of us is here forever, and it has to be the role of this board to look beyond individual commissioners or particular mayors and their administrations.

More than 35 years ago, the Board of Correction remarked on the relevance to prisons and jails of von Heisenberg's uncertainty principle. That's the rule of physics that says that certain atomic reactions happen differently simply because someone is observing them. There is no area of government to which von Heisenberg's rule applies better than the closed and hidden world of our jails and prisons. Thirty years ago, we gave you the power to go beyond the observer's role, and to compel the system to do the right thing. Please don't roll back three decades of progress and squander that right.

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INNOCENCE PROJECT
Benjamin N. Cardozo School of Law, Yeshiva University

WRITTEN TESTIMONY OF REBECCA BROWN,

POLICY ANALYST, INNOCENCE PROJECT, AND

MEMBER, COALITION TO RAISE MINIMUM STANDARDS

BEFORE THE NEW YORK CITY COUNCIL

RE: PROPOSED REVISIONS TO MINIMUM STANDARDS IN NEW YORK CITY JAILS

SUBMITTED: JUNE 6, 2007

My name is Rebecca Brown and I am the Policy Analyst at the Innocence Project and a member of the Coalition to Raise the Minimum Standards. The Coalition consists of former prisoners, current and former prisoners' families, concerned citizens, and members of the following prisoners' rights and social justice organizations working in New York City and across the country: Bronx Defenders; Center for Constitutional Rights; Correctional Association; Fordham Law Amnesty International; Fordham Law Prisoners' Rights Advocates; Innocence Project, affiliated with Cardozo Law School; Interfaith Coalition of Advocates for Re-Entry and Employment; Legal Aid Society; National Lawyers Guild New York City Chapter; New York City Anti-Violence Project; New York Civil Liberties Union; October 22 Coalition; Office of the Appellate Defender; Prison Legal News; Prisoners' Rights Advocacy at Cardozo Law School; Reentry Net; Stop Prisoner Rape; Society for Immigrant & Refugee Rights at the Columbia University School of Law; Sylvia Rivera Law Project; Urban Justice Center; and William Moses Kunstler Fund for Racial Justice.

I would like to take this opportunity to comment upon what has constituted nearly a complete lack of process with regard to the creation and promulgation of the recommended changes to the

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minimum standards. Between us, my colleague and I attended every Board of Correction meeting leading up to the dissemination of the proposal. While open to the public, these meetings were not conducive to discussion. The meetings were held in a very small room, always during standard business hours. In essence, the timing of all of these meetings barred genuine community participation and dialogue with respect to the proposed changes.

Since no process had been devised by the Board of Correction to elicit public participation, there was no chance for the public to weigh in on the proposed changes before they were disseminated. In fact, my colleague recalls a meeting in which John Boston of the Legal Aid Society's Prisoners Rights Project attempted to address Board members with respect to the anticipated proposal and was told to wait until the comment period. As well, it was only when Coalition members asked that current detainees at Rikers Island be given an opportunity to provide their input that their contributions were sought. Simply put, the suggestion that the Board of Correction deliberation process constituted an open forum is untrue.

It must also be noted that the proposed standards, and other important standards that should be proposed, touch upon a wealth of issues, including: overcrowding; hygiene; food/nutrition/hunger; medical treatment; violence; recreation; vermin; visiting; education; telephone use; mail; surveillance; clothing; translation services; and services or standards relating to female, transgender, and youth inmates. There is no way that all of the issues that were considered and all that should have been considered could possibly have been adequately vetted in this brief and closed process.

Also of critical importance is the fact that most inmates in New York City's jails are presumed innocent. Some of the proposed standards will have a direct impact on the ability of the innocent

to both maintain an appearance that conveys respectability and innocence and effectively address the charges lodged against them. These include, but are likely not limited to:

Interpreter services: The current revision is vague and appears to decrease the prevalence of Spanish translators. The ability to communicate with others – understanding the schedule of attorney and family visits and processes for reporting health problems and grievances – is a basic necessity for an inmate's fair treatment both pre-trial and post-conviction.

Access to Law Library Resources: Standards for the law library should be raised. The Board of Correction should make certain that library materials are in good condition – that pages and chapters ripped out of books are replaced, volumes are updated, card catalogues are easy to navigate, and that materials listed in the library's inventory exist and can be located. With the proposed removal of the inventory requirement [proposed revision to § [1-09] 1-08 (f)(7) of Chapter 1 of Title 40 of the Rules of the City of New York] , available resources could be changed without notice or knowledge. At minimum, the Board of Correction should be called upon to consult with family and criminal law experts, as well as law librarians, on what materials a good law library should have. The Innocence Project has found that a well-informed client is immeasurably valuable when devising legal strategy. Pre-trial, public defenders and even private attorneys are often overwhelmed by their caseloads, so they rely on clients to keep their cases on track. In addition, prisoners' access to law libraries has been critical to raising post-conviction claims.

Clothing: Appearing before any court proceeding in civilian clothing is absolutely necessary if a client is to receive fair treatment throughout the duration of his case. Wearing an institutional jumpsuit associated with convicted prisoners connotes guilt, and can have a subconscious effect

on the perceptions of even experienced judges. Providing for an inmate to wear civilian clothing only for trials is not enough – he or she must also wear regular clothes for all pre-trial court proceedings, and efforts should be made to assure this.

The collective experiences of our clients may inform additional recommendations about the general treatment of inmates in the City's jails. It is critical that at every point of contact with the outside, we do not reinforce the presumption of guilt. The opportunity to further address those standards as they relate to questions of guilt and innocence would be served by a more expansive and comprehensive process, one that ensures those most affected by minimum standards have adequate time to deliberate, and are then heard.

I have learned that the proposed revisions to these standards, which were devised nearly thirty years ago, were two years in the making. After much prodding, the Board of Correction held a public hearing and extended the public comment period to July 2, 2007. They have now invited "two or three" representatives from our Coalition to speak with them at their June 14th meeting for further discussion. Neither a short public commentary period on the heels of a public hearing, nor a discussion with a very limited number of our membership is sufficient to address revisions of standards that affect the fundamental rights of New York City's prisoners, as well as their families and the public at large. I urge the City Council to call upon the Board of Correction to withdraw its proposed amendments and initiate a full, fair and open process.

Testimony of The Legal Aid Society

on

Proposed Amendments to The Board of Correction Minimum Standards for New York City Correctional Facilities

Presented before

The New York City Council
Committee on Fire and Criminal Justice Services

Presented by

John Boston
Director, Prisoners' Rights Project
The Legal Aid Society

June 6, 2007

Thank you for the opportunity to testify concerning the amendment of the Board of Correction Minimum Standards for New York City Correctional Facilities. We have previously submitted comments to the Board itself concerning the amendments and the process that gave rise to them. These comments are attached.[1] This testimony will summarize some of our major concerns, though it does not address all the troubling aspects of the proposed amendments.

The Legal Aid Society has been dealing with the problems of the jail system indirectly, through its criminal defense practice, for a century, and directly, through its Prisoners' Rights Project, for 35 years.[2] From both perspectives, Legal Aid is intensely interested in the City's own rules for the treatment of prisoners in its jails, the vast majority of whom are pre-trial detainees[3] who are entitled to the presumption of innocence and not legally subject to punishment until convicted. Legal Aid believes strongly that effective municipal regulation and oversight is essential to maintaining standards of human decency in the jails and to reducing the need for court intervention into this essential municipal function.

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[1] They are: Comments of the Legal Aid Society Prisoners' Rights Project on the Proposed Amendments to the Minimum Standards for New York City Correctional Facilities ("PRP Board Comments"); letter, Legal Aid Society Prisoners' Rights Project to Board of Correction, May 4, 2007; letter, Legal Aid Society Criminal Defense Division to Board of Correction, May 2, 2007.

[2] Examples of the Project's current and recent litigation concerning the jail system include efforts to reduce physical abuse of prisoners by jail staff, *see Ingles v. Toro*, 438 F.Supp. 203 (S.D.N.Y. 2006) (approving settlement requiring numerous measures to control use of force by staff); enforcement of young prisoners' rights to general and special education, *see Handberry v. Thompson*, 446 F.3d 335 (2d Cir.); challenges to the physical conditions of confinement, *see Benjamin v. Fraser*, 343 F.3d 35 (2d Cir. 2003) (affirming findings of constitutional violation with respect to ventilation, lighting, exposure to extreme temperatures, and sanitation); and challenges to painful restraint practices and excessive delays in attorney visits, *see Benjamin v. Fraser*, 264 F.3d 175 (2d Cir. 2001); *see also Benjamin v. Fraser*, 2002 WL 31845111 (S.D.N.Y., Dec. 6, 2002) (holding City in contempt for disobedience of order concerning restraint practices).

[3] The latest data available to us show that as of December 31, 2005, about 83% of the jail population consisted of pre-trial detainees (10,561 of 12,758). Rockefeller Institute of Government, 2006 New York State Statistical Yearbook, at 340, Table H-28 (http://216.7.28.163/research/1column.aspx?id=10034).

The Board's deficient process

The Board of Correction, which initially promised to "reach out to interested constituencies"[4] in formulating proposed amendments, did not. Instead it engaged in a closed-door process with the Department of Correction and issued a set of proposals based on input from no one except the Department of Correction.

The results reflect the process. The proposed amendments are overwhelmingly directed towards serving the convenience and enhancing the prerogatives of the Department of Correction while providing no substantial benefits to prisoners, their families, or the communities they come from. The Board's explanations for the proposals explained nothing, and in some cases there was no explanation.[5] Nor has the Board addressed the myriad of issues that the present Minimum Standards do not adequately address, but which are very important to prisoners and their families, such as the conduct of searches, the treatment of visitors, and young people's access to education.

We agree with Councilman Martinez's recent letter to the Board, which stated: "I believe that the Board should defer further action on the proposed amendments and engage members of the affected communities, advocates, former Board members and correction experts in a thorough and open process to evaluate what changes need to be made to the Standards, and why." This process has been hopelessly compromised, and the only acceptable solution is to discard the present set of proposals and start over. The

[4] This phrase is taken from the Board's own minutes, and this discussion is largely taken from those minutes. A more complete account of the process is in the PRP Board Comments at 4-7 (section titled "The Board's Flawed Process").

[5] The Board's explanations, such as they are, appear in its Notice of Public Hearing and Opportunity to Comment on Proposed Amendments to the Minimum Standards for New York City Correctional Facilities, issued earlier this year.

Board's decision to extend the comment period by slightly over a month, and to invite a handful of public representatives selected by the Board to discuss the pending proposals at the next Board meeting (with the public free to attend but not allowed to speak), is no substitute for genuine community participation in formulating the standards that should govern jail operations. That is not meaningful public participation. The Board must stop the present process entirely and return to square one, conducting a broadly based inquiry, with meaningful community participation from the beginning, into what changes are necessary in the Minimum Standards, including the addition of standards in areas that the Minimum Standards do not presently address. The community should not be restricted to after-the-fact commentary on a pre-set agenda reflecting the priorities of the Department of Correction.

Crowding

One example of the skewed priorities resulting from the Board's closed-door collaboration with the Department of Correction is the proposal to make the jails more crowded by reducing the square footage required in open dormitory housing from 60 square feet per person to 50 square feet, and correspondingly to increase the number of persons who can be held in a dormitory from 50 to 60. Who would have thought that what the jails need is more crowding?

This proposal is unnecessary and dangerous. Greater crowding increases tension and the risk of violence, makes surveillance and control by correctional staff more difficult and thereby makes staff's job more dangerous, and increases the wear and tear on physical plant, the rate of failure of plumbing fixtures and other equipment, and the

difficulty of maintaining adequate sanitation—and sanitary conditions in the jails have been found unconstitutional, with the jails remaining under federal court supervision as a result.[6]

New York City struggled with jail overcrowding, and with litigation designed to curb it, for years. Now any need to overcrowd is finally gone, with the massive reduction in crime rates of the last decade and court processing improvements that move criminal defendants' cases along faster. Jails and housing units are standing empty.[7] Why increase crowding, then? Why throw away one of the few clear improvements in jail conditions in New York?

There is no answer to this question from the Board. All the Board says is that other urban jails have lower space requirements than New York, and in light of reductions in stabbings and slashings, it "believes" that this measure "would not adversely affect safety and security."[8]

But stabbings and slashings are only a small and unrepresentative fraction of the violence in the jails. They have gone down compared to, say, a decade ago, chiefly because the Department conducts multitudinous searches to find and remove weapons, not because of any overall reduction in tension and violence. Further, it appears that they are on their way up again. Data submitted to the Board by the Department shows a

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[6] These physical plant issues are discussed in the PRP Board Comments at pages 20-23 ("Other Concerns, and the Board's Failure to Monitor Them").

[7] The Queens Detention Center has been closed for several years. The James A. Thomas Center (formerly the House of Detention for Men) on Rikers Island has also been closed to inmate housing. (The Bronx Detention Center was closed several years ago and has now been demolished.)

The Brooklyn Detention Center has also been closed for several years; the City proposes to reopen it and add substantial additional capacity on the site.

[8] Notice of Public Hearing and Opportunity to Comment on Proposed Amendments to the Minimum Standards for New York City Correctional Facilities at 3.

significant increase from 2005 to 2006 in stabbings and slashings, and also in other measures of violence: inmate fights, use of force incidents, and "allegations"—reports by prisoners that staff used force against them but did not report it as the rules require. The Department also provided the Board with data from dormitories that are already overcrowded pursuant to variances granted by the Board; they show that inmate fights in these dormitories increased very substantially from 2005 to 2006.[9] In short, it appears that the jails are becoming more rather than less violent. It makes no sense to take steps now that would make the jails more tense and harder to supervise and control.

The idea that New York should embrace more crowding because other jails do so amounts to joining a "race to the bottom." That point is underscored by looking at the particular jails the Board has cited as role models, most of which are in a state of crisis from overcrowding and violence.[10] These include:

- The Los Angeles jails, which have been in a crisis of overcrowding and violence for many years, blowing up in uncontrollable riots early last year.
- The Chicago (Cook County) jails, where hundreds of prisoners routinely sleep on floors under unsanitary conditions, a situation that has persisted for years.
- The Houston (Harris County) jails, where in recent years 1000 to 2000 prisoners have had to sleep on the floors.
- The Philadelphia jail system, so crowded that only a few months ago a federal court had to enjoin the practice of backing up prisoners for days in intake areas and police stations. Philadelphia also houses prisoners in bunk beds in dayroom areas and is *triple* celling prisoners on plastic cots.

[9] This information is summarized and sourced in the PRP Board Comments at pages 18-20, "Increased Violence in the Jails."

[10] Support for the following statements appears in the PRP Board Comments at pages 10-13.

Even more incongruous is the Board's citation to the Phoenix (Maricopa County) jail, operated by Sheriff Joe Arpaio, self-described as "America's Toughest Sheriff," which features chain gangs (for juveniles as well as adults), service of only two meals a day, the prohibition of coffee, salt, and pepper, the use of striped uniforms and pink underwear, and housing prisoners in a "Tent City." Sheriff Arpaio also instituted World Wide Web broadcasts showing prisoners and their activities via cameras installed within the jails, until the courts struck this practice down as unlawful (though not before video of women inmates using the toilet had been copied onto web pornography sites). These antics aside, Maricopa County too is grossly overcrowded; in 2004, the system was at 176% of capacity. It is one of the few American jails to have its own report from Amnesty International.[11]

Is this what New York City wants its jails to be like? We think not; and we think that the Board is wrong to use them as models in setting standards. New York has passed through its overcrowding crisis, and it is finally almost in compliance with the crowding standards that have been in effect for many years. We should not throw away that victory.

Lock-In[12]

The proposed amendments would extend the use of 23-hour lock-in for prisoners housed in cells from punitive segregation units (for those convicted of jail disciplinary offenses) to include prisoners in the newly created "Close Custody" housing units, which

[11] Support for these comments about Maricopa County appears in the PRP Board Comments at pages 11-12.

[12] Further detail and documentation of this material appears in the PRP Board Comments at 24-29.

confine many prisoners who have not been shown to have engaged in jail wrongdoing, including many who are there for their own protection.[13] Protracted isolated confinement has been shown repeatedly to inflict serious psychological trauma, especially upon those who are already psychiatrically vulnerable, and to promote suicidal and self-mutilating behavior on the part of prisoners. There has already been at least one suicide in the Close Custody units.

Commissioner Horn has stated that the numbers in Close Custody are small and most of the prisoners in it are there at their own request. But future administrations may not be so conservative—nor may this one, if the rules are changed broadly to authorize this sort of confinement. Further, even if one granted the need for more restrictive confinement for safety and security reasons, 23-hour lock-in goes too far. The state prison system's protective custody units, which present comparable security concerns to the City's Close Custody units, allow several hours of optional lock-out time each day.[14] No less should be permitted in the City jails, though lock-out periods in such units must of course be closely supervised.

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[13] The Department of Correction has taken the position that imposing 23-hour lock-in in these newly designated units is permitted by the existing standards. In our view that is false, and the Board has simply failed to enforce its standards. If the Department's interpretation were correct, it would hardly be necessary to amend the standards on this point.

[14] 7 N.Y.C.R.R. § 330.4(a) ("Inmates will be afforded the opportunity to be out of their cells for a minimum of three hours per day between the hours of 7 a.m. and 11 p.m. A minimum of one hour out-of-cell time shall be scheduled for outdoor exercise.") The remaining out-of-cell time may be used for indoor or outdoor recreation or exercise, meals, telephone calls, showers, visiting, or programs on the housing unit. *Id.*

Denial of personal clothing[15]

Under the present standards, pre-trial detainees may wear their own clothing, a policy that has been in effect for decades. An amendment would require them to wear jail uniforms, a measure that should not be imposed on persons who have not been convicted of crimes, both because it is dehumanizing and because it may affect the way they are perceived in court. (They would be allowed to wear civilian clothing at trials, but would have to wear jail uniforms to other court appearances, potentially prejudicing their criminal proceedings. Judges are human beings too, no matter how hard they strive for objectivity.)

This amendment would also make it impossible for families to ensure adequate clothing for their family members in jail to cope with the wide fluctuations of temperature within the jails, for example by providing them with long underwear or with shorts and short-sleeved shirts.

The Board presents no justification for this amendment other than that other jails do it. Insofar as the Department of Correction has security concerns, they are exaggerated; prisoners are already searched, including strip searches, regularly and frequently. It is also doubtful that the Department of Correction will be able reliably to deliver sufficient clean clothing in acceptable condition and sizes to 14,000 prisoners. They allowed many of their existing laundry facilities to fall into a state of disrepair, and though laundry service is theoretically available in some of the jails, most prisoners are afraid to rely on it, washing their clothes by hand in the shower instead. Though the

[15] More detailed comments appear in the PRP Board Comments at pages 42-46.

amendment requires the Department of Correction to come up with an adequate system of laundry and storage, there is no provision for the Board of Correction to verify its adequacy.

Spanish-speaking prisoners

The amendments would repeal the requirement that the jails have sufficient Spanish-speaking staff and volunteers to assist Hispanic prisoners, and would provide only that the Department of Correction must implement "procedures" to ensure that they can understand communications from staff. There is no requirement or even hint as to what those procedures might be. Hispanic prisoners, a group that includes many monolingual Spanish speakers and many others with limited proficiency in English, are a large and apparently growing percentage of the jail population.[16] We understand that Board members have said that this provision is not intended to reduce services to Spanish-speaking prisoners, but that is what it appears to say. The Board should either leave the present standard intact, or enhance it to ensure that there are concrete means of ensuring that persons who do not speak English have adequate means of communication and understanding.

Telephone surveillance

The amendments would allow the Department of Correction to listen in on prisoners' telephone calls, entirely at their discretion, apparently for any reason or no reason. (The current standards properly require a warrant.) The *only* requirement for this

[16] The Department of Correction states that 32.5% of its inmate population is Hispanic. Letter, Commissioner Horn to Stanley Kreitman, Board of Correction, October 25, 2005.

surveillance is that the prisoner receive notice of the surveillance–and we understand that notice may be given simply by putting signs over all the telephones saying the calls may be listened to. The amendment says that calls to the Board of Correction, Inspector General and other monitoring bodies, and to treating physicians, attorneys, and clergy, shall not be listened to–but these calls are made over the same telephones as calls to prisoners' family members. No means has been put forward to avoid surveilling privileged calls. Even if one were developed, it would not solve the problem, since in some cases prisoners must speak with family members, friends, or others besides lawyers about matters concerning their criminal defense—for example, to locate witnesses in their communities, or documentation that might show their whereabouts or other matters relevant to their defense.

The Board's only justification is a boilerplate reference to "heightened security concerns"—what security concerns, or heightened by what, they do not say. This appears simply to be an example of the post-9/11 fashion of dispensing with checks and balances and reducing civil liberties without any solid factual basis, and it should not be countenanced.

Surveillance and censorship of letters and publications

The proposed amendment concerning correspondence would similarly drop the requirement of seeking a warrant to read incoming and outgoing mail, allowing it if the warden "has a reasonable basis to believe" that the correspondence threatens facility safety or security, "another person, or the public." It is precisely this kind of open-ended official discretion that the warrant requirement is intended to curb. Prisoners are

permitted to correspond with any person–except that the amendment would add "except when there is a reasonable belief that limitation is necessary to protect public safety or maintain facility order and security," with no suggestion as to what might provide a basis for such a belief, and no provision for any neutral party to review jail personnel's actions. Publications may be received from any source, but the amendment adds "except when there is a reasonable belief that limitation is necessary to protect public safety or maintain facility order and security"–again, with no suggestion of any limits or third-party review on the jails' actions.

Similarly, the grounds for excluding publications are expanded from those containing instructions on making explosives or escaping to include "other material that may compromise the safety and security of the facility," with no indication what that material might be. In our experience, the Department of Correction's main concern in censorship has been to exclude material that is critical of the Department of Correction.[17] Censorship expands unless curbed. The Board of Correction should not add to the Department's censorship powers except by spelling out very explicitly what kinds of material are allowed to be censored. The state Department of Correctional Services' "media review" standards illustrate the sort of specificity that is required.[18]

[17] Examples of Department censorship we are aware of include the removal from the *New York Times* of a news story concerning the settlement of Legal Aid's litigation about excessive force in the Central Punitive Segregation Unit. Another instance involved the censorship of a story in *Newsday* concerning an inmate homicide in one of the Rikers jails under circumstances which reflected poorly on the vigilance of Department staff. See letter, John Boston to Members of the Board of Correction, March 12, 2004 (pointing out violation of Board standards and Board's failure to act on it). These are examples of Justice Scalia's observation that "All government displays an enduring tendency to silence, or to facilitate silencing, those voices that it disapproves." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 235 (1987).

[18] These are quoted in the PRP Board Comments at pages 40-42.

Visiting

The proposed amendments would require visits within 24 hours of admission to jail to be non-contact visits. The only cited justification is that "during the first 24 hours of custody, DOC must determine a prisoner's security risk and classification, and health providers must evaluate a prisoner's health status, including whether a prisoner may have a contagious disease."[19] However, there is no justification for treating every new admission as if he or she had a contagious disease. The requirement that visiting be permitted within the first 24 hours of custody has been in effect for almost three decades, and the Board cites no actual problem that has ever been caused by allowing prisoners to visit in the normal fashion during that period. This proposed amendment appears to be a completely gratuitous restriction on prisoners and their families.

This amendment may have devastating consequences for some detainees. It is well known that the greatest danger of suicide in jail is during the first few days of custody, and the risk is particularly great for persons with a history of mental health problems—who make up quite a significant proportion of the Department of Correction's population. To deny a person who is first undergoing the shock of incarceration the right guaranteed to nearly all other prisoners, to be able to embrace family members and speak to them directly and not through a telephone hookup, may have grave psychological consequences for the most vulnerable new detainees. The same is true for family members, especially young children.

[19] Notice of Public Hearing and Opportunity to Comment on Proposed Amendments to the Minimum Standards for New York City Correctional Facilities at page 4.

What the Board did not consider

There is a host of issues about jail operations that are of concern to prisoners and their families, but these are not addressed by the proposed amendments—not surprisingly, since only the Department of Correction participated in their formulation. Examples include:

- The frequently dysfunctional inmate grievance system
- Delays in intake processing, which can leave prisoners in unsanitary and dangerous conditions for long periods
- Confinement in cells without working toilets and sinks
- Delays in visits and the treatment of visitors on Rikers Island
- Long delays in transportation to and from court
- Delays in attorney visits
- Access of young prisoners to education
- Abusive search practices
- Cross-gender staff surveillance and the attendant invasion of privacy
- Equal treatment of transgender prisoners and prisoners with disabilities

Our concerns with these issues are detailed in our earlier comments to the Board.[20] The above is far from a complete list of the jail conditions and practices that a regulatory body like the Board of Correction should examine, for the benefit of prisoners, their families, and the public, in addition to the Department of Correction.

[20] PRP Board Comments at 56-69.

Comments of The Legal Aid Society
Prisoners' Rights Project
on the Proposed Amendments
to the Minimum Standards for
New York City Correctional Facilities

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We submit herewith the comments of The Legal Aid Society's Prisoners' Rights Project on the proposed amendments to the Minimum Standards for New York City Correctional Facilities. We have not commented on every proposed amendment, and may supplement these comments based on further thought or further analysis of information we have sought from the Board of Correction and the Department of Correction.

Summary

The Board of Correction should withdraw the proposed amendments. They are the product of a flawed and one-sided process in which only the views and interests of the Department of Correction were considered. The results of the process are completely skewed towards the Department's concerns at the expense of the interests of prisoners and their families, and they fail to address any of the issues omitted from the original standards but highly appropriate for regulation by the Board at this point. The Board's explanations are mostly vague and general, and the fact that some other jails and the State Commission of Correction have harsher or more intrusive rules does not justify this independent Board in joining a "race to the bottom" with its own standards. (See § A, below.)

The Board should not amend the Overcrowding standard. Greater crowding risks more violence and less ability to maintain physical plant. The Department is not in control of either area of its operations; its own data shows that violence has been increasing. With jail population having fallen by a third from its peak and with jails and housing units standing empty, there is simply no need to make the jails more crowded. (See § B, below.)

The Board should not amend the Lock-in standard to allow 23-hour lock-in of all close custody prisoners because of the harsh consequences of such protracted lock-in times. If it makes any exception for close custody, it should require a reasonable amount of lock-in time, as is done in the state prisons' protective custody units. (See § C, below.)

The Board should not eliminate the requirement of sufficient Spanish-speaking staff to ensure that Spanish-speaking prisoners can understand and participate in facility activities; the need for such service has increased rather than decreased over the years. The proposed amendment to require "procedures" to assist non-English speakers generally is appropriate if made more specific. The Board should also spell out when the use of other prisoners as interpreters is inappropriate. (See § D, below.)

The Board should not approve the proposed amendments with respect to communications (telephones, correspondence, packages, and publications) in the absence of a showing of need. There is no showing that compliance with the existing warrant requirement has actually impeded the Department in pursuing any necessary investigation. The proposed amendments also convey entirely too much unfettered executive discretion; if any amendments are approved, they must be far more explicit about the circumstances in which intrusion and obstruction of communication are allowed. (See § E, below.)

The Board should not approve a requirement that pre-trial detainees, who are entitled to a presumption of innocence, wear jail uniforms, both because of their dehumanizing quality and because doing so would eliminate prisoners' and their families' options to provide clothing adapted to the extreme temperatures that prisoners sometimes encounter in the jails and during outdoor recreation. Further, there is no

provision for verification that the Department will actually be able consistently to provide clean clothing that fits for 12,000 detainees, and much reason to doubt that it is capable of doing so. (See § F, below.)

The Board should not approve the proposed amendment to deny contact visits to newly admitted prisoners because of the absence of any evidence that such visits have ever caused a problem and because of the potentially devastating impact of requiring such visits to newly incarcerated persons and their family members. (See § G, below.)

The Board should not approve the proposed amendment concerning housing sanitation in its current form because it is inconsistent with a governing federal court order. (See § H, below.)

The Board should not approve the proposed amendment concerning personal hygiene, since restricting showers in punitive segregation units is a potential threat to health in hot weather until such time as the Department provides some means of cooling the segregation units. (See § I, below.)

The Board should not approve the proposed amendment concerning "correctional best practices" variances, unless it is revised to provide that such variances cannot be more intrusive or restrictive than the existing standard. The proposed amendment eliminating the distinction between "limited" and "continuing" variances is appropriate. (See § J, below.)

The proposed amendments generally fail to provide an adequate oversight role for the Board and, in at least one instance, withdraws the Board from an existing oversight role. The Board should review its proposed amendments, as well as the rest of the

standards, with an eye to appropriate means to ensure that the Department actually complies with them consistently. (See § K, below.)

The Board has failed to look beyond the Department of Correction's wish list to assess whether additional amendments—especially those that might benefit prisoners or their families—are needed, both in areas of existing standards and areas which the Board has not previously regulated. (See § L, below.)

A. Introduction and General Comments

The Board should withdraw the proposed amendments in their entirety and start over. The proposals, nominally the result of a comprehensive review of the Minimum Standards, in fact reflect a completely one-sided process in which the Department of Correction pressed its agenda; in which all parties who might have questioned or opposed the Department's positions were excluded; and in which there was no voice to speak for the prisoners and the communities from which they come.

1. The Board's Flawed Process

This most recent phase of the Board's consideration of amendments to its Minimum Standards began in the fall of 2004, when the Department submitted requests for variances from the standards governing Overcrowding, Lock-in, Clothing, and Telephone Calls, along with requests for amendments of those standards.[1] A review of the ensuing process, which culminated in the publication of amendments now under consideration, reveals that Board, as a regulatory body, failed to exercise independent authority in the formulation of these proposals, failed to debate, or even discuss, the

[1] Letters from DOC Commissioner Martin Horn to BOC Executive Director Richard T. Wolf, October 19, 2004, and November 26, 2004 (two letters).

proposals prior to publication, and failed to include interested parties in the development of the proposals. The process has made a mockery of the Board's oversight mission.

A joint Board-Department committee was created to review the standards, with the Commissioner designating two Department representatives and the Board assigning two members to the review committee.[2] The Chair of the Board reviewed the standards himself and found them to be in "pretty good order."[3] On further review, the Board Chair reported that the committee would be recommending some "minor adjustments" in the standards. He described the process as follows: The committee would meet again in a week or two and would present its recommendations to the Board. Then there would be a meeting with the Department to learn what changes it would suggest. The committee would then develop its final list of recommendations to present to the full Board, and finally the "complicated process" of amending the minimum standards could begin.[4]

In March 2005, the Chair reported that the committee was making good progress, and was going to meet soon with the Department to discuss the Board's recommendations and solicit the Department's views. "Thereafter, the Board will reach out to interested constituencies for comments." In response to a question from a Board member, the Chair answered affirmatively that the full Board would have input before the recommendations were shared with the Department. It was clear at this time that the Department was working on its own set of proposals. The Commissioner reported that the Department had been working on a comparison of the Board's Minimum Standards with standards of the State Commission of Correction and the American Correctional Association.[5]

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[2] BOC meeting minutes, October 14, 2004 and December 8, 2004.
[3] BOC meeting minutes, December 8, 2004
[4] BOC meeting minutes, January 13, 2005
[5] BOC meeting minutes, March 10, 2005.

In May 2005, matters took a new turn when the Chair of the revision committee reported that the committee and Department staff would meet for the purpose of hearing *the Department's* proposals for change.[6] There was no mention of the committee having formulated its own set of proposals or recommendations. In June 2005, the Department presented its proposed revisions to Board staff. These were distributed to the full Board.[7] This set of requested revisions of the standards has not been made available for public review.

By September 2005, the committee's focus had fully shifted to a review of the Department's proposals, and away from any independent review of the Minimum Standards. Tellingly, one of the committee members commented at the September Board meeting that the committee "might" itself propose changes to the standards[8]--a remark which shows how far the process had shifted from one driven by the Board's own initiative to one driven by the Department's requests and proposals.

Over the next few months, the committee communicated with the Department to ask questions and obtain additional information about the Department's proposals. From reports given at Board meetings, November 2005 – March 2006, the Board members on the committee continued to focus on the Department's proposals rather than conducting its own independent review and formulation its own remedial proposals.[9]

At the January 2006 Board meeting, the committee chair described a process following the committee's completion of its work, that would include internal debate by the Board and then input from interested parties, such as unions and the Legal Aid

[6] BOC meeting minutes, May 12, 2005,
[7] BOC meeting minutes, June 9, 2005,
[8] BOC meeting minutes, September 15, 2005,
[9] BOC meeting minutes, November 10, 2005, December 8, 2005, January 12, 2006, February 9, 2006, March 9, 2006.

Society.[10] In March 2006, the committee chair said that the proposed amendments would have to be discussed at a full meeting of the Board. In April 2006, the Board Chair said that after a briefing of Board members, who had not served on the committee, the Board would discuss the recommended amendments.[11] As we now know, the process–including discussion of the proposed amendments by the full Board and input from interested groups—never took place.

By July 2006, Board staff had prepared a memorandum explaining the recommendation to amend certain standards and the reasons not to change others. The memo was distributed to the Board, but not to the public.[12]

At its September 2006 meeting, the Board voted to "move the process," meaning that the proposals would be sent to the Law Department for review, but no discussion of the substance of the proposals took place.[13]

2. The Results of the Board's Process

The results of this process reflect the defects of the process. The significant changes proposed in the amendments are overwhelmingly directed towards serving the convenience and enhancing the prerogatives of the Department while limiting oversight by the Board. There is simply nothing of substance in them for prisoners or their families. Rather, the amendments would make life in jail more oppressive and intrusive. The supposed explanations in the Board's notice document explain almost nothing, and indeed seem crafted for that purpose. In short, the picture the Board's proposals present is the same picture that has become all too familiar at all levels of government: the

[10] BOC meeting minutes, January 12, 2006
[11] BOC meeting minutes, April 13, 2006.
[12] BOC meeting minutes, July 13, 2006.
[13] BOC meeting minutes, September 14, 2006.

supposed regulatory agency that has become captured by the industry it regulates and serves its interests rather than those of the public.

It is not enough to say that now is the time for the community to be heard. The agenda has been firmly fixed after two years of collaboration between Board and Department, and there is no realistic expectation that a single day of hearings and a flurry of written submissions will have any significant impact on the determinations that have been reached behind closed doors.

In proceeding as it has, the Board has betrayed both its regulatory responsibility and the public trust. We call on the Board to turn back from its present course and commence a genuine, open, and even-handed review of the Standards, open to all elements of the community who are concerned about the treatment of their neighbors, friends, family members and fellow citizens who may be held in jail, and not just those who run the jails.

One of the most disturbing aspects of the Board's comments on the proposals is its invocation of practices in certain other jails, without presenting any reason why those jails should be viewed as appropriate role models for New York's, or any evidence that their prisoners are treated any better, or even as well, as New York's prisoners. In fact, as shown below,[14] those jails are severely overcrowded and in some cases grossly mismanaged and consciously abusive of prisoners. They present nothing to aspire to, and the Board's citation of them amounts to a "race to the bottom." Nor is there any support for the Board's citation of the less demanding standards of the State Commission of Correction. If the Commission's standards were appropriate for New York, there would be no reason for the Board to have standards at all. No jail system in New York State is

[14] *See* § B, below.

as large and as complex as New York City's, and none has demonstrated such an inability over 30-plus years to manage its staff and facilities consistently with court orders incorporating minimal constitutional standards.

In the rest of these comments, we will address the specifics of each significant amendment and its supposed justification. We will also begin to address what the Board has *not* done: examine the significant areas of jail life and operations that were omitted from the original Standards and *still* will not be addressed under the Board's present proposals.

B. Overcrowding

We oppose the amendments to the Board of Correction's Overcrowding Minimum Standard (Section 1-04), which would allow the Department to squeeze more prisoners into less space by shrinking the minimum floor space per person in dormitories to 50 square feet and increasing the maximum number of detainees housed in a dormitory from 50 to 60.

We oppose these changes, first, because they have a strong potential for creating or exacerbating dangerous and disruptive conditions in the jails, as well as straining the Department's ability to maintain basic plumbing equipment (toilets, urinals, sinks, and showers) and sanitation, and to provide inmate services and programs.[15] It is wrong to

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[15] As we said in 2004, when faced with a similar, though much smaller scale, version of the current proposal:

> The Legal Aid Society is deeply concerned about the Department's variance request concerning crowding, since overcrowding has historically been the bane of the City jail system and has been linked to inmate-inmate violence, excessive force by staff, and the disruption and sometimes the breakdown of medical care access, food service, sanitation and maintenance, and other essential services and operations. *See, e.g., Fisher v. Koehler*, 692 F.Supp. 1519 (S.D.N.Y. 1988), *aff'd*, 902 F.2d 2 (2d Cir. 1990) (linking unconstitutional inmate-inmate and staff

claim that these risks are not real because these crowding levels have been allowed in some locations under variances without obvious disaster. In fact, where the Department has been allowed, through variances, to operate expanded capacity dormitories in the past, the Board has failed to adequately monitor the impacts of overcrowding.

Second, there is no need or justification for the amendment, except that other jail systems do crowd to this extent, and the State Commission of Correction standards permit it. In the absence of some affirmative policy reason to embrace more crowding, to join this "race to the bottom" just because somebody else is doing it, would constitute an abdication by the Board of its independent oversight and standard-setting authority. "Because the neighbors are doing it" is not a good reason, nor is "because we can."

That is especially true in light of the comparisons chosen by the Board. One would think that the jails that the Board suggests emulating would be jails that are known to be well-run and not grossly overcrowded or violent. But that is not the case. Specifically:

Los Angeles. It is astonishing and shocking that the Board puts forth Los Angeles as a suitable model for New York City. The Los Angeles County jail system has been in a crisis of overcrowding and violence for many years, blowing up in uncontrollable riots early last year.[16]

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violence to crowding among other causes); Benjamin v. Malcolm, 564 F.Supp. 668 (S.D.N.Y. 1983) (finding safety, sanitation, medical services, and other services inadequate for proposed population levels; finding population caps constitutionally required to provide basic services).

Letter, Prisoners' Rights Project to Board of Correction, December 6, 2004.

[16] *See* "Los Angeles Officials Defend Effort to Calm Jails," *New York Times*, Feb. 19, 2006:

> Sheriff's officials are defending recent tactics used in hopes of quelling two weeks of violence in the Los Angeles County jail system, including taking mattresses away from inmates and ordering them to strip.

Chicago. The Cook County jail system is also severely overcrowded. Prisoners routinely sleep on floors in that system and have for years.[17]

Houston. The Harris County jail system, like that of Los Angeles, is in crisis. In mid-2004, 1700 to 1900 inmates were sleeping on the jail floors, of a population of 9100; a year later, some 1000 or more were still housed on floors.[18]

Phoenix. Of all the jails cited by the Board, the Maricopa County jail system is the most incongruous. Operated by Sheriff Joe Arpaio, who boasts of being known as

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> More than 100 inmates at Pitchess Detention Center spent much of Feb. 9 naked, without their mattresses and with only blankets to cover themselves. The punishment was an effort to calm inmates who had repeatedly attacked each other, even after privileges like access to mail, television and phones were taken away, said Sammy Jones, chief of the custody division.
>
> Sheriff Leroy D. Baca said Friday that he supported the move, as long as it was over a short term. He said keeping inmates naked was at the "outer edge of our core values" but was done to save lives.

(http://www.nytimes.com/2006/02/19/national/19jail.html?ex=1176264000&en=912ba86a24dae465&ei=5070). *See also* "More Injuries as Race Riots Disrupt Jails in Los Angeles," *New York Times*, Feb. 10, 2006 (http://select.nytimes.com/search/restricted/article?res=FB0A1EFE3E5A0C738DDDAB0894DE404482); "A Jail Tour in Los Angeles Offers a Peek Into 5 Killings Behind Bars," *New York Times*, May 23, 2004 (http://select.nytimes.com/search/restricted/article?res=FA0E12FD3D5A0C708EDDAC0894DC404482).

[17] The John Howard Association, which monitors the Cook County jails pursuant to court order, has made observations on this subject for years in its reports, *e.g.* (from the two most recent reports on-line):

"Although the average daily inmate population and the number of inmates sleeping on floors have decreased somewhat since 2002, overcrowding remains a problem of the first order for CCDOC." Executive Summary, Court Monitoring Report for *Duran v. Sheahan* et al., 74 C 2949: Crowding And Conditions Of Confinement At The Cook County Department Of Corrections And Compliance With The Consent Decree at 15 (July 2004) (http://www.john-howard.org/images/EXECUTIVESUMMARY.doc).

"Sadly, with all the progress made, over 500 detainees (individuals suspected but not found guilty of a criminal act, individuals who cannot afford bail, individuals who are disproportionately people of color and increasingly female) sleep on the floors every night at CCDOC in terribly cramped and unsanitary conditions." Executive Summary, Court Monitoring Report for *Duran v. Sheahan* et al., 74 C 2949: Crowding And Conditions Of Confinement At The Cook County Department Of Corrections And Compliance With The Consent Decree at 1 (May 2005).

[18] "Revised numbers show jail crowding is worse," *Houston Chronicle*, August 5, 2005, *reprinted at* http://www.solutionsfortexas.net/id408.html .

"America's Toughest Sheriff,"[19] it is one of the few American jails to have its own report from Amnesty International.[20] Among the policies to which the Sheriff points with apparent pride[21] are chain gangs (for juveniles as well as adults), service of only two meals a day, the prohibition of coffee, salt, and pepper, the use of striped uniforms and pink underwear, and housing prisoners in a "Tent City" which he calls "a remarkable success story," but which Amnesty International described as posing "serious environmental hazards which make them unsuitable for inmate housing" and serious security and safety risks to prisoners and staff.[22] Sheriff Arpaio also instituted World Wide Web broadcasts showing prisoners and their activities via cameras installed within the jails, until the courts struck this practice down as unlawful[23] (though not before video of women inmates using the toilet had been copied onto web pornography sites[24]). These antics aside, the Maricopa County jails too are grossly overcrowded; in 2004, the system was at 176% of capacity.[25]

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[19] *See* http://www.mcso.org/index.php?a=GetModule&mn=Sheriff_Bio .

[20] Amnesty International, *Ill-Treatment of Inmates in Maricopa County Jails, Arizona* (August 1997) (http://web.amnesty.org/library/pdf/AMR510511997ENGLISH/$File/AMR5105197.pdf) (citing excessive force, inappropriate and inhumane use of restraint chairs, confinement of prisoners in outdoor tents).

[21] http://www.mcso.org/index.php?a=GetModule&mn=Sheriff_Bio .

[22] *Ill-Treatment of Inmates* report at 9-10. *See Flanders v. Maricopa County*, 203 Ariz. 368, 54 P.2d 837 (2002) (holding "[t]he history of violence, the abundance of weaponry, the lack of supervision, and the absence of necessary security measures" at Tent City support a finding of deliberate indifference to prisoner safety; upholding over $600,000 in compensatory and punitive damages to a prisoner severely injured in an assault).

[23] *Demery v. Arpaio*, 378 F.3d 1020 (9th Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005).

[24] Jamie Fellner, *Prisoner Abuse: How Different Are U.S. Prisons?* Human Rights Watch Commentary, (http://hrw.org/english/docs/2004/05/14/usdom8583.htm); "'Jail cam'" raises hackles and a law suit when links to porno site are discovered," *Village Voice*, June 6-12, 2001 (http://www.villagevoice.com/news/0123,haddon,25345,1.html).

[25] U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin, Prison and Jail Inmates at Midyear 2004 at 9, 10, Table 12 (April 2005) (http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf). This is apparently the most recent year for which data are available.

There are two separate dimensions to crowding: spatial density—the number of square feet per person—and social density—the number of people held in a particular space. Both are significant. In the *Fisher* case, Verne C. Cox, a professor of psychology who had performed extensive research on prison crowding testified that the high population density at CIFM

> causes inmate stress and arousal, manifesting itself in violence as well as other adverse consequences. Cox' theories and research point to a substantial connection between overcrowding and inmate-inmate violence: a high population combined with predominance of open dormitories causes stress and arousal, one of the manifestations of which is violence. T. 4692-94. According to his research, "social density," the number of persons in a particular space, is a more potent factor in creating negative consequences than "spatial density," the actual amount of space per person. T. 4696-97. Cox' research shows that the negative effects of social density include a variety of measures of stress, such as illness complaints, mood states, natural deaths, psychiatric commitments and violence. PX 411. Cox explains these findings in terms of "social interaction demand": crowding produces uncertainty arising from contact with unfamiliar individuals, "goal interference" and resulting frustration largely related to competition for resources, and "cognitive load," which reflects the difficulty of making decisions in a complex situation. The negative effects of social density are magnified in prison because of the relative dangerousness of the environment, the high turnover and constant influx of unfamiliar persons, and the limited resources available to each prisoner. See generally PX 411 (Cox, Paulus, McCain, Prison Crowding Research, reprinted from American Psychologist, October 1984); PX 412 (McCain, Cox, Paulus, The Effect of Prison Crowding on Inmate Behavior).[37]

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violent physical hostilities towards deputy personnel, civilians and other inmates." *Fisher*, 692 F.Supp. at 1543.

Such statements from corrections professionals are common. For example, the Sheriff of Cook County—whose jails the Board has cited as supporting greater crowding in New York—has said that overcrowding "breeds agitation and tempers flare as a result. . . . [O]vercrowding contributes to volatility in a correctional setting. It increases the burdens and stress on staff and it agitates the inmate population. It contributes to the occurrences of inmate-on-inmate violence, as well as the potential for excess force." "Jail Overcrowding and Understaffing," *Chicago Tribune*, (http://www.chicagotribune.com/news/specials/chi-jailreport-parttwo-jailovercrowding,1,6513918.story?coll=chi-newsspecials-hed).

[37] *Fisher*, 692 F.Supp. at 1543. The court added that Dr. Cox "endorsed the views expressed by Susan Saegert, an expert on the psychological effects of crowding, concerning 'social overload' and its negative consequences in prisons," that the court had adopted in the Bronx House of

The City's research expert, Dr. Gerald Gaes—an employee of the Federal Bureau of Prisons—criticized Dr. Cox's testimony, but Judge Lasker observed that "much of Gaes' own research and writing supports Cox' core conclusion that there is a substantial connection between overcrowding and violence in correctional facilities." Gaes' own study of assaults at 19 federal prisons over a period of 33 months showed that

> ". . . assault rates generally increased with crowding increases." . . . He also found that "a system configured with larger percentages of their population housed in dormitories is especially susceptible to higher assault rates." Id. Gaes reconfirmed these findings in a later review of crowding literature, . . . in which he concluded that one of the "basic conclusions warranted by the prison crowding research" is that "prisons that have higher density ratios are also more likely to have higher assault or misconduct rates," . . . . He noted elsewhere that "a prison with an excessive number of inmates housed mostly in dormitories is particularly likely to have higher assault rates," and that "[i]n summary, crowding, not age or transiency, is the best predictor of assault rates." . . .[38]

Based on that evidence, Judge Lasker concluded that "overcrowding is a significant cause of violence at CIFM." He added that, although Dr. Cox was criticized "for being overly theoretical and removed from reality, the practical realities testified to by CIFM inmates, officers and corrections officials tended to support" Cox's testimony.[39]

In light of this evidence and these findings at one of New York's own jails, it is remarkable that the Department has sought, and the Board has proposed, to increase crowding when there is no need for it.

Detention litigation mentioned above. "When asked how the state of knowledge on the subject had changed since 1976, Cox stated that 'a much more substantial body of data collected within prisons has emerged that basically buttresses many of the points that Susan Saegert stressed in her article.'" *Id.* at 1544.

[38] *Fisher*, 692 F.Supp. at 1544.

[39] *Fisher*, 692 F.Supp. at 1546.

2. Increased Violence in the Jails

The rulemaking notice states that the Board recognizes "significant reductions in reported stabbing and slashing incidents in the City's jails." However, stabbings and slashings are only a small slice of violence in the jails, and their relatively low frequency says more about the Department's efforts to find and remove weapons than about the overall rate of violence and tension in the jails. The rulemaking notice does not mention the more relevant data, provided by the Department as a condition of the overcrowding variances, concerning inmate fights in the areas of OBCC and EMTC presently affected by those variances. They show levels of violence that not only are high but also substantially increased from 2005 to 2006 in both jails: the EMTC average almost doubled, while the OBCC average almost tripled.[40]

Even these data represent too narrow a view. One can't assess the impact of overcrowded housing just by looking at what happens in the housing area. Prisoners subjected to stress, tension, and frustration by crowded settings and overtaxed services and facilities don't instantaneously recover when they walk out the dormitory door, and the consequences of those conditions may erupt when they are elsewhere in the jail and

[40] In March through October of 2005, the number of fights per month in the 24 expanded EMTC dormitories ranged from 4 to 11, and averaged 7.4. In the 14 expanded OBCC dormitories, the number of fights per month in March through October 2005 ranged from 0 to 3, with a monthly average of 1.75. (data for November/December 2005 is not available; January/February data is not included because reporting periods were of varying lengths). In 2006, the average number of fights per month in the 24 expanded EMTC dormitories was almost 14, with a range of 0 to 24. In the 14 expanded OBCC dormitories, the number of fights per month in 2006 ranged from zero to 17, with a monthly average of about five. These data are taken from the Department's Expanded Dormitory Security Reports for the relevant time periods; we have calculated the averages. The EMTC monthly average almost doubled from 2005 to 2006. The OBCC average almost tripled. These data are taken from the Department's Expanded Dormitory Security Reports for the relevant time periods; we have calculated the averages.

not only in the housing area. The Board should, therefore, look at violence data and trends based on incidents occurring throughout the jails and not just within the "expanded dormitories."

Applying this broader perspective, Department-wide statistics, not confined solely to the four jails where overcrowding variances were granted, show high *and increasing* levels of violence in the jails. Stabbings and slashings increased from 30 in fiscal year 2005 to 37 in fiscal year 2006. Preliminary data for fiscal 2007 showed 20 stabbings and slashings in the first four months compared to 12 in the first four months of fiscal 2006. The number of inmate fights or assault incidents resulting in infractions rose from 6,548 in fiscal year 2005 to 6,833 in fiscal year 2006.[41] Uses of force by staff against inmates increased from 961 in calendar year 2005 to 1,290 in calendar year 2006, an increase of 26%. These numbers do not include the hundreds of instances where inmates alleged that staff used force against them but did not report it. The number of inmate injuries resulting from uses of force rose from 1,079 in 2005 to 1,565 in 2006. And the number of injuries resulting from uses of force alleged by prisoners but not reported by staff increased from 314 in 2005 to 384 in 2006.[42]

Allowing more overcrowding would be a grave mistake, when, by reasonable measures, the jails are getting more violent despite efforts to control violence, and when neither the Board nor the Department has adequately gauged the impact of overcrowding variances. Further, even if the Department were able to keep the lid on in a limited number of housing areas that it was reporting on monthly to the Board of Correction, that

[41] Preliminary Fiscal 2007 Mayor's Management Report, at 121.
[42] Department of Correction, Bureau Chief of Security Annual Reports, 2005 and 2006.

artificial situation would hardly demonstrate that it is capable of operating the jails safely when overcrowding is allowed system-wide with no further oversight.

3. Other Concerns, and the Board's Failure to Monitor Them

Violence is not the only concern raised by increased crowding. However, the Board has failed to keep itself informed about these types of impacts. In our 2004 comments on the overcrowding variances, we pointed to the detrimental impact on the delivery of health services resulting from overcrowded conditions. (Sick call access at OBCC was specifically pointed out as a problematic area.) The program reports (part of the "Expanded Dormitory Program & Maintenance Reports") submitted monthly to the Board from the jails with the overcrowding variances do not identify any problems with health services in 2005 and 2006, but these reports are conveniently devoid of data. Month after month, the Department said to the Board, "All programs were provided in accordance with existing policies and procedures." Not once in two years is there any indication that the Board questioned or reviewed these reports or asked for real information. So long as the Department said everything is fine, the Board was content to give the Department a pass.

Greater crowding also leads to greater strains on physical plant. The Department submits monthly maintenance reports on the operability of plumbing fixtures (showers, sinks, toilets, and urinals) in the dormitories affected by the overcrowding variances. These reports show a significant number of fixtures out of service each month at OBCC, EMTC, and VCBC. The number of showers needing repair in 2006 at VCBC ranged from 16 to 47 per month. At OBCC, the range was 5 to 21. And at EMTC the range was 7 to 18. Toilets and urinals are frequently out of commission at EMTC; sinks and toilets

at OBCC present regular problems, as do the sinks at VCBC. There does not appear to be any standard used by the Board for reviewing the information regarding breakdowns of plumbing, assessing its impact on the stress and frustration of densely populated dormitories, and the impact of shortages of plumbing fixtures on housing area capacities, problems which are likely to worsen under heavier use.[43]

This concern is accentuated by evidence of ongoing failures by the Department in the areas of physical maintenance and sanitation. Many of these are documented in reports commissioned by the federal court's Office of Compliance Consultants. For example, a report by an expert sanitarian found that sanitation is compromised by the lack of maintenance and the sheer level of unrepaired damage to the buildings:

> . . . Most shower and toilet rooms, many dorm and cell areas have structural defects which make proper sanitation difficult. Conditions such as missing floor and wall tiles, peeling paint, grout missing between tile work, corroded metal walls or surfaces, cracks in surfaces such as shower floors and at the wall floor junctions in dorm areas where the wall coving has come off the wall require extra diligence to maintain sanitation. All of these surfaces should be maintained in a smooth and easily cleanable condition. Rough surfaces harbor disease organisms and are difficult to clean. It is possible to keep these clean and sanitary, but at a tremendous cost and effort. It is in this effort that the institution is not effective as evidenced by the soil accumulations observed in these defective areas. . . .
>
> Maintenance also continues to compromise sanitation in the area of vermin control. Exterior emergency doors are badly damaged, corroded, and have a large opening along the bottoms which allow the entrance of vermin in from the outside. Some window screens are torn or the glass broken, these likewise are allowing the entry of vermin. . . . Failure to do these fundamental repairs is undermining the efforts of the vermin control program.
>
> Routine maintenance cleaning of soil drain lines in shower, toilets, and utility closets is needed to prevent the drain fly infestations observed.

[43] Monthly Expanded Dormitory Program and Maintenance Reports submitted by the Department to the Board, 2005-06.

> Most soil drains in these areas are up to 1/2 the pipe diameter clogged with a buildup of organic debris, soil, and soap residue. . . .[44]

Similar inattention to physical plant issues is revealed in the report of a fire safety engineer who inspected the Anna M. Kross Center on Rikers Island, after having made two prior reports documenting that jail's multitudinous failings. The engineer found a lack of maintenance resulting in essential equipment that did not work (sometimes unbeknownst to staff) and fire exits that were blocked and unusable. He stated:

> . . . [T]he overall level of fire safety has not substantially improved from my first survey of the building in 1993. . . . Although new fire alarm systems have been installed in the Chevron Units, many of these new fire alarm systems were not operational at the time of the site visit and had not been operational for some months prior to the site visit. . . .
>
> From maintenance standpoint backup unlocking mechanisms and procedures failed during the site visit. In addition, several new and existing fire alarm systems did not work. . . .
>
> A tree was located in the outside exit discharge route from the rear exit from Quad #3 in Building #1. It is clear that this is the result of poor inspection and maintenance and the lack of use during drills. . . .
>
> The rear exit stairways in Quads #11 and #13 were full of masonry debris and were not usable. It is my understanding that the debris was the result of renovations in the housing units that were completed over 9 months prior to the site survey. . . .[45]

A similarly long list of malfunctions and failure to maintain and repair appears in the recent report of an engineering firm on the ventilation systems in four of the Rikers jails. Specifically, the consultant firm noted problems of closed fire dampers and

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[44] Eugene B. Pepper, R.S. [Registered Sanitarian], *Sanitation Inspections for New York City Jail Facilities at Rikers Island* (March 3, 2006). Mr. Pepper is the expert consultant on sanitation for the Office of Compliance Consultants, the court monitor in the ongoing *Benjamin* litigation about jail conditions, who was retained after the federal court found "unconstitutionally unsanitary conditions" in the jails. *See Benjamin v. Fraser*, 343 F.3d 35, 55 (2d Cir. 2003). Mr. Pepper's comments are based on observations made in January and February of 2006.

[45] Thomas W. Jaeger, P.E., Jaeger & Associates, LLC, *Evaluation of Fire Safety: Anna M. Kross Center, Rikers Island* (February 17, 2006).

unbalanced volume dampers at three Rikers jails; improper operation of air handler units at three jails; an air handler unit and a relief fan not running because of electrical problems at one jail; loose insulation in the fan plenum or compartment in two jails; split flexible connections on exhaust fan discharges at two jails; disconnected damper actuators at two jails; automatic control systems that didn't work; and many other failures to keep these basic systems in good repair.[46]

The relevance of these findings is that there is a general inadequacy of maintenance of physical plant within the Department of Correction. In light of such findings, it is unrealistic to believe that the Department will be able adequately to maintain physical plant and sanitary conditions under even greater intensity of use and the resulting wear and tear than presently exist.

In conclusion, the Board is deceiving itself into thinking that it has sufficient basis on which to relax existing standards for dormitory capacity. Data available to the Board shows increased violence and overtaxed systems resulting from overcrowded conditions, The Board has unfortunately chosen to ignore the signals and simply adopt the Department's assurances and plan. Predictions that additional overcrowding will not have adverse impacts are based largely on guesswork. There are too many risks attached to amendment of this standard, and we urge the Board retain its current standard.

The Commissioner recently testified before the City Council Committees on Finance and Public Safety (March 13, 2007). Speaking in support of the Department's plans to build new jails and simultaneously reduce jail capacity, he said:

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[46] Lawless & Mangione Architects & Engineers, LLP., *Air Ventilation Study at Rikers Island* (July 14, 2005). This firm was engaged by the Office of Compliance Consultants in response to the federal court's finding that ventilation in the jails was unconstitutionally deficient and presented health hazards to the detainee population. *Benjamin v. Fraser*, 343 F.3d at 52.

> We don't want more jail space than we need or that we will need. The City is today in a position to do what no other big city in America is doing, reduce the size of its local jail system as a result of the dramatic reductions in crime we have achieved in New York. Can we make the jail system even smaller? I don't know yet. Maybe we will be able to. But I do know we must have enough space to avoid overcrowding in the future. Remember that in the 5 years from 1986 to 1991 we went from housing fewer inmates than we house today to more inmates than we're planning capacity for. How many people come to jail is a far larger policy question that would require changes in the law and changes in criminal justice policy, over which the Department of Correction has little control. This Department has an obligation to ensure that the City avoids overcrowding in the future and to house inmates securely and humanely. And I know that even if there was but one inmate in city custody—that one inmate should not be on Rikers Island.

We agree with the Department's goals for new construction, to reduce the Rikers Island jail population, and for secure and humane housing and conditions for the individuals in its custody. But when the Commissioner speaks of avoiding overcrowding, at the same time that he asks this Board to increase overcrowding, he is, at best, sending a mixed message, and at worst, saying one thing to the Council and the opposite to the Board.

C. Lock-in

The Standards presently require lock-in in celled areas to be kept to a minimum, and set limits on lock-in time for all prisoners except for those in punitive segregation, who are kept locked in for 23 hours per day. However, the proposed amendments to the Standards would exempt prisoners in "close custody" as well.[47] These prisoners,

[47] Close custody was unilaterally created by the Department of Correction in 2005, in disregard of the Board's lock-in standard. The Department, we understand, asserted that adding new categories of prisoners who could be subject to 23-hour lock-in was authorized by the classification standards, which provide at § 1-02(e)(v): "Prisoners placed in the most restrictive security status shall only be denied those rights, privileges, and opportunities that are directly related to their status and which cannot be provided to them at a different time or place than provided to other prisoners." The notion that this provision authorized 23-hour lock-in under

including many who are in close custody for their own protection, are to be treated substantially the same as those who are locked in because of prison misconduct such as assaulting staff or other inmates, smuggling contraband, or trying to escape. This use of lock-in time for close custody would place some of the most vulnerable prisoners into unlimited solitary confinement. This is seriously ill advised and dangerous.

There is a long and unpleasant history of solitary and near-solitary confinement in American corrections. Numerous states (including New York) used some form of the "Pennsylvania system" of solitary confinement during the nineteenth century, and the United States Supreme Court summed up the well-known results in 1890:

> A considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.[48]

Concerning New York's adoption of solitary confinement at Auburn Prison, Gustav Beaumont and Alexis de Tocqueville observed: "This experiment, of which such favourable results had been anticipated, proved fatal for the majority of prisoners. It devours the victim excessively and unmercifully; it does not reform, it kills. The unfortunate creatures submitted to this experiment wasted away. . . ."[49]

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circumstances expressly excluded by the lock-in standards was inappropriate then but was not challenged by the Board. The Board should take this opportunity to have the new Standards explicitly state appropriate and necessary limitations on the use of close custody confinement.

[48] *In re Medley*, 134 U.S. 160, 168 (1890) (striking down a statute retroactively imposing solitary confinement as an ex post facto law).

[49] Quoted in Torsten Eriksson, *The Reformers: An Historic Survey of Pioneer Experiments in the Treatment of Criminals* (New York: Elsevier, 1976), at 49. *See also* Harry Elmer Barnes, The Historical Origin of the Prison System in America, 12 J.Crim.L. & Criminology 35-60 (1921), at 53.

> and systematic research . . . conducted over a period of four decades, by researchers from several different continents. . . .[54]

Researchers have also concluded that the use of severe levels of restriction on inmates in prison housing increases problems within the prison system rather than relieving them.[55]

Prisoners with no prior history of mental illness who are subjected to prolonged isolation "may experience depression, despair, anxiety, rage, claustrophobia, hallucinations, problems with impulse control, and/or an impaired ability to think, concentrate, or remember."[56] For those who do have pre-existing psychiatric disorders, the risk is much greater. As a well-known expert on prison psychiatry recently testified:

> Prisoners who are prone to depression and have had past depressive episodes will become very depressed in isolated confinement. People who are prone to suicide ideation and attempts will become more suicidal in

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[54] Craig Haney, Mental Health Issues in Long-Term Solitary and "Supermax" Confinement, 49 Crime & Delinquency (2003), at 130. See also Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondent, 2005 WL 539137 (March 3, 2005), filed in *Wilkinson v. Austin,* 545 U.S. 209, 125 S.Ct. 2384 (2005) (psychiatric and correctional experts conducted intensive literature review demonstrating repeated findings of the negative psychological effects of isolated confinement including findings of: "cognitive impairment, including the inability to think coherently and logically, as well as producing anxiety, anger and depression"; "verbal aggression, physical destruction of surroundings, and the development of an inner fantasy world, including paranoid psychosis"; "uncontrolled rage, including an increase in homicidal and suicidal impulses"; "headaches, mental and physical deterioration, emotional flatness, lability, breakdowns, hallucinations, paranoia, hostility and rage, and some were beset with thoughts of self-mutilation and suicide (which some acted upon)"; rage, panic, loss of control and breakdowns, psychological regression, a build-up of physiological and psychic tension that led to incidents of self-mutilation"; "a 'pervasive sense of frustration and hopelessness,' 'deep feelings of despair,' and the possibility that the psychological pain of their confinement might drive them 'to extreme actions, and desperate solutions'"; "'overwhelmingly negative and antagonistic to effective rehabilitation,' and that they were 'both hostile and provocative' because they 'provoked hostility, resentment and resistance',"

[55] Brief of Professors and Practitioners of Psychology and Psychiatry, 2005 WL 539137 at 28 and fn. 62 and 63 ("The creation of control units and increased use of administrative segregation have not reduced the level of violence within general prison populations." Citing Rodney Henningsen, Wesley Johnson, and Terry Wells, Supermax Prisons: Panacea or Desperation, 3 Corrections Management Quarterly 53-59 (1999) at p. 55.).

[56] Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* (2003), at 151, *citing* Stuart Grassian and N. Friedman, Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement," 8 Int'l J. of Law & Psychiatry 49-65 (1986); Grassian, Psychopathological Effects of Solitary Confinement," 140 Am. J. Psychiatry 1450-1454 (1983).

> that setting. People who are prone to disorders of mood, either bipolar . . . or depressive will become that and will have a breakdown in that direction. And people who are psychotic in any way . . . those people will tend to start losing touch with reality because of the lack of feedback and the lack of social interaction and will have another breakdown, whichever breakdown they're prone to.[57]

The dangers of over-use, and reliance on the use, of isolated confinement are all too often tragic and irreversible. Among the well-known consequences of isolated confinement are acts of self-mutilation and suicidality. One expert on prison suicide has written: "By and large, most self-harm behavior in prison is exhibited by individuals who are confined in conditions of segregation, social isolation, and/or psychosocial deprivation."[58] We have already seen at least one actual suicide in close custody, that of Matthew Cruz. Data from the New York State prisons shows that prisoners in isolated confinement commit suicide in numbers greatly disproportionate to their numbers in the prison population, further supporting this grave concern about isolated confinement:

> [Office of Mental Health] statistics for 1998 through 2000 reflect that in 1998 there were 14 suicides state-wide, five occurred in SHU and one in Keeplock. In the same time period 3% of prisoners were housed in SHU and 5% in Keeplock. Thus 36% of all the successful suicides in the entire department occurred within the 3% of prisoners confined in SHU. . . . in other years there was even a greater disproportion of suicides in isolated confinement. 1999 figures reflect that 50% of suicides in the entire population occurring in the 8% of prisoners confined in SHU or Keeplock, and 25% of all suicides statewide occurred in the 4% of the population confined in SHU. In 2000, 43% of suicides in the entire corrections department occurred in the 4% of the population in SHU. . . . a chart of suicides between 1995 and mid-2004, which demonstrates that in those

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[57] Testimony of Dr. Terry Kupers, *Jones'El v. Berge*, Civil Case 00-C-0421-C (W.D.Wis. 2001), *quoted in* Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* at 152.

[58] Raymond Bonner, Rethinking Suicide Prevention and Manipulative Behavior in Corrections, 10 Jail Suicide/Mental Health Update (2001), at 7-8, *quoted in* Human Rights Watch, *Ill-Equipped:U.S. Prisons and Offenders with Mental Illness* at 179.

years 53 of the 119 known suicides, or 45%, involved prisoners assigned to some form of isolated confinement.[59]

Rather than adopt the extreme of 23-hour lock-in for the broad range of prisoners who may be placed in close custody,[60] if the Board is to exempt close custody from the general lock-in standard, it should require that close custody prisoners be allowed several hours of optional lock-out each day, as is done, for example, with protective custody prisoners in the state Department of Correctional Services, who present comparable security concerns to many of the persons placed in close custody.[61] Such lock-out periods should, of course, be very closely supervised by correctional staff. Such investment of staff resources is appropriate and necessary to mitigate the hardship and risk of prolonged isolated confinement.[62]

D. Non-discriminatory Treatment

A proposed amendment to the Non-discriminatory Treatment standard would eliminate the requirement that the Department staff each facility with sufficient numbers

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[59] Exhibit 2, Report of Plaintiff's Expert Dr. Terry Kupers, M.D., M.S.P., June 1, 2005, *Disability Advocates, Inc. v. New York State Office of Mental Health*, 02 Civ. 4002 (SDNY GEL).

[60] At present, we understand that the numbers in closed custody are relatively small, and the present administration of the Department has indicated an intent to keep them small. However, attitudes and incumbents may change in the future, and the closed custody criteria are sufficiently broad that closed custody could be expanded considerably within the bounds of the written policy.

[61] 7 N.Y.C.R.R. § 330.4(a) ("Inmates will be afforded the opportunity to be out of their cells for a minimum of three hours per day between the hours of 7 a.m. and 11 p.m. A minimum of one hour out-of-cell time shall be scheduled for outdoor exercise.") The remaining out-of-cell time may be used for indoor or outdoor recreation or exercise, meals, telephone calls, showers, visiting, or programs on the housing unit. *Id.*

[62] It has been suggested that 23-hour lock-in is not a serious issue because of the relatively short length of stay in the City jails. However, as the Board knows, the average length of stay reflects both a large group of persons who remain in jail only a few days before they are bailed or their cases are disposed of, and a large number of persons who remain in the system for periods of many months and in some cases over a year. Further, the effects of isolated confinement may manifest themselves more quickly or more slowly depending on the susceptibility of the individual. Mr. Cruz, we understand, had been in close custody for only a matter of days before his suicide.

of Spanish-speaking employees and volunteers to enable Spanish-speaking prisoners to understand and participate in facility programs and activities. A second amendment would require the implementation of "[p]rocedures . . . to ensure that non-English speaking prisoners understand all written and oral communications from facility staff members . . . ." We oppose the first, but support the second if it is significantly modified.

The New York State Department of Correctional Services has acknowledged that "[s]uccessful programming and institutional security depend upon effective communication."[63] The Board and the City Department of Correction should do likewise.

We urge the Board to retain § 1-01(c)(1) in its present form. Hispanic prisoners, including monolingual Spanish speakers and limited proficiency English speakers constitute a significant percentage of the New York City jail population.[64] The prevalence of Spanish speakers in the City jails was significant enough when the Board first issued its standards to capture the Board's attention and to warrant the particularized requirements for deployment of Spanish-speaking staff and volunteers. The Spanish-speaking population in New York City has increased in proportion to the English-speaking population. It can be safely assumed that this proportional increase is reflected in the jail population. One rationale cited by the Board for changing the minimum

[63] New York State Department of Correctional Services, The Impact of Foreign-Born Inmates on New York State Department of Correctional Services (April 2006), at 4.

[64] Precise figures for New York City are not available. However, in the state prison system 7.2% of the New York State prison population is Spanish-language dominant, New York State Department of Correctional Services, Hub System: Profile of Inmate Population Under Custody on January 1, 2006. It is likely that the percentage of the New York City jail population that is Spanish-language dominant is higher than that in NYSDOCS since New York State's Spanish-speaking population is concentrated in the New York City area, and 55% of the NYSDOCS population (as of January 1, 2006) was committed from New York City.

standards is the need to update them in response to the passage of time. In the area of services for Spanish-speaking prisoners, time has brought about an increased need, but the Board is misguidedly headed in the opposite direction.

The Department provided the Board with a chart showing the number of staff able to speak languages other than English. 477 staff members (4.37%) speak Spanish. The Department has not come forward with any evidence that it cannot comply with the current standard or that compliance efforts have created any hardship.

In light of the undiminished need for translation and interpreter services for Hispanic prisoners, by far the largest group of non-English speakers in the jail population, § 1-01(c)(1) should not be repealed.

We support the amendment adding § 1-01(d)(3), to provide additional requirements to benefit speakers/readers of all languages other than English,[65] with the important qualifications (1) that it should be adopted in addition to, rather than as a replacement for, § 1-01(c)(1), for the reasons stated above, and (2) that it requires significant modification.

Before adoption, § 1-01(d)(3) should be expanded to explain what procedures the Standard contemplates. The present proposal is contentless. A revision using the form "Such procedures should include, but not be limited to," would add the necessary specificity while allowing for future innovation. Also, the Board should require the Department to provide information demonstrating its capability and its performance in complying with the existing standard on services for non-English speaking prisoners.

[65] Section 1-01(d) should also be amended to eliminate an ambiguity created by the labeling of all the paragraphs in 1-01. The general designation "Different languages" following a paragraph specifically designated "Hispanic prisoners and staff" leaves open the possible interpretation that paragraph (d) does not apply to Spanish speakers. This can be avoided by redesignating paragraph (d) as "Languages other than English."

Instead of giving the Department a vague directive to implement "procedures," the Board should assure itself that the Department has been living up to the existing standards.

One area that needs to be addressed in the Standards is the practice of relying on other prisoners for interpreting at times when personal or sensitive information is being exchanged. Such reliance inhibits effective communication and compromises confidentiality. Therefore, it should be made clear that non-prisoner interpreters should be provided for medical encounters, disciplinary proceedings, and grievance proceedings, except on request by the prisoner or in emergencies—and the lack of a staff interpreter should not be an emergency. (That is another reason for retaining § 1-01(c)(1) in its present form.) Such a provision should be added to the Minimum Standards.

In summary:

- Section 1-01(c)(1), pertaining to adequate numbers of staff and volunteers fluent in Spanish, should not be repealed.

- Proposed Paragraph (d)(3) should be adopted in an expanded form, to include more specific descriptions of the translation and interpreting procedures, and to include a prohibition of the use of other prisoners as interpreters in medical encounters, disciplinary proceedings, and grievance proceedings..

- Section 1-01(d) should be relabeled "Languages other than English."

E. The Communications Issues

The Board has proposed amendments to several Standards pertaining to prisoners' communication with the outside world. In our view these proposals are unduly restrictive and intrusive and leave important First Amendment concerns to the unfettered discretion

to the Department of Correction. Further, to the extent that they do contain any safeguards or limitations at all, they are grossly inconsistent internally.

1. Telephone Calls

The proposed amendment to the telephone standard (§ 1-10(h)) eliminates the requirement of seeking a warrant to eavesdrop on prisoner telephone calls, and places *no* substantive restrictions on the circumstances under which Department personnel may eavesdrop. The amendment does say that monitoring may be done "only when notice has been given to the prisoner," but we understand that the notice contemplated is no more than a general announcement, perhaps in the form of signs near the telephones stating that they may be monitored. Thus that requirement does not place any meaningful limits on discretion or protect against abuse.

No substantial justification is presented for this change. The Board states only that "heightened security concerns provide ample justification for this amendment," without stating what these "heightened" concerns might be or what has "heightened" them. While it has become fashionable in the post-9/11 world to dispense with checks and balances and to place less value on civil liberties relative to the power of government, we suggest the Board should be guided by facts and not fashion, and there are no facts cited in support of this change.[66] Further, we believe that recent events have illustrated that when government is given this sort of *carte blanche* to invade privacy, that discretion will be abused.[67] The warrant requirement is intended precisely to prevent such abuses of

[66] The kinds of facts that would be relevant are instances where significant harm can be shown to have been done to public or personal safety because of the warrant requirement.

[67] *See, e.g.*, David Stout, "F.B.I. Head Admits Mistakes In Use Of Security Act," *New York Times*, March 10, 2007 ("Bipartisan outrage erupted on Friday on Capitol Hill as Robert S.

executive discretion; and for that reason, it should be maintained regardless of other considerations. Certainly, to say, as the Board does, that "prisoners have no expectation of privacy during confinement" is not only mistaken[68] but also misses that significant purpose of the warrant requirement. Further, the prisoner, by definition, is only half of the conversation; the other half of it is a person who is not incarcerated, and whose rights of privacy are as much invaded as is the prisoner's by the Board's proposal.

The completely open-ended power this amendment would confer is at odds with some of the other communication-restricting amendments. The proposed amendment to the Correspondence standard (§ 1-11) permits restriction of correspondence "when there is a reasonable belief that limitation is necessary to protect public safety or maintain facility order and security," and adds: "Correspondence shall not be deemed to constitute a threat to safety and security of a facility solely because it criticizes a facility, its staff, or the correctional system, or espouses unpopular ideas, including ideas that facility staff deem not conducive to rehabilitation or correctional treatment." There are also provisions for opening and reading incoming and outgoing non-privileged correspondence without a warrant if the warden has "a reasonable basis to believe" that it threatens facility safety or security, "another person, or the public." In our view these criteria are grossly

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Mueller III, the F.B.I. director, conceded that the bureau had improperly used the USA Patriot Act to obtain information about people and businesses.")
(http://select.nytimes.com/search/restricted/article?res=FB0A14F838550C738DDDAA0894DF404482).

[68] Prisoners' privacy rights are greatly diminished by incarceration, but not necessarily obliterated. For example, the Second Circuit has held that a pre-trial detainee, though not a convict, retains an expectation of privacy that forbids warrantless cell searches for law enforcement rather than prison security purposes. *United States v. Cohen*, 796 F.2d 20, 23 (2d Cir.1986) (so holding with respect to pre-trial detainees); *see Willis v. Artuz*, 301 F.3d 65 (2d Cir. 2002) (excepting convicted prisoners). The vast majority of City jail prisoners are detainees, as the Board knows.

inadequate, for reasons described below; but even so they contrast sharply with the complete absence of criteria in the Telephone amendment.[69]

The abolition of the warrant requirement would leave prisoners with no procedural or substantive protections against arbitrary abuses. In this respect, the proposed amendment contrasts sharply with the next section of the telephone standard itself, § 1-10(i), Limitation of telephone rights, which requires specific notice of the reasons for limitation, an opportunity to be heard, and a written determination, with notice to the Board[70] and a right to appeal under § 1-10(j). At a minimum, the Board should require such notice and opportunity to be heard before the Department may engage in telephone surveillance. It might be objected that such procedures are inconsistent with the necessities of law enforcement. But if a search is done for law enforcement purposes, rather than for jail security purposes, then the argument for requiring a warrant is at its strongest.

There is only one meaningful—and essential—qualification on the unrestricted right to eavesdrop on telephone calls in the amendment. That is the requirement that calls to the Board of Correction, the Inspector General, and other monitoring bodies, and to treating physicians, attorneys, and clergy, shall not be listened to or monitored. However, there is no explanation of how the Department will, or can, distinguish between those calls and other calls. The prisoners use the same telephones to call their lawyers, the

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[69] Standard 1-10 allows for limitations on telephone rights "only when it is determined that the exercise of those rights constitutes a threat to the safety or security of the facility or an abuse of written telephone regulations previously known to the prisoner." This criteria in this provision, 1-10(i), headed "Limitation of telephone rights" does not appear to apply to the proposed amendment, which is to the provision in 1-10(h) headed "Supervision of telephone calls."

[70] The notice to the Board is of importance independently of an individual prisoner's right to procedural protections. If the Board adopts this amendment or any variation on it, it should require that it be notified of all instances of telephone eavesdropping, and the reasons for it, so it may monitor and assess the Department's use of its power.

Inspector General, etc., as they do to make all other calls. While we have heard vague statements about available technology, there is apparently no actual workable plan for maintaining the confidentiality of legal, medical, and whistle-blowing telephone calls. This is not just an issue of technology. There are over 100,000 admissions to the jail system a year, a fact that presents great logistical difficulties if the Department of Correction is to distinguish between confidential phone calls and those that will or may be monitored for its population on a continuing basis. There is no plan apparent for addressing that logistical problem. Yet the Board has not even provided in this amendment, as it did for the uniform clothing amendment, that the Department must have a system permitting reliable compliance with the standard's distinctions among types of calls—much less required, as it should, that the Department demonstrate the workability of such a system before it begins to eavesdrop on telephone calls.

Finally, the standard says that telephone calls shall be of "at least up to six minutes in duration." The words "up to" are new. It is completely unclear what the Board intends by this change. At present, telephone calls are subject to a six-minute cut-off, and it is impossible to tell whether the amendment is intended to change anything or not. The confusion is compounded by the juxtaposition of two terms, "at least" and "up to," that have contrary meanings.

2. Correspondence

Standard § 1-11(a) states: "Prisoners are entitled to correspond with any person." The amendment would add "except when there is a reasonable belief that limitation is necessary to protect public safety or maintain facility order and security." The amendment does not give any hint as to what circumstances may lead to a belief that

We have the same objections to dispensing with the warrant requirement for outgoing and incoming correspondence as stated in connection with the telephone surveillance provisions. In the absence of evidence that the warrant requirement has caused significant damage or risk, this amendment should not be adopted. Further, to allow such surveillance based merely on an order "articulating a reasonable basis to believe that the correspondence threatens the safety or security of the facility, another person, or the public" fails to provide sufficient protection against the abuse of unfettered discretion. Above we have suggested an appropriate way of narrowing this open-ended provision (requiring evidence that the correspondence would advance criminal activity, promotion of jail contraband, or interference with parties or witnesses to any court proceeding). If this suggestion or some variation of it is adopted, the record that is maintained (§§ 1-11(c)(6)(iii), (e)(2)(iii)) must include the reason that the correspondence is deemed to be a threat. Further, the Board should receive notice of all such instances so it may exercise oversight to ensure that the power is not abused.

One issue which the standards do not address directly is the forwarding of mail between jails, although it is clearly required by the provision requiring delivery to the prisoner within 24 hours "unless the prisoner is no longer in custody of the *Department*." § 1-11(d) (emphasis supplied). Forwarding was also formerly a requirement of a federal court order, but that order has been terminated, and it does not appear that mail is now being forwarded. Legal Aid's mail to City prisoners is often returned with an indication that the prisoner has been transferred, rather than delivered to the current jail location. The Standard should be amended to make it explicit that when inmates are transferred between jails, their mail should be forwarded to their current location.

3. Packages

The current standard says: "Prisoners shall be permitted to receive packages from, and send packages to, any person." (§ 1-12(a)) The amendment adds "except when there is reasonable belief that limitation is necessary to protect public safety or maintain facility order and security." There is no provision for notice or a record of prohibitions on sending and receiving packages. Nor is there any hint of what circumstances might justify such action.

This amendment is unacceptable for similar reasons to the telephone and correspondence amendments: it fails to spell out the kinds of circumstances where it is reasonable to believe that such limitation is necessary. In fact, it is difficult to see any need for any amendment here. There is already a restricted list of items that may be received in packages. Items that are not on the approved list need not be delivered. The Board gives no indication in its explanation how a package of approved items can possibly present a threat to public safety or to order and security.

4. Publications

The current standard says prisoners "can receive new or used publications from any source, including family, friends and publishers." (§ 1-13(a)) The amendment adds "except when there is reasonable belief that limitation is necessary to protect public safety or maintain facility order and security." For no apparent reason, it does *not* include the limits on this power that appear in the Correspondence amendments which state that criticism, unpopular ideas, etc., are not to be censored. The amendments retain the provision that incoming publications may be censored or delayed because of instructions on the manufacture or use of weapons or explosives, or plans for escape, but they also

add a provision allowing delay or censorship of "other material that may compromise the safety and security of the facility." The amendment does not say what kind of material this might be. The only justification for this change is the boilerplate formula "The Board believes that heightened security concerns justify the proposed amendment"; there is no statement of what concerns are heightened, why they are heightened, and what reading materials might run afoul of them, other than the already-acknowledged categories of instructions concerning weapons, explosives, or escape plans.

The absence of detailed and explicit criteria for censoring publications is completely unacceptable. While no one disputes that some written material can appropriately be excluded from prisons, there is a long history in corrections of excessive and unjustified censorship, and the Department is no exception.[71] Experience shows that keeping censorship within lawful bounds requires explicit and detailed rules as to what may and may not be censored. A good example of comprehensive but not vague or overbroad censorship rules is the New York State "media review" policy, which provides:

> (a) In general, the materials should be acceptable for regular mailing according to United States Postal Law and regulations.
>
> (b) Publications which contain child pornography or which promote a sexual performance of a child in violation of Penal Law, article 263 are unacceptable. Publications which, taken as a whole, by the average person applying contemporary community standards, appeal to

[71] Examples of Department censorship we are aware of include the removal from the *New York Times* of a news story concerning the settlement of Legal Aid's litigation about excessive force in the Central Punitive Segregation Unit. Another instance involved the censorship of a story in *Newsday* concerning an inmate homicide in one of the Rikers jails under circumstances which reflected poorly on the vigilance of Department staff. *See* letter, John Boston to Members of the Board of Correction, March 12, 2004 (pointing out violation of Board standards and Board's failure to act on it). These are examples of Justice Scalia's observation that "All government displays an enduring tendency to silence, or to facilitate silencing, those voices that it disapproves." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 235 (1987).

prurient interest, and which depict or describe in a patently offensive way sexual bestiality, sadism, masochism, necrophilia, or incest and which taken as a whole, lack serious literary, artistic, political or scientific value are obscene and are unacceptable.

(c) The publication should not incite violence based on race, religion, sex, sexual orientation, creed, or nationality. Incite violence, for purposes of this guideline, means to advocate, expressly or by clear implication, acts of violence.

(d) Any publication which advocates and presents a clear and immediate risk of lawlessness, violence, anarchy, or rebellion against governmental authority is unacceptable.

(e) The publication should not incite disobedience towards law enforcement officers or prison personnel. Incite disobedience, for purposes of this guideline, means to advocate, expressly or by clear implication, acts of disobedience.

(f) The publication should not give instruction in the use or manufacture of firearms, explosives, and other weapons, or depict or describe their manufacture. Mere depictions of the use of hunting and/or military weapons which reasonably would not affect the safety and/or security of the facility are not prohibited.

(g) The publication should not provide instruction by word(s) or picture(s) regarding martial arts skills. Martial arts includes, but is not limited to, aikido, jiujitsu, judo, karate, kung fu, and tai chi chu'an. Publications which discuss martial arts without providing instruction are acceptable.

(h) The publication should not:

(1) contain information which appears to be written in code; or

(2) depict or describe methods of lock picking; or

(3) depict or describe methods of escape from correctional facilities; or

(4) depict or describe procedures for the brewing of alcoholic beverages or the manufacture of drugs or use of illegal drugs; or

(5) depict or describe methods or procedures for smuggling prison contraband; or

(6) depict or describe techniques or methods for rioting and/or information instructive in hostage or riot negotiation techniques.

(i) The department reserves the right to deny the inmate publications which may be held noninciteful or nonadvocative, as the case may be, during the media review process, but which actually result in

violence or disobedience after entrance into a facility, as is clearly set forth in paragraphs (h)(3) and (6) of this section. . . .

(j) Publications which discuss different political philosophies and those dealing with criticism of governmental and departmental authority are acceptable as reading material provided they do not violate the above guidelines. For example, publications such as Fortune News, The Militant, The Torch/La Antorcha, Workers World, and Revolutionary Worker shall generally be approved unless matter in a specific issue is found to violate the above guidelines.

7 N.Y.C.R.R. § 712.2. The foregoing rules have been in effect for over two decades, except that the Department of Correctional Services added the provisions about techniques of hostage negotiations, § 712.2(h)(6), more recently..

If the Board is to expand the Department's powers of censorship, there is no reason it cannot promulgate rules as concrete and specific as the State DOCS rules, based on the specific concerns that the Department has, rather than adopting a nebulous phrase like "reasonable belief that limitation is necessary to protect public safety or maintain facility order and security."

F. Clothing

Since the inception of the Minimum Standards, the Board of Correction has recognized that humane treatment of detainees includes allowing them to dress in civilian clothing. Detainees currently can wear their own clothes, and their families can bring them clothing as needed. The amendments would allow the Department of Correction to make pre-trial detainees wear institutional clothing, as sentenced inmates already do. (§ 1-03) We are concerned about the dehumanizing effect of forcing jail uniforms on persons who have not been convicted and are presumed innocent, about the Department's ability to provide a sufficient quantity of clean clothing that fits, and about the fact that

families will no longer be able to help take care of their loved ones in prison by ensuring that they have sufficient clothing appropriate to the season. The current Board says that some other large jail systems require uniforms for detainees, but does not give any reason for changing the long-standing practice in New York City.

Forcing an accused defendant, yet to be tried on the charges against him or her, to dress like a convict is degrading treatment, and treatment that *de facto* brands a defendant as a criminal without benefit of trial. Despite any disclaimers that may be offered, such treatment is contrary to the presumption of innocence. The picture of a citizen dressed in a jail uniform is far more powerful than a thousand words of rationalization of the practice, and it will inevitably have an effect on detainees' treatment in court and elsewhere.

It is no answer to say that detainees will be allowed to wear their own clothes at trial. Our point applies to the daily treatment of human beings and not just to their appearances in court. Moreover, the proposed amendment would require detainees to wear uniforms to all court appearances other than trials. Apparently the assumption is that judges, unlike jurors, will not be susceptible to influence by the appearance of the defendants who are brought before them. This assumption is facile and unrealistic. Judges are human beings too no matter how hard they may strive for objectivity.

The Board states no justification at all for changing this Standard, except that other jail systems require institutional clothing. As stated before, this "race to the bottom" approach to the treatment of prisoners is not an acceptable reason for weakening the Standards. Insofar as there are security concerns underlying the proposal,[72] they are

[72] We understand informally that this is the Department of Correction's concern in seeking this amendment.

not sufficient justification for stripping inmates of the dignity and individuality which personal clothing represents. Inmates are already searched thoroughly, including strip searches, whenever they leave or enter the jail or go to and return from visits, recreation, court, or other outside destinations. Inmates are also searched in their housing areas and in the hallways of the jail both regularly and randomly, with and without cause to believe that contraband will be found. In addition, disobedient inmates in punitive segregation are already required to wear uniforms.

The proposed amendment raises major practical problems as well as questions of principle. The Department would have to establish *and maintain* sufficient laundry service to provide a clothing exchange every four days for *the entire jail population.* When Legal Aid examined the state of laundry operations several years ago, the Department nominally made laundry service available to all prisoners, but in practice it was completely inadequate for that purpose. Few prisoners knew of the service, fewer still used it, and it was conceded that the Department lacked the equipment to handle even 20% of the prisoners' laundry.[73] As far as we know there has been no significant expansion of this capacity. More importantly, those laundry facilities that existed were not kept operational. Throughout the system, we observed washers and dryers that simply did not work. At one of the jails, some of the machinery had not worked for a year without being repaired.[74] This is unfortunately consistent with the general failure of the Department to maintain its physical plant and equipment adequately, a failure that persists to the present, as shown in § B.3, above.

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[73] *Benjamin v. Fraser*, 161 F.Supp.2d 151, 178 (S.D.N.Y. 2001) (citing testimony of Patricia Feeney, Director of Environmental Health), *aff'd in part, vacated in part, and remanded,* 343 F.3d 35 (2d Cir. 2003.

[74] *Benjamin v. Fraser*, No. 75 Civ. 3073 (S.D.N.Y.), trial transcript, May 17, 2000, at 995-96.

Further, this situation persisted despite the fact that a court order in effect for 20 years required the Department to implement a system to provide detainees with clean clothing twice a week.[75] Despite this order, most laundry was, and still is, washed by the prisoners in their housing areas in plastic buckets and dried on pieces of twine.[76] Yet the proposed amendment would require the Department to establish *and maintain* laundry facilities for nearly 14,000 inmates, a work that would be *in addition to* the present enormous demand to wash and distribute sheets, pillow cases, blankets, towels, visit and special housing jumpsuits, and work clothes, among other items that presently strain the Department's limited laundry capability.

For these reasons, the proposed amendment's requirement that the Department of Correction establish sufficient laundry service to provide all prisoners with a clean change of clothing twice a week is illusory. The amendment makes no provision for the Board to verify the adequacy of laundry service, and it makes no reference to the need to ensure that that service is maintained consistently, a task that all evidence suggests is beyond the capabilities of the Department.

The proposed amendments also require establishment of secure storage facilities where prisoners' personal clothing can be retrieved and cleaned promptly for court appearances and upon discharge. This is all very well, but it fails to account for the much greater need for storage facilities where *institutional* clothing for 14,000 people, in

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[75] Section D of the *Benjamin* consent decree provided, in part, that "defendants shall provide free laundry service sufficient to provide all detainees with a neat, clean change of clothing and a clean towel at least twice per week." Paragraph EE required that this provision, and many others, would be implemented within the year, i.e., by 1980. *Benjamin v. Malcolm*, 75 Civ. 3073, Stipulation for Entry of Partial Final Judgment (S.D.N.Y., March 30, 1979).

[76] *See* Department of Correction, Directive 1251R: Inmate Personal Laundry (Oct. 21, 1997).

institutions where populations have exceeded 2,000 inmates, can be stored and retrieved regularly so as to provide clean clothes that fit for that many prisoners.

In addition, the amendments do not address the fit, quality and condition of the clothing, subjects we have already had complaints about from indigent prisoners who were forced to rely on the institutional "clothes box" because they lacked sufficient personal clothing. The amendments address storage for civilian clothing but not the storage necessary to maintain a stock of institutional clothing sufficient for institutional populations that have often exceeded 2,000 in a single jail. They call for clothing exchange every four days but do not allow for more frequent changes that may be necessary when clothing becomes soiled, *e.g.*, when women are menstruating. (Prisoners would have only four sets of undergarments and socks, two shirts, and a single pair of pants.)

The amendments also do not provide for temperature-appropriate clothing. The jails can become very hot in the summer and cold in the winter (and vice versa, when the heating and ventilation systems malfunction, which is rather often). At present, prisoners can wear short pants and short-sleeved shirts when it is hot and long pants and sleeves–and in many cases long underwear–when it is cold. It appears they would lose these options under the proposed amendments.

We have similar concerns about clothing for outdoor recreation, especially in the winter. The clothing amendments require only "one sweater or sweatshirt" during cold weather. Gloves and hats are not mentioned. Proposed amendments to the Recreation standards (§ 1-06, formerly 1-07) state that "appropriate outer garments" shall be provided for outdoor recreation without stating what those garments might be. Outdoor

recreation is prisoners' only respite from the jails' crowded, noisy and sometimes claustrophobic housing areas, and we are very concerned that prisoners' ability to take advantage of it may be compromised by these new clothing restrictions.

G. Visiting

The amendment to § 1-09(d) limits the initial visit within 24 hours of admission to a non-contact visit. The Board's explanation is that "during the first 24 hours of custody, DOC must determine a prisoner's security risk and classification, and health providers must evaluate a prisoner's health status, including whether a prisoner may have a contagious disease." However, there is no justification for treating every new admission as if he or she had a contagious disease. The requirement that visiting be permitted within the first 24 hours of custody has been in effect for almost three decades, and the Board cites no actual problem that has ever been caused by allowing prisoners to visit in the normal fashion during that period. This proposed amendment appears to be a completely gratuitous restriction on prisoners.

This amendment may have devastating consequences for some detainees. It is well known that the greatest danger of suicide in jail is during the first few days of custody, and the risk is particularly great for persons with a history of mental health problems—who make up quite a significant proportion of the Department of Correction's population. To deny a person who is first undergoing the shock of incarceration the right guaranteed to nearly all other prisoners, to be able to embrace family members and speak to them directly and not through a telephone hookup, may have grave psychological consequences for the most vulnerable new detainees. The same is true for family members, especially young children.

In the absence of any need for this new restriction, it should be withdrawn.

Section 1-09(g)(4) allows the Department to require visitors to secure personal property in a lockable locker and also repeals language allowing visitors to wear wedding rings, religious medals and religious clothing. The purpose of this change is completely unclear and there is no explanation for it whatsoever in the "Statement of Basis and Purpose." If this change is actually intended to mean that the Department will require all visitors to take off their wedding rings, religious medals, and religious clothing, then it is excessive and of doubtful validity under the First Amendment's Free Exercise Clause and the similar protection of the State Constitution, which provides (at Article I, section 3): "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind . . . ." It also likely violates the Religious Land Use and Institutionalized Persons Act to the extent that it obstructs the rights of prisoners to receive visits as well as the rights of visitors. Even if the change is not intended to require visitors to remove all religious items, it is likely to be interpreted that way. The Board should reinstate the language about wedding rings and religious medals and clothing, and should not repeal it.

The visiting process is an area where there is a particular need for the Board to do more in light of the experience of the past several decades. We address that issue in § L.4, below.

H. Housing Area Sanitation

Section 1-03(j) amends the standard requiring provision of cleaning supplies to prisoners by adding an exception "when contraindicated by medical staff. Under such circumstances, the Department shall make other arrangements for cleaning these areas."

The meaning of this language is not clear. It appears that it may be intended in part to be consistent with a court order entered in litigation against the Department in which unsanitary living conditions were found to exist in the Department's medical and mental health housing areas where the prisoners were too sick to clean the dormitories and cellblocks. In any case, it does not do so correctly. The relevant order says:

> Cleaning crews *that do not include infirmary patients* shall be assigned to clean the NIC, GMDC, and RMSC infirmaries twice each day, or more often if need is indicated . . . . At NIC, the cleaning crew shall continue to consist of civilians. Cleaning crews shall also be assigned to all mental health housing areas. Residents of the mental observation units may be assigned to those crews . . . *only if they have been cleared in writing by their primary mental health provider* as mentally fit for such work. The mental health provider shall certify that such work will not adversely affect the inmate's mental health . . . . These crews shall clean all common areas twice daily and any cells or living areas occupied by inmates who cannot clean these personal areas adequately by themselves. The correctional and mental health staff assigned to mental health housing areas will identify in writing those prisoners whose cells or living areas shall be cleaned by the cleaning crews.[77]

Therefore, the proposed amendment should provide that prisoners shall be provided cleaning materials

> , except that infirmary patients shall not be assigned to cleaning crews, and at the North Infirmary Command, civilian cleaning crews shall be used. In mental observation units, cleaning crews shall be assigned, and residents of those units may be assigned to the cleaning crews only if they have been cleared in writing by their primary mental health provider as mentally fit for such work. In mental health housing areas, the correctional and mental health staff shall identify in writing those prisoners whose cells or living areas shall be cleaned by the cleaning crews. Other prisoners may be excused or excluded from cleaning duties based on medical contraindication, and the Department shall make other arrangements for cleaning.

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[77] *Benjamin v. Fraser*, 75 Civ. 3073 (HB), Order on: Environmental Conditions at ¶ 19(b) (April 26, 2001) (emphasis supplied).

There is no dispute that in general population housing the Department may excuse any inmate it chooses from cleaning duties, that on a doctor's orders prisoners must be excused from cleaning duties, and the Department must find other ways to keep the prisoner's living area clean and sanitary.

I. Personal Hygiene

The amendments to § 1-03 would allow restricting access to showers and shaving for prisoners in punitive segregation who are convicted of infractions on the way to, from, or during showers to three per week. (Shaving is included because punitive segregation prisoners shave when they are in the shower.)

Any restriction on an inmate's access to showers in punitive segregation areas can have severe health consequences during hot weather. The temperatures in punitive segregation cells can reach 100 degrees or more during the summertime. The federal court has recognized the life-threatening dangers of heat stroke posed by extremely hot temperatures and has entered orders to ensure that inmates have access to cool showers during hot weather to protect their health.[78] In punitive segregation, where the Department of Correction has taken the position that it cannot let prisoners out of their cells for additional showers during the day, the court has ordered submission of a plan for cooling those areas. So far, no plan has been submitted.[79] Until the Department provides for cooling in punitive segregation areas, any Board standard that limits the already limited ability of inmates to take cool showers during hot weather will pose serious health and safety risks to those prisoners.

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[78] *See Benjamin v. Horn*, 2006 WL 1370970 at *5-6 (S.D.N.Y., May 18, 2006).
[79] *Id.* at *5.

The fact that the proposed shower limit is already permitted by variances to the standards is not a legitimate excuse for codifying the variance as an amendment to the Minimum Standards. Rather, it illustrates the point that the Board has been excessively free in granting variances.

J. The Variance Procedure Amendments

The Board proposes to simplify the section of its Minimum Standards pertaining to the process for requesting and granting variances from the standards. We support the removal of the distinction between "continuing" and "limited" variances, but we oppose the "correctional best practices" amendment.

We agree that distinguishing continuing and limited variances makes matters more complicated than necessary. The amended version would make it clear that in the application and decision processes, the purpose and duration of a variance will be accurately described, making it unnecessary to have two different kinds of variances. We support this simplication, with the caveat that this simplification should not make the Board's review of variance requests less rigorous.

We oppose the amendments that would introduce "correctional best practices" as an alternative form of variance. There is no need to create a special form of variance to introduce an improved practice, and doing so introduces the kind of unnecessary complication that the previously discussed amendment is intended to get rid of.

Further, it is unclear what the proposal actually means. The term "correctional best practices," as it is used in the profession, does not really connect with the subject matter of the Board's Standards. In his keynote address to the 2003 annual conference of the International Corrections and Prisons Association, Reginald Wilkinson, Director of

the Ohio Department of Rehabilitation and Correction, described several examples of best practices. One was compliance with the accreditation standards of the American Correctional Association. Others, however, included: telemedicine and medical teleconferencing; victim services programs; "Operation Night Light" (home visitation of youthful offenders by police and probation officers); community crime prevention efforts; and intensive community supervision programs.[80] Based on these examples, it is hard to see any intersection between the best practices and the Board's Minimum Standards. Best practices have been studied and instituted in the areas of crime prevention, treatment, and re-entry, which are not areas where the Board has chosen to regulate by issuing minimum standards. Nor are they areas apt to affect the conditions of confinement, programs, activities and procedures that are governed by Board standards. Since correctional best practices seem to fall outside the scope of the minimum standards, we fail to see how their implementation would create a compliance problem. If the Board has something else in mind by the term "correctional best practices," it has not identified it.

The Board does refer in its commentary (at 6) to "a procedure or practice that demonstrably has improved jails in other jurisdictions." That is not the same as a "correctional best practice," a term which we understand represents a broad consensus in the field and not just a practice that has improved some jails somewhere. If that is what the Board means, the term "correctional best practice" is not accurate and should not be used.

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[80] Reginald Wilkinson, Correctional Best Practices: What Does It Mean in Times of Perpetual Transition? http://www.drc.state.oh.us/web/Articles/article91.htm.

Based on the present proposals and their justifications, we are concerned that this proposed amendment would perpetuate the "race to the bottom" phenomenon we have already commented on, whereby the Department continually seeks more restrictive and intrusive conditions of confinement simply because some other institution is using them and it will make the lives of staff and administration easier. Such measures can always be justified in terms of safety or security. But the Board Standards are supposed to set a floor for the humane treatment of prisoners despite the competing concerns of safety and security, and they should not be compromised further.

For those reasons, the "best correctional practices" amendment should not be adopted, unless it is revised to provide that the variance shall be no more restrictive or intrusive than the existing standard. In cases where there is a legitimate concern that compliance with a standard is causing a serious security or safety problem, § 1-15(b)(1)(iv), with its provision for variances for "extreme practical difficulties as a result of circumstances unique to a particular facility," will allow temporary measures to address such concerns, which in the longer run should probably be addressed by amendment rather than variance.

For the foregoing reasons, the change of the definition of variance, removing the distinction between "limited" and continuing" variances should be adopted, and the amendments establishing correctional best practices as alternative bases for granting variances should be disapproved.

K. The Board's Abdication of Its Regulatory Role

One of the most striking features of the proposed amendments is the manner in which the Board has proposed to avoid or withdraw from its regulatory role.[81] As we have already mentioned:

> The Board would play no role in verifying that adequate laundry and clothing exchange systems had been created and were workable in connection with the proposed uniform requirement;
>
> The Board does not require the Department to demonstrate any means of complying with the requirement of the telephone amendment that phone calls to the Board, other oversight agencies, lawyers, treating physicians, and clergy be exempted from monitoring;
>
> The Board has proposed to do away with the requirement of sufficient Spanish-speaking staff to assist Hispanic prisoners and replace it with a general requirement that the Department implement "procedures" to ensure that prisoners can understand staff communications, with no specification of what those procedures might be, and no requirement that the Department demonstrate their adequacy. The Board has essentially issued the Department a blank check on this important issue;
>
> Though the Board remains the decision-maker on appeals from publication censorship, it has provided no comparable appeal procedure for decisions to prohibit or surveil correspondence or to restrict receipt of packages. The Board need not even be informed of instances of such surveillance or restriction, though the need for outside scrutiny and an independent decision-maker is as great in these instances as for publications;
>
> With respect to law libraries (§1-08(f)(7)), the Board has *eliminated* the requirement that the Department report to the Board about available law library resources. There is not a word of justification in the Statement of Basis and Purpose concerning this change. It is far from trivial. We have received a number of complaints about failure to keep important materials up to date,

[81] The City Charter at § 626(c) assigns the Board the following powers and duties, among others:

1. The inspection and visitation at any time of all institutional and facilities. . . .;
2. The inspection of all books, records, documents, and papers of the department;

* * *

4. The evaluation of departmental performance.

contrary to the Standards' requirement (§ 1-08(g)(1)), since the termination of the relevant court order. This is an issue that calls for monitoring by the Board, not for the Board to abolish its means of monitoring.

In the rest of the proposed amendments, there is nothing that enhances the Board's oversight or scrutiny of the Department.

There is another significant respect in which the Board's oversight function is weakened by the proposed amendments. In several cases—most notably Overcrowding—the amendment would convert long-standing variances into permanent amendments. We have heard statements to the effect that "it's time to stop administering by variance."

We respectfully disagree. In our view, the Board has been entirely too free in granting variances. However, the variance process at least has had the virtue of providing some opportunity for oversight. In some cases, the Board has formally or informally disapproved variances in part, based on its independent assessment of conditions in particular units, and it has required the Department to provide it with relevant information both in support of the variance and on an ongoing basis. That opportunity will be gone if it amends the Standards to conform to previously granted variances.

We have already said that the Board should withdraw the proposed amendments and conduct a genuine comprehensive review of the Minimum Standards. Part of that review should be consideration of what measures can be enacted to ensure that the Board can verify the Department's actual compliance for each area in which the Board is to have a substantive standard.

L. The Board's Failure To Look Broadly at Jail Conditions

The Board's review of the Minimum Standards, the first in decades, was fatally compromised by its narrow focus on the agenda of the Department of Correction and its neglect of the broader range of issues that affect prisoners and their families and communities, including a number where the protections of court orders have been stripped away in recent years. The Board should withdraw its proposed amendments and start over, and this time it should perform a genuinely comprehensive review of the Standards—one that broadly considers what the Board *should* be regulating to fulfill its responsibilities, and not merely what is already in the 30-year-old standards or on the Department's wish list.

The following is a list of some issues that the Board should have considered, and did not. It is far from exhaustive and is intended to illustrate the need for a broader review.

1. Grievances

The City Charter at § 626(f) explicitly confers on the Board the power to establish procedures for hearing grievances. However, the Minimum Standards do not address that subject. The jail grievance procedure is governed by a directive promulgated by the Department of Correction. While the Board is nominally the decision-maker of final grievance appeals, there are five levels to the system, and the prisoner must traverse the first four before even getting to the Board. As a result, the Board does not play any meaningful role in hearing grievances. We understand that it has been several years since a single grievance appeal has reached the Board level for decision.

The reasons for this fact are not hard to find, and it is not because the grievance process is solving all of the problems at lower levels.[82] Prisoners have repeatedly complained to us that they cannot get to the grievance office, that grievance personnel refuse to accept their grievances or even to make a record of their complaints, sometimes on the ground that their complaints are not "grievable"[83] and sometimes for no stated reason. Prisoners who have persisted in trying to file grievances have found themselves transferred, sometimes repeatedly, resulting in their grievances being dismissed. Many prisoners who manage to file grievances say they receive no response from anyone.

The Board should require that the grievance system be simplified so that grievances may be processed more quickly and reliably and prisoners will have the opportunity to bring their complaints to the final level of appeal.[84] Further, there is a simple step that the Board could and should take to help restore the integrity of the grievance process: provide that grievances can be filed initially at the jails, as is now the case, *or* directly with the Board, for transmission to the relevant facility, so the Board can

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[82] Some problems do get solved at lower levels. Our clients' reports suggest that some grievance personnel are exceptionally helpful to them, while others are not.

[83] There are some issues that are legitimately non-grievable, such as "complaints pertaining to an alleged assault or verbal harassment." Department of Correction Directive 3375R at § B (March 4, 1985). However, we have seen grievances rejected on the ground that grievances "cannot be brought against Officers or Staff," which is not supported by the Directive. *See Davis v. Frazier*, 1999 WL 395414 at *4 (S.D.N.Y., June 15, 1999) (noting allegation that prisoners were told that during orientation). Other grounds for rejecting grievances have been invented by grievance personnel. For example, in one case, the prisoner stated that the jail grievance coordinator told him that his complaint about issues including failure to place him in a non-smoking environment "did not qualify as a grievance" and refused to document it. The grievance coordinator denied making such a statement, but what he did say is equally contrary to the grievance Directive: that "in order to grieve medical concerns, [the prisoner] would need written physician authorization for each request." *Kendall v. Kittles*, 2004 WL 1752818 at *2 (Aug. 4, 2004). There is no basis for such a requirement.

[84] Grievance systems typically have fewer intervening steps before the final decision-maker. The New York State grievance system has three steps, 7 N.Y.C.R.R. § 701.5, and the Texas prison system's grievance procedure has only two. *See Washington v. Texas Dept. of Criminal Justice*, 2006 WL 3245741(S.D.Tex., Nov. 5, 2006), *citing Wendell v. Asher*, 162 F.3d 887, 891 (5th Cir.1998), and TDCJ Admin. Directive No. AD-03.82 (rev.1), Policy ¶ IV (Jan. 31, 1997).

track and verify that those grievances are actually recorded and processed. The Department should be required to respond in writing to all grievances and to all appeals.

2. Intake Processing

For many years, a court order required that prisoners be placed in a legitimate housing area within 24 hours of admission to the jail system; prisoners already admitted to the system who are transferred between jails were required to be housed within 12 hours. That order was issued because prisoners were languishing for days, essentially incommunicado, in crowded and filthy receiving room pens, sleeping on floors and benches if they could sleep at all, without separation of those suffering from contagious diseases and with no treatment for those undergoing drug withdrawal. After a number of years and payment of fines for noncompliance to a number of prisoners, the Department of Correction became able to comply consistently with the order, and it was later terminated. This is the sort of minimal standard of decency that should become part of the City's own regulation of its jails. Although the Department has adopted these time frames in its own policy directives, it has not always complied with them,[85] and in the absence of a court order there is no external pressure to maintain them. In our view the Board should adopt these requirements as part of the Standards. Certainly it should have considered the issue as part of any overall review of the Standards.

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[85] "The growing jail population is already causing logistical and bureaucratic problems on Rikers Island, including unacceptably long waits to process newly arriving inmates, Mr. Horn told members of the city's Board of Correction at a public meeting last month." "City Inmate Population Up; Brooklyn Jail May Reopen,"*New York Times*, March 3, 2006, http://select.nytimes.com/search/restricted/article?res=FA0712FF3F550C708CDDAA0894DE404482. Legal Aid has received complaints from clients of multiple days waiting in the receiving rooms.

3. Confinement in Cells Without Working Toilets And Sinks

Similarly, for many years a court order forbade locking prisoners into holding cells and receiving pens without working toilets and sinks, for obvious reasons.[86] The need is especially urgent where, as indicated above, prisoners may spend up to 24 hours in such areas without even violating Department policy, and must pass through them repeatedly on intake, when transferred, when taken to and returned from court appearances, medical appointments, or other trips outside the jail. While in theory staff can let a prisoner out of a toiletless cell and provide access to a toilet, or to a source of drinking water,[87] the reality of busy jails—especially intake areas with high levels of traffic and many demands on staff—is that this will not happen reliably. And even when staff are responsive, they shouldn't have to be. They have enough to do and enough to pay attention to in such busy environments that they should be freed of this responsibility by making sure that prisoners have access to toilets without staff intervention. Not surprisingly, both federal courts applying the Constitution[88] and correctional standards[89]

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[86] *Benjamin v. Sielaff*, 752 F.Supp. 140, 148 (S.D.N.Y. 1990) (noting "[t]he defendants have previously been ordered to refrain from confining any inmate in a holding cell, room, or other non-housing area which lacks unmediated access to an operable toilet and sink"). The City agreed to a similar order concerning jail medical and specialty clinic holding cells in other litigation. *Vega v. Sielaff*, 82 Civ. 6475, Order at ¶ 2(F) (Holding Areas) (S.D.N.Y., Oct. 5, 1990).

[87] Drinking water is a serious need given the hot temperatures often encountered in the jails, the risk of heat-related illness, and the number of persons who are admitted to jail suffering from drug detoxification, for whom adequate hydration is an especially urgent necessity.

[88] *See Benjamin v. Sielaff*, 752 F.Supp. at 141-42 n.3; Flakes v. Percy, 511 F.Supp.1325, 1329 (W.D.Wis. 1981) ("However primitive and ordinary, the right to defecate and to urinate without awaiting the permission of the government. . . are rights close to the core of the liberty guaranteed by the due process clause. . . . Surely by any common understanding of the word, it is "cruel" to subject a person to involuntary confinement in a cell without a toilet."); *Wolfish v. Levi*, 439 F. Supp. 114, 157 (S.D.N.Y. 1977), *aff'd in relevant part and rev'd in part on other grounds*, 573 F. 2d 118, 133, n.31 (2d Cir. 1978), *rev'd on other grounds sub nom. Bell v. Wolfish*, 441 U.S. 520 (1979) (holding "it falls today below an acceptable level of humaneness to confine a prisoner of any sex where he or she must solicit freedom to use a toilet.")

have generally forbidden confinement of prisoners in cells without direct access to working toilets, and the Board's own standards (§ 104(c)(3)) specifically require that toilets "be accessible for use without staff assistance 24 hours a day" in multiple occupancy housing areas. The Board should act to guarantee the humane necessities of toilet access and water in all cells in which prisoners may ever be locked.

4. Visiting Delays and Procedures

There is a long history of egregious delays in the visiting process on Rikers Island—delays which, when added to the difficulties in getting to and from Rikers Island, make visiting impractical or nearly impossible for many people. Legal Aid addressed this problem through litigation and obtained a consent judgment that required visits to start within an hour of the time the visitor checked in at bridge control (now the visitors'center).[90] While DOC never achieved perfect compliance with that standard, most visitors did see their loved ones within the hour time limit or close to it.

That consent judgment is now terminated, and there is no specific requirement in the Standards concerning the timeliness of visits. They provide only for the Department to "make every effort to minimize the waiting time prior to a visit." § 1-10(b)(3). Reports we receive from prisoners and visitors indicate that waiting times have again become excessively long. This is a perfect example of an instance where the Board

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[89] *See* American Correctional Association, *Standards for Adult Local Detention Facilities* (3d. ed., March 1991), Standard 3-ALDF-2C-08 (requiring that "[i]nmates have access to toilets and hand-washing facilities 24 hours per day and are able to use toilet facilities without staff assistance when they are confined in their cells/sleeping areas").

[90] *Benjamin v. Abate*, No. 75 Civ. 3073, Stipulation and Order re Uniform Visit Procedures for Visitor Access (S.D.N.Y., March 11, 1993). The one-hour time limit was adopted into the Department's own policy. *See* Department of Correction, Directive 2005, Inmate Visit Procedures, Rikers Island (March 18, 1993) at § II.F ("no visitor shall spend more than one (1) hour in total processing time between arrival at Rikers Island and the actual commencement of the particular visit").

should step up now that the courts have withdrawn from involvement with this issue. It is also an example of an area of concern to prisoners and the community that the Board has not addressed in its supposed comprehensive review of the Standards.

The Board should adopt the one-hour visiting time limit, which was proven to be workable over a period of years. The Board's present standard, which requires only an exhortation to "make every effort to minimize the waiting time prior to a visit," § 1-10(b)(3), proved ineffectual, resulting in the need for the above described litigation.

The Board should also adopt additional measures to facilitate visiting. The improvement in the visiting process depended on several key reforms in that process that were required by the consent judgment and were subsequently adopted into Department policy—but which could be changed at any time for reasons of convenience or cost-cutting. These measures merit protection by adoption into the Board standards.

Elimination of duplicative visitor processing. The consent judgment required elimination of the duplicative registration and search procedures, and the reformed procedures provided "expeditious, prompt and efficient processing of visitors and inmates for visits *without duplication* and with a minimum of delay. . . ."[91] The Board should adopt a standard prohibiting duplicative processing.

Uniform visit schedule for all jails. The present Standard (§ 1-10(c)) says "Visiting hours may be varied to fit the schedules of individual institutions." Before the Minimum Standards were enacted, different jails had different schedules, and it may have appeared necessary to accommodate them. The varying and conflicting schedules caused much confusion about when prisoners could receive visits,

[91] Directive 2005 at § I (emphasis supplied).

judgment required creation of a sanitation plan to keep these areas clean. The Minimum Standards should include a requirement of regular cleaning and sanitation to ensure that they are maintained in a sanitary condition.

5. Attorney Visiting Delays

In this area, too, Legal Aid obtained a court order—not a consent judgment, but an order reflecting a court finding in 2000 that the pattern of delays was so excessive and unjustified as to violate the Constitution.[92] The order required that attorney visits begin within 30 minutes after the attorney's arrival at Rikers and check-in at the visitor center, and within 45 minutes after the attorney's arrival at one of the borough jails, except during the afternoon count. The Department of Correction, after devising new procedures and after a period of implementation, was able to comply with those time frames in the vast majority of cases, and successfully pressed for termination of the order on the grounds that it had complied satisfactorily.

The Board should adopt the attorney visiting time limits, which have proved to be workable over a period of years.

6. Court Transportation

In our litigation over the "Red ID" practice, we learned that prisoners frequently spent as much as eight hours, and sometimes as long as 14 hours,[93] en route and in holding pens when they were taken to court appearances at which they might be in court for no more than a few minutes—or in some cases, not at all. This is a grossly oppressive

[92] *Benjamin v. Fraser*, 264 F.3d 175 (2d Cir. 2001).
[93] 264 F.3d at 181.

and unnecessary practice, and one which encourages the view that many detainees hold that the system is designed to coerce them to plead guilty.

The Board should adopt a standard requiring that prisoners be returned promptly to their jails once they have left the courtroom. We suggest that an appropriate rule would require the Department of Correction to have each prisoner in a vehicle on the way back to jail within an hour after they leave the courtroom.

There is also an ongoing problem with transportation to court of disabled prisoners. Persons in wheelchairs have often been taken to court (and to medical appointments and other out-of-facility destinations) in vans not properly equipped for such transportation, exposing the prisoners to the risk of injury. This problem has been mitigated recently by the Department of Correction's purchase of additional wheelchair-adapted vans, but we have received some further complaints from prisoners either about not being transported in such a van or of their wheelchairs not being adequately secured. The Board should adopt a standard requiring transportation of persons with mobility problems in wheelchair-adapted vans, properly secured.

7. Education

The Department of Correction was grossly out of compliance for years with the requirement that young prisoners without high school diplomas be permitted to attend school. Legal Aid has been litigating these issues for some years.[94] As a result of the litigation, a new high school was built on Rikers Island, and now it appears that around

[94] *Handberry v. Thompson*, 92 F.Supp.2d 244 (S.D.N.Y. 2000) (granting summary judgment to plaintiffs); *Handberry v. Thompson*, 446 F.3d 335 (2d Cir. 2006) (affirming in part, vacating in part, and remanding).

requirements. Those consent decrees have been terminated. In their absence, we receive many complaints from prisoners about abusively conducted searches notwithstanding the Department's nominal policies. Prisoners have complained that strip searches are conducted in full view of numerous other prisoners and many staff members, including those of the opposite gender.[98] Muslim prisoners have complained that the Directive's explicit protections of their religious rights are no longer respected.[99] The Board should adopt as standards the protections the Department has adopted on paper but fails to comply with.

Prisoners also report that their property is treated contemptuously, thrown on the floor, sometimes damaged, and sometimes confiscated without apparent reason and without a receipt—again, contrary to the Department's official policy.[100] Mistreatment of property by staff appears to be a significant source of staff-inmate conflict and in some cases violence and injury.

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[98] Department policy provides that such searches must take place in "an area which provides privacy and does not permit other inmates or persons not involved in the search to observe the undressed inmate" and that only personnel of the same gender as those being searched should be present." Department of Correction, Directive 4508R-B at ¶ VI.D.4.a-b (June 10, 2005).

[99] Muslim inmates "shall only be strip frisked in an isolated (private) area with one officer present of the same sex. This procedure will prevail absent of an emergency situation where staff/inmate safety would be compromised." Directive 4508R-B at ¶ VI.D.4.a.

[100] Policy provides:

> All of the inmate's personal and assigned departmental property shall be examined carefully. However, an inmate's property should be moved only to the extent necessary to facilitate the search. . . .
>
> At the end of the search, every effort shall be made to leave the living quarters in the same condition as it was prior to the search. To the extent possible, items are to be returned to the same place and in the same condition in which they were prior to the search. When this is not possible, items shall be placed on the already searched bed in an orderly fashion. Bedding stripped from an already "made up bed", shall be placed in an orderly manner at the foot of the bed.

Directive 4508 at ¶ VIII.D.7, 10. If items are confiscated, the prisoner is to receive a receipt or an infraction on contraband charges, as appropriate. *Id.* at ¶ VIII.D.7.a-b.

The Board should adopt a standard providing (as Department policy already does) that detainees' property should not be disturbed more than necessary to conduct the search, should be returned to its place and condition to the extent possible at the end of the search, and receipts should be given for all confiscated property.

9. Cross-gender Surveillance

Sexual assault and harassment of prisoners by staff or by other prisoners is a serious issue in all jails and prisons,[101] including the New York City jails, yet it is an area that the Board has failed to address. International standards require that women prisoners be guarded by staff of their own gender.[102] Even short of promulgating such a standard, BOC should take steps to minimize the risk of sexual harassment and assault to all inmates in DOC custody. For example, the Board should promulgate a standard ensuring prisoners sufficient privacy so that they can dress, shower, and perform private functions without being watched by staff of the opposite sex. Cross-gender pat frisks of women prisoners should be prohibited, except in emergency situations, particularly where the prisoner reports a history of post-traumatic stress disorder caused by a history of physical or sexual abuse.[103] The Board should promulgate standards describing the steps that

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[101] The importance of this issue is widely recognized. *See, e.g.*, Prison Rape Elimination Act, Pub. Law Section 108-79 (2003).

[102] United Nations Standard Minimum Rules for the Treatment of Prisoners, Rule 53, adopted Aug. 30, 1955.

[103] *See, e.g.*, New York State Department of Correctional Services Directive 4910, III.B.3 (female prisoners are not to be subjected to cross-gender pat frisks over objection except in emergency situations when female staff is available or when the inmate has received a "cross-gender pat frisk exemption" as determined by mental health staff based upon a showing of a history of PTSD.

they are sometimes unable to access services as fundamental as meals; the failure to provide ADL (assistance with daily living) services to persons who are paralyzed or otherwise incapacitated; the repeated confiscation of medical aids such as canes and crutches from prisoners who need them to get around; and the above-mentioned failure to transport prisoners who use wheelchairs in appropriate vehicles appropriately secured.

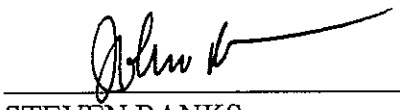
The foregoing list represents only part of the long list of issues not addressed in the Minimum Standards and not addressed in the proposed amendments. Additional such issues include the large number of environmental health and physical plant-related issues, some of which are still the subject of litigation, and some of which are not: food service, pest control, sanitation, ventilation, lighting, temperature control, fire safety, noise, and others.

Conclusion

For all the foregoing reasons, the Board of Correction should withdraw its proposed amendments to the Minimum Standards and conduct a genuinely comprehensive assessment of the appropriate standards for jail operations in this community, with attention to the needs and interests of prisoners and members of the communities they come from in addition to the desires of the Department of Correction.

Dated: New York, New York
April 12, 2007

Respectfully submitted,



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May 4, 2007

Richard T. Wolf, Executive Director
Members of the Board of Correction
Board of Correction
51 Chambers Street, 9th floor
New York, N.Y. 10007

Re: Proposed amendments to Minimum Standards

Dear Mr. Wolf and Members:

The Prisoners' Rights Project of The Legal Aid Society submits the following additional comments on the Board's proposed amendments to the Minimum Standards. These comments are intended to supplement our more extensive comments submitted on April 12, 2007, and our procedural suggestions submitted by letter of April 20, 2007.

The amendment process: During the hearing, Board members suggested that members of the public who believe the Board should address other issues that might benefit prisoners and their families, and not just the Department of Correction, should submit their specific suggestions during the comment period. In our already submitted comments, we identified a number of areas where we think such amendments would be appropriate. On reflection, we do not think it appropriate to try to draft more specific suggestions on those or other subjects at this point. As we and others testified at the hearing, the present process does not provide sufficient opportunity for open and public discussion of proposals that we and others might make on any subject. We therefore reiterate our view that the Board should withdraw the proposed amendments in their entirety and commence a genuinely comprehensive review of the Minimum Standards—what is missing from them, as well as what is there—in which the community will have a voice from the beginning.

Telephone surveillance: At the public hearing, a representative of the Queens District Attorney's office testified in favor of the proposed telephone surveillance amendments based on considerations arising from domestic violence cases. While those concerns are certainly legitimate, they do not justify a wholesale and standardless intrusion on the communications of all prisoners and all the non-prisoners with whom they communicate. If the Board is to amend the relevant standards, it should enact narrower measures that are targeted to the specific requirements of domestic violence cases and are applied based on the facts and needs of individual cases. More specific suggestions in this regard are made in the separate comments of the Criminal Defense Division of The Legal Aid Society, which will be submitted shortly if they have not already been submitted.

Recreation: The proposed amended § 1-06(g) would allow access to recreation to be denied for up to five days for "misconduct" going to or from, or during, recreation. This proposal is unacceptable for several reasons.

First, we are concerned that this important right may be suspended for the most trivial misconduct. There is no lower limit on the kind of alleged misconduct for which recreation may be suspended.

Second, there is no requirement that the misconduct be demonstrated in a disciplinary proceeding. Presumably that is what is assumed. But, as written, the amendment would allow deprivation of this important right purely on the basis of a staff member's say-so, with no review or accountability.

In these respects, the proposed amendment contrasts very sharply with the Department's previous proposed amendment, submitted in 1981. That proposal was the basis for the variance that was granted and has been in effect during the intervening years. Under it, recreation could be denied for five days "only when it is determined that such recreation constitutes a serious threat to the safety or security of the institution" and where alternative arrangements, including an individual recreation period, would be insufficient to address the threat. Such denials "must be based on a specific act of a serious nature, such as an attempt to escape or assaultive action," during recreation or en route to or from the recreation area, or on specific verified information that the prisoner plans to commit such action. The prisoner was to be provided with notice of the charges, names and statements of the charging parties, and an opportunity to respond, with a determination made in writing stating the specific facts and reasons for the determination. The decision was to be provided to the Board of Correction and the prisoner had the right to appeal to the Board. *See* Letter from Barbara Radin to Peter Tufo, June 10, 1981, and attachment (copy enclosed).

It is astonishing that the Board would propose an amendment, based on this long-standing variance, that strips away all of the criteria and protections in the original proposal.

Third, there is no explicit prohibition on consecutive denials of recreation. Thus a prisoner could be kept from going outdoors for the entire length of his confinement in DOC based on a series of incidents of minor misconduct (or accusations of it). This provision, unlike the deprivation of showers and shaving in the amendment to § 1-03(b,c), is not limited to prisoners in punitive segregation. Since, as we have previously noted, outdoor recreation is prisoners' only respite from the jails' crowded, noisy, and

claustrophobic housing units and the tensions they generate,[1] deprivation of recreation should be used as a sanction sparingly if at all.

For these reasons, the proposed amendment in its present form should not be approved. If the Board is to amend this standard at all, it should retain the protections of the original 1981 amendment and add a prohibition on consecutive deprivations of recreation.

Religion: The proposed amendment to the Religion section (§1-07(d)(1)) states that religious advisers who conduct religious services must receive "approval by the Department's Executive Director of Ministerial Services." No reason is given, nor are criteria for approval or disapproval given. Similarly, prisoner requests "to exercise the beliefs of a religious group or organization not previously recognized" must be approved by the Deputy Commissioner for Programs. Again, no reason for this change and no criteria for approval or disapproval are given.

These provisions raise the possibility of significant restrictions on religious exercise and thus present substantial First Amendment questions. They should not be approved, at least in their present form. First, it should be made clear what purposes they are intended to serve, and then they should be narrowly tailored to those purposes. If religious advisors are to be approved and disapproved by the Department, criteria for those decisions should be stated. It should also be made clear that any provision for approval to exercise religious beliefs is purely an administrative matter and that the Department will not disapprove the exercise of religious beliefs.

Access to Courts and Counsel: The proposed amendment concerning Law Libraries (§ 1-08(f)) would relax the requirement that the required hours of law library operation be conducted during the times when prisoners are locked out of their cells, and allow those times to be counted as part of the total time that the law libraries must be kept open. This would shrink the availability of law libraries for the general population. There is no reason to reduce hours for the general population. We already receive complaints of inadequate law library time from general population prisoners, in large part because of the inevitable time lost in moving prisoners from place to place, signing in, etc.

The justification for this change is to increase the time that special housing prisoners have to use the law library. This is a commendable idea. However, it need not be achieved at the expense of the much larger number of general population prisoners. The Board should authorize—or, indeed, require—the Department to operate its law libraries outside lock-out hours, but require this time to be in addition to the hours prescribed in the present standards. This could be accomplished by leaving standards § 1-08(f)(2)(i, ii) as is, but adding to each a phrase such as, e.g., "and in addition, each law

[1] As the Board itself put it in the proposed amendment to standard § 1-06(a): "Recreation is essential to good health and contributes to reducing tensions within a facility."

library shall be operated for ___ hours a week outside lock-out hours for the use of prisoners from special housing units." We suggest five hours—the equivalent of an hour each day the library is open—but it may be preferable for the Department if that time can be aggregated on a smaller number of days.

Respectfully submitted,

STEVEN BANKS
JOHN BOSTON
DALE A. WILKER
MILTON ZELERMYER

THE CITY OF NEW YORK
DEPARTMENT OF CORRECTION
100 CENTRE STREET
NEW YORK, N.Y. 10013

BENJAMIN WARD
COMMISSIONER

ELLEN SCHALL
DEPUTY COMMISSIONER
FOR PROGRAM SERVICES
AND LEGAL POLICY

June 10, 1981

Peter Tufo
Chairman
51 Chambers Street
New York, New York 10007

Dear Mr. Tufo:

As you know the Department has been working with Board staff to develop an amendment to the Minimum Standards that would give us a means of handling inmates whose participation in scheduled recreation poses a serious threat to the institution.

I am forwarding the proposed amendment for consideration by the Board.

Sincerely

Barbara Radin

Barbara Radin
Acting Deputy Commissioner
Program Services and Legal Policy

BR/el
cc: Ted Katz, Esq., Legal Aid Society
ATTACHED

Proposed Amendment to Part 7 - Recreation, entitled Limitation of Recreation Rights

a) A prisoner's right to recreation as provided in Section 7.3 and 7.5 of this part may be denied or limited up to a period of five (5) days only when it is determined that such recreation constitutes a serious threat to the safety or security of an institution, provided that recreation may be denied only where alternative arrangements for affording the prisoner one hour of daily recreation, including but not limited to an individual recreation period, would not be sufficient to reduce the serious threat.

(i) This determination must be based on a specific act of a serious nature, such as an attempt to escape or assaultive action, committed by the prisoner during the exercise of his or her recreation rights, including travel to and from the recreation area, while in custody under the present charge or sentence, or on specific information received and verified that the prisoner plans to engage in such act during the next recreation period. Prior to any determination, the prisoner must be provided with written notification of the specific charges and the names and statements of the charging parties and be afforded an opportunity to respond. The name of an informant may be withheld from the prisoner if necessary to protect the informant's safety.

(ii) Any determination to deny or limit a prisoner's recreation rights pursuant to subdivision (a) of this Section shall be in writing and shall state the specific facts and reasons underlying such determination. A copy of this determination together with notice of the appeal procedure must be provided to the prisoner prior to any limitation of recreation rights. A copy shall be sent to the Board of Correction within 24 hours of the determination.

b) Any person affected by a determination made pursuant to subdivision (a) of this Section may appeal such determination to the Board of Correction.

(i) The person affected by the determination shall give notice in writing to the Board and to the Department of his or her intent to appeal the determination.

(ii) The Department and person affected by the determination may submit to the Board for its consideration any relevant material in addition to the written determination.

(iii) The Board or its designee shall issue a written decision within five business days after it has received the notice of appeal.

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Theodore A. Levine
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Seymour W. James, Jr.
Attorney-in-Charge
Criminal Practice

May 2, 2007

Richard Wolf, Executive Director, and
Members of the New York City Board of Correction
51 Chambers St., Room 923
N.Y., N.Y. 10007

RE: Proposed revision of minimum standards
for New York City jails

Dear Mr. Wolf and Members of the Board:

The Legal Aid Society's Criminal Defense Division acts as "primary defender," under a contract with the City, in Manhattan, Brooklyn, Queens and the Bronx. As such, we represent the majority of indigent criminal defendants in the City, and the majority of all pre-trial detainees housed at the Rikers Island and White Street jails. This experience provides us with a unique perspective on the way in which jail operations and standards affect the day-in, day-out representation of detainees facing charges in the criminal courts.

Although we fully endorse the comprehensive testimony and written comments presented by Legal Aid's Prisoners' Rights Project at your recent hearing, we would like to add our own comments directed toward three proposed revisions of the standards that would have particular impact on the representation of our clients in the courts. These three proposals relate to expanded telephone surveillance, expanded mail surveillance, and the suggested rule that pretrial detainees must wear "institutional clothing" to court appearances.

Monitoring of phone calls

Given the caseloads of Legal Aid and other attorneys defending indigent prisoners, timely and unimpeded attorney-client communication is essential to effective representation. The existing Standards recognize this by stating that attorneys should be able to contact their detained clients by telephone. In practice, attorneys are generally unable to do so: the client must initiate

the call, and then it is limited to six minutes, which may or may not be adequate time to discuss critical matters of plea negotiation and defense strategy.

Instead of facilitating attorney-client communication, the proposal goes in the opposite direction, adding to the reasons why detainees, who may be mistrustful of their attorneys, will be reluctant to be open and truthful during telephone interviews. Detainees, understandably lacking faith in the Department's good intentions and in the effectiveness of its systems ostensibly designed to safeguard "confidential" attorney-client calls, will be still more likely to "hold back" in conversations with their lawyers. This would be damaging to the fair administration of justice, as well as to attorneys' ability to do the job they are assigned to do.

Furthermore, it is often necessary that the jailed client actively assist his attorney in contacting and marshaling witnesses who can help in the client's defense. Many witnesses, no matter how honest and truthful, may be mistrustful of strangers, reluctant to "get involved" in judicial proceedings, or simply be unreachable during normal business hours. These witnesses will be less likely to co-operate in the defense if they know that their privacy is potentially being invaded by the government each time the defendant telephones them from jail to discuss the case. In view of this concern, the Department should be required to make a clear and strong factual showing of the necessity for warrantless eavesdropping, before the Board permits this significant change in policy.

To be sure, giving the Department a free hand to eavesdrop may have some marginal benefit in deterring witness-tampering, but there are other means to protect witnesses that do not jeopardize a detainee's ability to mount a defense. For instance, prosecutors have discussed the danger that defendants in "domestic violence" cases will call victims and ask them to drop charges. In many of these cases, prosecutors can arrange with co-operative victims to have the prosecutor monitor the victim's phone, to detect calls from jail, by or on behalf of the defendant. This type of case-specific, victim-directed monitoring will often lead to additional charges against the detainee for violating Orders of Protection issued by the criminal court. Alternatively, calls to victims from the jails may simply be blocked at the victim's request. If there is reason to believe that a particular detainee is using the telephones to harass multiple witnesses, that detainee's telephone use can be blocked. Either of these approaches would be much more effective than a random or standardless surveillance regime that will impair detainees' and their attorneys' ability to obtain valuable truthful testimony because of detainees' and their potential witnesses' fears that even casual, inadvertent remarks will be heard by the government, distorted, and used against them.

Finally, as others have noted, you concede that there will be no monitoring of certain privileged conversations, including attorney-client conversations, but you have failed to specify the means by which the Department of Correction will ensure that attorney-client conversations are not inadvertently overheard or recorded. It is essential both that the means of protecting these conversations are clarified and that the means be clearly explained to detainees. At the very least, the revision of this standard should be postponed until the Department has settled on the means by which eavesdropping on privileged attorney-client phone communications will be avoided, and until all concerned parties agree that the proposed method will be practical and effective.

Reading of mail

Our concern about the proposal to allow warrantless reading of prisoners' incoming and outgoing mail is similar to our concern about telephone monitoring. In some instances, detainees are unable to use the telephone to contact potential witnesses, but must use the mail. This is particularly likely when the inmate is indigent, because in those cases, the detainee's family and friends may lack the funds to maintain a working telephone number. In other cases, the potential witness has a schedule that makes him or her difficult to reach by telephone, especially given detainees' limited opportunity to make phone calls.

In these cases, the detainee's or witnesses' fear of governmental intrusion on private communications will interfere with the defense attorney's ability to gather critical evidence in support of her client. This risk is not quantifiable, but it is real. The Board should not risk compromising the judicial process in this way without a much clearer showing that current rules are inadequate to protect legitimate security interests.

Moreover, the proposed standard lengthens from 24 hours, to 48 hours, the allowable time for delivery of mail to a prisoner after it reaches the detention facility. This difference can be critical, when attorneys are trying to convey important information, such as a plea offer, to a client who will have just a day or two to make a life-changing decision before his scheduled trial. The Department has not put forth any justification for this easing of the Board's requirements.

Clothing requirements

Besides infringing on the dignity and personal autonomy of detainees who are "presumed innocent," the proposed standard authorizing the Department to require all detainees to wear "facility clothing," except at trial, risks exacerbating the disadvantages detainees already face, compared to non-detained defendants, as their cases move through the judicial process.

Even if one accepts the dubious proposition that the Department can actually meet its goals for a greatly expanded and efficient system of laundering, storing and transferring clothing, a requirement that detainees wear institutional clothing at the great majority of their court appearances, which are not trials, will mark them in the eyes of judges as detainees. While we have confidence that most judges will not treat detainees less fairly on this account, human perceptions and prejudices are subtle. Even the most well-intentioned, judges included, react differently to a well-groomed, well-dressed defendant appearing before them, than they react to a down-at-the-heels defendant wearing a prison jumpsuit.

The effects of the change will be less alarming if the required facility clothing consists of clean and modest civilian clothing, such as a non-detainee might also wear, rather than consisting of readily identifiable, color-coded jail "uniforms." Even in that case, however, current practices should not be altered just because certain other correctional systems follow more restrictive practices. Respect for detainees' rights to personal autonomy should require the Department to demonstrate a clear need for a change in rules, before any compromise in detainees' right to wear their personal clothing is implemented. The Board should not simply give the Department a "free

hand" in this sensitive area. No urgency has been shown. The Department should circulate and seek approval for the specific clothing rules it seeks to implement, as well as demonstrate the adequacy of its laundry and clothing-transfer arrangements, before the Board permits any alteration to current standards.

We join our colleagues in asking the Board to withdraw the revisions currently proposed, and to initiate a new, more inclusive review process in which all interested parties, not just the Department, may participate.

Very truly yours,

Seymour W. James, Jr.
Attorney-in-charge, Criminal Practice

Robert C. Newman
Staff Attorney,
Special Litigation Unit

Testimony of Corey Stoughton on behalf of the New York Civil Liberties Union

Before

The New York City Council Committee on Fire and Criminal Justice Services

Regarding

Proposed Amendments to the Minimum Standards for New York City Correctional Facilities

June 6, 2007

The New York Civil Liberties Union (NYCLU), state affiliate of the American Civil Liberties Union, is a civil rights and civil liberties organization with more than 48,000 members across the state. The NYCLU is devoted to the protection and enhancement of the fundamental rights and values embodied in the Bill of Rights of the U.S. Constitution and the Constitution of the State of New York.

We submit this testimony regarding proposed amendments to the Minimum Standards for New York City Correctional Facilities proposed by the New York City Board of Correction, an independent oversight agency charged with monitoring and regulating the practices of the New York City Department of Correction. These proposed amendments unnecessarily restrict the rights and privileges of the incarcerated, particularly in light of the fact that the majority of the City jail population consists of pre-trial detainees who have not been convicted of any crime and are incarcerated solely because they cannot afford to pay bail. In particular, the Board of Correction has offered no compelling reason for abandoning the requirement of a warrant before conducting telephone surveillance and reading prisoner mail. The Board also poses an unwise and unnecessary threat to the civil liberties of prisoners, as well as those who wish to communicate with prisoners, by proposing greater discretion for the Department of Correction to conduct telephone and mail surveillance, limit prisoners' correspondence rights, and censor publications received by prisoners. Further, the proposed amendments dilute the Department of Correction's responsibilities to Spanish-speaking prisoners, depriving those prisoners of meaningful equality in City jails.

We also believe that the Board of Correction erred when, in reviewing and reconsidering the Minimum Standards for the first time in 30 years, it undertook a process apparently dominated by the interests of the Department of Correction and failed to fulfill its function as an independent oversight organization with not merely the administrative and security interests of the Department at heart, but also the interests of jail populations and the community at large. The result, predictably enough, is a set of proposed amendments that uniformly serve the narrowly defined interests of the Department at the expense of prisoners' rights and broader social concerns. In proceeding with a one-sided process,

the Board overlooked an opportunity to propose amendments to the Minimum Standards that not only enhance safety and efficiency but also improve conditions of confinement and protect the rights of prisoners.

In light of the many flaws in the proposed amendments and the failure to examine thoroughly perspectives from outside the Department of Correction earlier in the process, we join the call of the coalition of advocacy groups represented here today, as well as the voice of City Councilmember Miguel Martinez, for the Board of Correction to return to the drawing board and undertake a renewed and well-rounded effort to review and improve the Minimum Standards. We urge this Committee to endorse this call as well.

Specific Problems with the Proposed Minimum Standards

The remainder of this testimony, which incorporates the points raised by the NYCLU before the Board of Correction at its April 17 hearing on the Proposed Minimum Standards, addresses some of the specific problems with the Proposed Minimum Standards. This list is by no means exclusive. The NYCLU fully supports and affirms the comments of organizations such as the Legal Aid Society, which brings to bear a wealth of knowledge and experience with issues including the conditions of confinement and prisoners' rights, and the Sylvia Rivera Law Project, which has identified the particularly harsh impact of the proposed standards on transgender prisoners. Drawing on our own expertise, however, the NYCLU would like to highlight the impact of the proposed changes on prisoners' and their correspondents' First Amendment rights to communicate, whether by telephone, letter or publication.

These amendments must be viewed in light of the Second Circuit's admonition that each prisoner "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Giano v. Senkowski*, 54 F.3d 1050, 1053 (2d Cir. 1995). This is especially so given that the majority of prisoners in City jails are pre-trial detainees who retain an expectation of privacy within the jailhouse walls. *See United States v. Cohen*, 796 F.2d 20, 23 (2d Cir. 1986) (holding that pretrial detainees retain an expectation of privacy that forbids warrantless cell searches for law enforcement rather than prison security purposes).

Communications with the "outside" are of crucial importance to both prisoners' welfare and proper functioning of the prison system. Particularly for pre-trial detainees, maintaining avenues of contact with family and friends, as well as treating physicians and clergy, is important to prisoners' physical and mental health. Such contacts, as well as contacts with the prisoner's attorney, can also be essential to preparing a defense for a charged pre-trial detainee. Moreover, restrictions on communications and fears of unwarranted surveillance have direct impacts on the families and communities from which prisoners come, impacts that are often overshadowed by the Department of Correction's broad legal authority to disregard the privacy rights of prisoners. Finally, from a broader social perspective, prisoners are often the most informed about prison conditions and thus maintaining a conduit to the outside world – including regulatory

agencies, advocacy organizations and the media – is a crucial window into jail operations and may expose problems that would otherwise escape notice. In light of these important interests, the Board of Correction's role should be to ensure that the Department of Correction only restricts or monitors those communications that it must to maintain safety and security. The proposed rules do not provide that kind of assurance.

Surveillance of Telephone Conversations

The proposed amendments would allow the Department of Correction to eavesdrop on and record most prisoner telephone calls for any reason. *See* Notice of Proposed Hearing and Opportunity to Comment at 4-5. Under current policy, the Department must obtain a warrant before monitoring telephone calls. *See* Minimum Standards, § 1-11(h). This proposed change expands the Department's surveillance authority in a manner that is unnecessary and potentially unlawful.

First, the Board of Correction has not stated any convincing rationale for allowing the Department to monitor telephone calls with no limiting principle, let alone any rationale for creating a universal suspicionless surveillance program. The Notice of Proposed Hearing simply states that "heightened security concerns provide ample justification for this amendment...." However, there is no identification of the cause for heightened concerns and no explanation of how suspicionless surveillance will address those concerns. Warrants are readily obtainable in New York Courts, and there is no reason to believe that the warrant requirement hinders the Department's ability to conduct necessary surveillance. The City Council should remind the Board of Correction's of its institutional oversight role, and encourage the Board to demand that the Department provide substantiation of the purported need to alter the rule governing telephone surveillance.

Second, the amendment does not contain adequate protections for privileged phone calls, including calls to attorneys, clergy, physicians, and monitoring and oversight agencies. Although the proposed standard recognizes that such calls cannot be monitored, there is no procedure for ensuring that they are not monitored. The absence of a procedure raises troubling questions about how such calls can feasibly be identified and isolated from the Department of Correction's proposed surveillance scheme, particularly if the Department takes advantage of its new authority to institute a blanket surveillance program. Although we oppose this amendment categorically, it should in no event be approved until and unless there is an effective program in place to protect privileged calls.

Third, the amendment does not contain adequate procedures for notifying detainees that their telephone calls may be listened to or recorded. Consistent with relevant legal precedent, notice is putatively required by the proposed standard. However, the amendment provides no definition of what constitutes notice, and thus no guarantee of a meaningful effort to ensure that notice is actually and effectively communicated to prisoners. *Cf. United States v. Walkman*, 80 F.3d 688 (2d Cir. 1996) (upholding prison telephone monitoring only where signs were posted at each phone and prisoners received handbook explaining telephone surveillance program, and signed a form indicating they

had received the handbook); *United States v. Barnett*, 2006 WL 2129332 (S.D.N.Y. July 28, 2006) (upholding prison telephone monitoring only where individualized and signed notice was provided to inmates, and arrangements for non-monitored telephones were available). At a minimum, the Minimum Standards should require affirmative steps to ensure that actual notice is delivered to each prisoner.

Notably, the Proposed Amendments do not require the Department of Correction to provide any kind of reporting to the Board regarding its proposed universal, suspicionless telephone surveillance operation. Such reports should identify the scope of the program; how the program is enhancing prison safety or security; how calls are monitored and reviewed; how notice is delivered to prisoners; how privileged conversations are protected; what happens to any recordings or transcripts of conversations; and how surveillance is used against prisoners, whether in disciplinary proceedings, for law enforcement purposes, or otherwise. Such reports would allow the Board to ensure that appropriate safeguards are in place and to evaluate continually whether such a drastic surveillance program correctly balances institutional security with the rights of prisoners and those who wish to communicate with them.[1]

Surveillance of Correspondence

The proposed amendments would allow the Department of Correction to read prisoners' non-privileged correspondence if the warden issues a "written order articulating a reasonable belief that the correspondence threatens safety or the security of the facility, another person, or the public." *See* Notice of Public Hearing at 5, 34-35. The current provision requires a search warrant before outgoing correspondence can be read and flatly prohibits the reading of incoming correspondence. *See* Minimum Standards, §§ 1-12(c)(6), (e)(1), (e)(2).

The Department of Correction has offered no valid reason for eliminating the warrant requirement. The stated rationale for this change is that obtaining a court order "could cause undue delays, and interfere with DOC's ability to act quickly and decisively when dealing with imminent security threats." *See* Notice of Public Hearing at 5. It is well-established law, however, that an imminent security threat creates exigent circumstances for a search, for which no court order is required. *See, e.g., New York v. Quarles*, 467

[1] It is not entirely clear from the text of the proposed amendments whether the changes to the telephone monitoring provisions are meant to authorize a universal suspicionless telephone surveillance program or to authorize the Department of Correction, in its sole and unfettered discretion, to selectively monitor and record prisoner telephone conversations. While the former is, as explained above, an overbroad and unnecessary invasion of privacy for both prisoners and their callers from the outside, the latter raises serious questions of selective enforcement and the potential for retaliation. Thus, whether the Department creates a universal surveillance program or simply uses their unfettered surveillance authority to target only select conversations, the Minimum Standards should, at a minimum require reporting to ensure that such power is not abused.

U.S. 649, 653 n.3 (1984). Moreover, there is no evidence in the public record that the warrant requirement has interfered with any necessary surveillance. Thus, there is no convincing need to erode civil liberties by lowering the standard for reading prisoner correspondence.

Moreover, the presence of a reasonable suspicion standard and written notice requirement in this proposal highlights the absence of any similar standard in the proposed amendment governing telephone communications. The recognition of the feasibility and the need for such safeguards in this instance severely undermines the rationale for instituting a suspicionless surveillance program for telephone communications.

Limitations on Correspondence, Sending and Receiving Packages

The amendments would allow the Department to deny a prisoner's right to correspond or send and receive packages "where there is a reasonable belief that limitation is necessary to protect public safety or maintain facility order and security." *See* Notice of Public Hearing at 5. The current standard simply states that "Prisoners are entitled to correspond with any person." Minimum Standards, §§ 1-12(a), 1-13(a).

This amendment presents several problems. First, it does not contain any exception for privileged correspondence. The omission of this exception, particularly where it is expressly made in the same section of the proposed rules for surveillance of correspondence, suggests that the rule would grant the Department of Correction the authority to bar prisoner mail to and from oversight agencies, physicians, clergy and even attorneys under some circumstances. Indeed, the provision governing prisoners' access to counsel, § 1-09(c)(4) indicates that mail between prisoners and attorneys may be "interfered with ... as provided in" this section. The deprivation of a prisoner's right to correspond freely with his attorney would be a clear violation of both the First Amendment and the Sixth Amendment right to counsel. *See Washington v. James*, 782 F.3d 1134, 1138 (2d Cir. 1986); *Davidson v. Scully*, 694 F.2d 50, 53 (2d Cir. 1982). Access to clergy and treating physicians also should not be deprived except in extraordinary circumstances. Giving the Department authority to take away a prisoner's ability to contact oversight agencies is unwise and unnecessary. Such a measure would cut off a crucial source of information about jail conditions and create a serious risk of retaliation against whistleblower prisoners. As an advocate of reform and open government, the City Council should take particular note of this provision and object to such broad power to deprive prisoners of communication rights.

Second, this amendment – again in contrast to the provision for reading prisoner correspondence – contains no requirement that the Department of Correction's basis for barring a prisoner from engaging in correspondence or sending and receiving packages be documented in written form. The failure to mandate creation of a written record increases the chances for abuse of authority and unnecessarily undermines the ability to appeal denials of correspondence privileges by either the prisoner or the outside correspondent.

Third, the standard articulated in the proposed amendments is too vague to provide meaningful guidance to the Department of Correction in determining when correspondence and packages may be barred, beyond stating the unremarkable proposition that "[c]orrespondence shall not be deemed to constitute a threat to safety or security of a facility solely because it criticizes a facility, its staff or the correctional system, or espouses unpopular ideas, including ideas that facility staff deem not conducive to rehabilitation or correctional treatment." *See* Notice of Hearing at 33. Without specific guidance as to what constitutes "there is a reasonable belief that limitation is necessary to protect public safety or maintain facility order and security," there is no assurance that any decision to ban or limit a prisoner's ability to send or receive mail and packages is rationally related to a legitimate penological interest, rather than an overbroad or unnecessary limitation on a core right of prisoners.

This is especially so given that authority to limit these rights is – unlike the provision for surveillance of correspondence – not vested solely in the warden but dispersed broadly throughout the Department. In upholding certain mail and publication restrictions, the Supreme Court has emphasized the importance of lodging decisionmaking authority in a central figure to ensure consistent and reviewable application of the policy. *See Thornburgh v. Abbott*, 490 U.S. 401, 416 (1989).

Moreover, the lack of a clear standard in this amendment contrasts with the current provision authorizing the Department of Correction to limit telephone privileges. That provision sets a standard for when privileges can be revoked (i.e., only where "specific acts committed by the prisoner during the exercise of telephone rights ... demonstrate such a threat [to safety or security] or abuse"), requires prior written notification to the prisoner with a statement of the basis for revoking privileges, affords the prisoner an opportunity to respond, and provides for Board review of the decision. *See* Minimum Standards, §1-11(i), (j). The telephone rights provision demonstrates that it is both feasible and consistent with institutional safety to implement similar provisions whenever prisoners' right to communicate is threatened. Thus, there can be no justification for not implementing such procedures for denials of the right to correspond or send and receive packages.

Finally, as articulated above, no specific events or reasonably anticipated problems have been identified to justify increased limitations on prisoners' right to correspond and exchange packages with whomever they choose. Packages and correspondence are routinely monitored for contraband, and existing rules limit prisoners' ability to receive non-approved items in packages. Without a compelling justification for additional restrictions, there is no reason to put such an important right in jeopardy.

Censorship of Publications

The proposed standards would authorize the Department of Correction to censor any publication that it determines "may compromise the safety and security of the facility." *See* Notice of Hearing at 6, Section 1-13. The current rule prohibits only those

publications that "contain specific instructions on the manufacture or use of dangerous weapons or explosives, or plans for escape." Minimum Standards, § 1-14(c)(3).

This amendment is excessively vague and susceptible to overbroad interpretation by the Department and the personnel who will be charged with carrying out the authority to censor publications. A ban on publications must be tailored to a legitimate penological purpose. *See Allen v. Coughlin*, 64 F.3d 77, 80 (2d Cir. 1995) (holding that publication ban on newspaper clippings was not, as a matter of law, rationally related to a legitimate penological interest). Where prisons and jails lack clear standards for determining what publications may be censored and which may not, it has been the case that even ACLU publications get censored. *See, e.g., Faulkner v. McLocklin*, 727 F. Supp. 486 (N.D. Ind. 1989) (awarding damages to prisoner where jail officials read and withheld ACLU materials in the absence of meaningful standards governing the appropriate circumstances for surveillance and censorship).

Notably, this provision does not contain the language in the proposed provision governing censorship of correspondence establishing that "a threat to safety or security of a facility" does not arise "solely because [the material] criticizes a facility, its staff or the correctional system, or espouses unpopular ideas, including ideas that facility staff deem not conducive to rehabilitation or correctional treatment." The absence of this language from the provision regarding censorship of publications strongly indicates that the Department of Correction intends to reserve the power to censor publications merely for containing institutional criticism or controversial material, raising serious First Amendment concerns.

As with the proposed power to limit correspondence and package rights, the dissemination of decisionmaking authority in this amendment magnifies the risk that this vague standard will be misapplied. The proposed standard's broadly delegated authority accompanied by a relatively vague standard of "safety and security" stands in sharp contrast to the limited decisionmaking authority authorized in decisions like *Thornburgh v. Abbott*, cited above. The Board appears to have recognized this in the proposed amendments governing surveillance of prisoner correspondence, which provides that only the warden may authorize such surveillance, and only by written order.

Finally, as has been repeated in prior sections, the Board offers only the conclusory statement that "heightened security concerns justify the proposed amendment," without any meaningful explication of what those concerns are and how the proposed amendment would address those concerns. Given the lack of justification and the myriad implementation problems, the City Council should oppose this provision.

Eliminating the Requirement of Sufficient Spanish-Speaking Jail Staff

The proposed standards would eliminate the requirement that each facility employ a sufficient number of employees who are fluent in Spanish. In its place, the Board proposes a requirement that the Department create procedures "to ensure that non-

English speaking prisoners understand written and oral communications from facility staff members...."

To the extent that this change reflects the fact that the population of non-English speaking prisoners are not exclusively Spanish speakers, the NYCLU welcomes any effort to ensure that all prisoners have equal access to translation and interpretation services.

However, missing from this proposed standard is any guidance as to what procedures the Department must implement to ensure that all prisoners understand all written and oral communications from staff in City jails. Once again, the proposed changes accord more discretion to the Department without providing any assurance, through the Board's oversight authority, that such discretion does not translate into reduced protections for non-English speaking prisoners. There should be specific requirements in the Minimum Standards or, at a minimum, a demand that the Department develop a plan for ensuring that non-English speaking prisoners understand all communications within City jails and have equal opportunity to utilize the services provided in the facilities in which they are incarcerated.

Unfortunately, the amendment appears designed to limit the Department's obligations to non-English speaking prisoners. The current standard requires the Department to provide sufficient numbers of Spanish-speaking staff not only to ensure that orders and instructions are understood, but also to "assist Hispanic prisoners in understanding, and participating, in the various institutional program and activities, including the use of the law library and parole applications." *See* Minimum Standards, § 1-01(c)(1). This requirement would be eliminated under the proposed amendments, apparently relieving the Department of the responsibility to ensure that the City jails employ sufficient Spanish-speaking staff to make the promise of equal access to such critical resources as the law library and parole applications, as well as educational, religious, and vocational programs, a reality. Rather than eliminating this requirement, it should be expanded to ensure that all non-English speakers, not just Spanish-speaking prisoners, have real equality in City jails.

The Apparent Abdication of the Board's Oversight Responsibilities

Having identified some of the many flaws in the proposed amendments, a clear theme emerges: namely, the Board's relinquishment of its oversight function and grant of broader discretionary authority to the Department of Correction. Whether in eliminating the need to obtain variances and the oversight that comes with that process, relieving the Department of the responsibility to report to the Board regarding law library facilities, or any of the many other examples discussed above, the amendments replace specific standards with increased discretion, eliminate reporting requirements and accept the Department's requests for increased flexibility with remarkable consistency.

Naturally, the Minimum Standards cannot always mandate specific procedures. There will always be instances in which the correct course is to establish a general principle and permit the Department to design a set of procedures for ensuring that the principle is

followed in a manner consistent with Department needs and priorities. However, the Board has the responsibility to ensure that those procedures do in fact function to protect the principle established by the Minimum Standards – whether that principle is prisoners' rights, public safety or institutional security.

The Board was not always so sanguine about the Department's willingness to design and implement adequate procedures. When the Minimum Standards were first designed, the Board required the Department to submit specific proposals for implementing certain of the standards to the Board for approval. *See, e.g.,*, Minimum Standards § 1-02(e)(1) (requiring the Department to submit to the Board for approval its proposed system for classifying prisoners by degree of surveillance and security required and setting forth specific criteria that the system must meet); § 1-04(j)(2) (requiring the Department to submit to the Board for approval plan for regular cleaning and extermination of facility housing areas); § 1-07(d) (requiring the Department to submit to the Board for review a list of the recreation equipment it plans to provide to fulfill its obligation under this section); § 1-13(b) (requiring the Department to submit restrictions on the number of packages prisoners may send or receive to the Board for written approval).

The proposed amendments, however, uniformly increase the Department's discretionary power at the expense of the Board's oversight function. And they frequently do so with very little explanation or justification for the change, sometimes none at all. As an indicator of a trend to dilute the Board's mandate, this is a disturbing sign. It also creates specific implementation problems and vastly increases the opportunity for the Department to overreach or abuse its additional discretion, particular with regard to the censorship and surveillance provisions discussed above.

Other provisions in the original, unamended Minimum Standards recognize that, where fundamental rights are concerned, an on-going procedure for Board oversight is necessary. *See, e.g.*, Minimum Standards § 1-08(j)(1) (requiring the Department to submit to the Board for review decisions to limit prisoners' exercise of religious belief based on security concerns); § 1-08(f), (j) (requiring the Department to submit any change in law library schedules or denial of prisoner access to the library to the Board); § 1-08(f)(7) (requiring the Department to report to the Board regarding the resources available at facility law libraries). Yet despite proposing changes that materially affect, among other key rights, prisoners' First Amendment right of access to information, none of the amendments include any such oversight function.

Taken as a whole, then, proposed changes represent a substantial change in philosophy for the Board, at serious cost to prisoners' rights. Lacking expertise in the complexities of prison administration, courts historically and doctrinally defer to prison administrators even when serious constitutional rights are at stake. Because of this fact, the Board uniquely has the competence and legitimacy to ensure that the Department's institutional interests in efficiency and security do not unnecessarily override the few remaining rights and privileges of prisoners. Changes to the Minimum Standards should capitalize on that competence and legitimacy, not undermine them.

The Need for a More Inclusive Process of Reviewing the Minimum Standards

Perhaps reflecting the Board's shift away from objective oversight and toward a Department of Correction-centered perspective, the process by which the Board created the proposed amendments to the Minimum Standards appears to have been excessively one-sided. The result, not surprisingly, is a set of proposals that entirely reflect the narrowly defined interests of the Department at the expense of prisoners and offer little in terms of improving prison conditions or protecting prisoners' rights.

The mere fact that the proposed amendments are so one-sided raises prima facie questions about the propriety of the Board's process. The additional fact that the Board waited until the end of a more than two-year process to seek the perspective of any group other than the Department of Correction and the Law Department magnifies those questions. By delaying outside participation until this stage, the Board allow the Department to control the agenda, creating a strong presumption in favor of the amendments as currently drafted.

Meaningful input from outside groups has been further limited by the fact that the Board's Notice of Hearing offers very little in the way of explanation for many of the proposed amendments. For example, the amendments propose increasing crowding of prisoners in dormitory-style housing from 50 people per room to 60 people and deny pre-trial detainees the ability to wear their own clothes while incarcerated, without providing any affirmative justification for these measures. Examples relating to the limitations on communication privileges and expansion of surveillance powers are discussed above. The lack of rigorous justifications for the proposed changes can only reflect a lack of rigorous examination by the Board of the need for the changes.

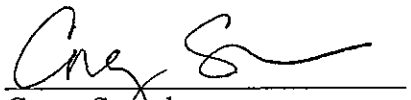
In focusing almost solely on amendments that advance the Department's interests at the expense of prisoners and by foreclosing early input from prisoners' rights and community groups, the Board missed an opportunity to consider other areas within the Minimum Standards, or currently missing from the Minimum Standards, that are ripe for reform. Examples of such issues include the failure to include disability discrimination in the Standards' statement of non-discrimination and the resulting challenges faced by prisoners in City jails who are disabled; the unique problems facing transgender prisoners, including abuse by prisoners and staff, housing and clothing issues; and procedural problems with the prisoner grievance process that prevent meaningful review of prisoner complaints. Many more examples have been raised by other parties that have submitted comments on the Proposed Amendments.

In light of the inadequate process to date and the clear need for a fresh look at the Board's proposed amendments, we urge the City Council to join the chorus of voices demanding a fresh start and a new, more inclusive process for examining the Minimum Standards. Proceeding down the current path would do a fundamental disservice to prisoners and their families and threaten the Board of Correction's reputation and function as a governmental oversight agency.

Conclusion

The proposed amendments to the Minimum Standards for New York City Correctional Facilities are the unfortunate result of a flawed, one-sided process. The City Council should urge the Board to withdraw these proposals, which raise serious civil rights and civil liberties concerns, and re-open its review of the Minimum Standards, undertaking a process that is more inclusive, truer to its oversight mandate, less Department-centered, and more respectful of the rights and interests of prisoners.

Respectfully Submitted,



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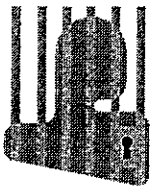


Coalition to Raise the Minimum Standards
at NYC Jails

Bronx Defenders
Center for
Constitutional Rights
Community Access, Inc.
Correctional Association
Fordham Law
Amnesty International
Fordham Law Prisoners'
Rights Advocates
Fortune Society
Foundation for Responsible
and Open Government
Hispanic AIDS Forum
Innocence Project, affiliated
with Cardozo Law School
Interfaith Coalition of
Advocates for Re-Entry and Employment
Legal Aid Society
National Lawyers Guild
New York City Chapter
New York City Anti-Violence Project
New York Civil Liberties Union
October 22 Coalition
Office of the Appellate Defender
Prison Legal News
Prisoners' Rights Advocacy
at Cardozo Law School
Reentry Net
Stop Prisoner Rape
Society for Immigrant & Refugee
Rights at the Columbia University
School of Law
Sylvia Rivera Law Project
Urban Justice Center
William Moses Kunstler Fund
for Racial Justice

May 7, 2007

Dear Members of the Board of Correction:

The large turnout at April 17th's public hearing shows the extent of public concern with the Board's process and resulting proposal, and it demonstrates the need for greater public involvement than the Board has so far allowed. Unfortunately, the Board's approach has denied the public any real opportunity to speak and be heard on the important issues the proposed amendments raise. Like almost all of the speakers at the hearing, we urge you to stop this process, withdraw the proposed standards, and start over by implementing a process that will allow the many constituencies that have not yet been consulted or heard with an opportunity to discuss their ideas and concerns with you, so that the final revisions have the benefit of real input and involvement of the community.

The promulgation of the amended Standards was two-and-a-half years in the making. This process included input from the Department of Correction, to the exclusion of every other informed stakeholder. Opportunities to elicit involvement from interested parties were continually squandered. Indeed, as far back as March of 2006, the chair of the joint Board-Department revision committee indicated that the proposed amendments it intended to offer would be discussed by the full Board. Yet this never took place, nor did any attempt to allow for input from concerned and relevant individuals and groups.

Members of the public have now been given a narrow window of time in which to respond to the proposed revisions and put forth its own set of positive recommendations. This seems an impossible task, given the multitude of issues that might be addressed, including, but not limited to: overcrowding; visiting; attorney visits and court transport; access to law libraries; temperature and ventilation; hygiene and sanitation; light and noise; the use of force; the prevalence of violence; issues relating to transgender inmates; education; clothing;

discrimination; recreation; interpreter services; surveillance; mail; and use of telephones.

In fact, as members of the undersigned Coalition tried to seek input from a number of interested parties and members of the public in an effort to amass a compendium of responses to the proposal, we observed firsthand the difficulty in attempting such an effort in a limited period of time.

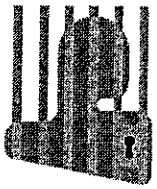
Individuals and representatives of a number of prominent organizations attended the public hearing en masse to voice their objections to this rulemaking process. Indeed, an addendum to this letter includes just some of the many assertions put forth that the direction taken by the Board was terribly flawed. The public hearing, the first and only opportunity for members of the public to weigh in, was notable in that there was no exchange between Board members and those providing testimony. In fact, many participants had more to offer in the way of substance than was offered to them in the time allotted.

In order to restore the faith of the public, efforts must be undertaken to establish a process that honors the diversity and breadth of concern about the issues addressed in the Minimum Standards. At minimum, elements of such a process should include:

- The broadening of the window of time for a final set of proposed minimum standards to allow for responsible and informed deliberation;
- An opportunity for a dialogue between Board members and interested participants;
- An attempt to engage a wide range of relevant stakeholders, including: individuals who are currently incarcerated; former inmates; their families; legal advocates; service providers who represent notably vulnerable populations or provide reentry services; community organizing projects; community and religious leaders; etc. using a variety of forums and methods;
- The creation of issue-specific working groups, the members of which may determine a process that will best employ research, social science and best practices in the field;

It is not unprecedented, as in fact is the norm, for rulemaking bodies to actually engage interested constituents in their process. A few examples follow.

The State of California's Board of Correction endeavored to embark upon a more open process when it compelled "extensive collaboration among state and local subject matter experts to make recommendations for needed changes to the regulations." Further, when California's BOC decided to address minimum standards in its juvenile facilities, the process involved "an executive steering committee, six task forces, and participation of more than 100 juvenile facility administrators, managers, practitioners, and subject area experts."



While the number and diversity of those individuals and groups the California BOC conferred with is notable, a reasonable rulemaking process does not necessarily have to mirror those methods used by other states' Boards of Correction. From the federal to the local level, governmental agencies employ a range of methods to solicit and consider public input, examples of which include:

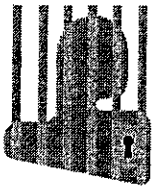
Department of Transportation (DOT): The DOT initiated a series of "summits" to address highway safety issues, followed by the formation of issue-specific loose associations, with open-ended agenda, which can offer input to the DOT over the course of a two-year period. The DOT expects that participant composition will not remain constant.

Federal Aviation Administration (FAA): The FAA, seeking to encourage public participation in its decision-making processes, and issued the following formal statement: "[The FAA will take affirmative steps to] provide the public an opportunity to comment prior to key agency decisions" and to "solicit and consider public input on [FAA] plans, proposals, alternatives, impacts, mitigations, and final decisions." The FAA's Office of Environment and Energy has gone so far as to create a training course for agency personnel with the express purpose of teaching personnel how to engage the public in FAA decision-making.

Inter-Agency Environmental Technology Organization (IAETO): IAETO is an organization comprised entirely of government personnel that advances the development and execution of new environmental technologies. In an effort to address how to best communicate with its constituency, IAETO initiated a discussion with interested participants. Ultimately, the chair suggested the creation of "focus group" with the purpose of defining the parameters of the issue being considered.

New York City Department of Health and Mental Hygiene (DOHMH):
While accomplished in advance of a procurement process, rather than a rulemaking one, the DOHMH's method of seeking input from other stakeholders is noteworthy. Before issuing a Request for Proposal for the provision of health and mental health care in the City jails, DOHMH asked interested parties to submit "concept papers" in order to guide their conclusions.

These are just some examples of elements that have been incorporated into practice by other agencies, which we are hopeful the BOC will take under advisement in contemplation of a more full and fair process. Regardless of the intent of the type of rulemaking scheme employed by the BOC to date, there remains no question that a host of interested and relevant parties believe the process as it stands is woefully insufficient.

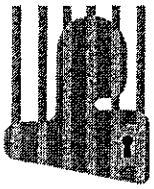


Coalition to Raise the Minimum Standards
at NYC Jails

At this stage, we request a meeting with BOC members to set up a formal process in which interested parties, including those directly impacted by incarceration, can provide meaningful and ongoing input into the rulemaking process. We are confident that together we can establish a process that is both collaborative and accountable to the public. We hope to be placed on the May 10th agenda of the next BOC meeting to discuss an alternative process. Please contact Rebecca Brown, at (212) 364-5360 or rbrown@innocenceproject.org, who is responsible for conveying all communication from the BOC to Coalition members.

Sincerely,

Coalition to Raise the Minimum Standards at
New York City Jails



Coalition to Raise the Minimum Standards
at NYC Jails

Addendum

The following quotes were culled from written testimony submitted to the Board of Correction at April 17th's public hearing. They highlight an overarching desire for civic engagement in the BOC's rulemaking process:

"With regret, I believe your proposals to revise the minimum standards reflect your loss of independence and, accordingly, your failure to fulfill the purpose for which the board was created some 50 years ago..."

- *John Brickman, Chairman off the Board of Directors, Correctional Association & Former Executive Director, New York City Board of Correction (1971-1975)*

"I am concerned about the process that you took to get to this point. From my study of the record, and my discussions with others, other than your meetings with the Department of Correction, you did not consult people who are knowledgeable about conditions in New York City jails before going public with formal proposed amendments to the minimum standards. This is a fundamental error that I believe you must correct.... The inescapable truth is that so far you have actively consulted only one party and that party is the very agency you have been established to monitor."

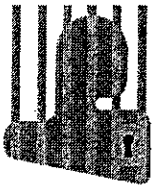
- *Michael Mushlin, Professor of Law, Pace University*

"The Board should withdraw the proposed amendments in their entirety and start over. The proposals, nominally the result of a comprehensive review of the Minimum Standards, in fact reflect a completely one-sided process in which the Department of Correction pressed its agenda; in which all parties who might have questioned or opposed the Department's positions were excluded; and in which there was no voice to speak for the prisoners and the communities from which they come."

- *Legal Aid Society's Prisoners' Rights Project*

"We ask that the Board of Correction withdraw the proposed amendments to the minimum standards for NYC correctional facilities, and reformulate its proposals based on input from us and other advocates, family members, and individuals who have directly experienced incarceration in New York City's jails, and who can speak to the human needs of people who will be most directly affected by the proposed changes."

- *The Bronx Defenders*



Coalition to Raise the Minimum Standards
at NYC Jails

"I look forward to seeing the standards revised to be youth-friendly, and to seeing some consistency with upholding the improved standards. One way to achieve this is to involve and listen to youth like myself who have lived and directly experienced the standards."

- *Youth Ambassador, The Osborne Association*

"The Sylvia Rivera Law Project is deeply concerned that the BOC seems to be abandoning its role as an oversight agency that must hold the Department of Correction (DOC) accountable to minimal standards for the humane treatment of prisoners in DOC care, custody, and control. We are particularly upset that BOC proposed amendments that would severely restrict the rights of prisoners without first having meaningful public discussions and debates involving the communities that are most impacted by the proposed changes. We call on BOC to withdraw all of its proposed amendments and to initiate a fair, full, open public process that meaningfully includes all the stakeholders, including prisoners; former prisoners; families, friends, and communities of prisoners; community organizing groups, service providers, and advocacy groups that work with these communities; correction staff and unions; and DOC."

- *Sylvia Rivera Law Project*

"Neither this hearing nor a short public commentary period is sufficient to address standards that affect prisoners, most of whom are presumed innocent, their families, and the public at large."

- *Innocence Project*

"...the Board erred when, in reviewing and reconsidering the Minimum Standards for the first time in 30 years, it undertook a process apparently dominated by the interests of the Department of Correction and failed to fulfill its function as an independent oversight organization with not merely the administrative and security interests of the Department at heart, but also the interests of jail populations and the community at large."

- *New York Civil Liberties Union*

The Osborne Association

STATEMENT

by

Elizabeth Gaynes
Executive Director
THE OSBORNE ASSOCIATION

to

NEW YORK CITY COUNCIL

June 6, 2007

SUBJECT: PROPOSED REVISIONS TO MINIMUM STANDARDS FOR NEW YORK CITY JAILS

° Administration	809 Westchester Avenue, Bronx, NY 10455	718-707-2600	Fax: 718-707-3102
Bronx	809 Westchester Avenue, Bronx, NY 10455	718-707-2600	Fax: 718-707-3102
Beacon Site	380 Main Street, Suite 200, Beacon, NY 12508	845-440-7924	Fax: 845-440-7435
Brooklyn Site	175 Remsen Street, Brooklyn, NY 11201	718-637-6560	Fax: 718-237-0686

Good morning. I am Elizabeth Gaynes, Executive Director of the Osborne Association. The Osborne Association is a 75-year old criminal justice nonprofit organization with programs sites in the Bronx, Brooklyn, and Beacon, NY, as well as 17 prisons and Rikers Island. We operate a wide range of programs for individuals affected by incarceration, including those currently incarcerated and their children and families. Osborne programs offer alternatives to incarceration, health and mental health services (including substance abuse treatment, risk reduction, and HIV/AIDS services), youth and family services, and job training and placement.

Our services at Rikers Island include discharge planning at EMTC, as part of the Rikers Island Discharge Enhancement (RIDE) initiative, and Fresh Start, a unique jail-based reentry program that offers a range of vocational and educational offerings. Both programs offer follow-up case management and counseling following release. At the state level, we offer transitional services of various kinds at maximum, medium and minimum security facilities - Bayview and Albion prisons for women, Sing Sing, NYC work release facilities, and more than 10 prisons in the Sullivan and Green Haven hubs. For many years we provided a collect call Hotline accessible to people calling from jail or prison, and we now offer a toll free Hotline for families of people incarcerated in NY's prisons and jails as part of our Family Resource Center. The Hotline provides information about visitation, transportation, transfers, medical issues, DOC policies and procedures, as well as information about resources available in the community to assist children and families in coping with the issues that arise when a loved one is behind bars.

I mention this range of programs so that you understand that we are well grounded in the day to day operations of facilities, and that I recognize that jail and prison operations are complicated and multi-faceted.

I also want to mention that I have personally been working in prisons and jails since 1971, when I was a law student at Syracuse University. I worked in clinical programs that represented people in prison, and was then a criminal defense attorney representing men who were charged with participating in prison rebellions at Auburn in 1970 and at Attica in 1971. I later went to teach at Albany Law School in their prisoners

rights clinic, which later became the Albany office of Prisoners Legal Services of New York. Starting as early as 1973, I was visiting Erie County, Monroe County and Onondaga County jails and penitentiaries. And I have, in the course of my 35 year career in corrections and criminal justice, visited prisons and jails in 10 states, as well as Canada, England, Switzerland, France, Sweden and Ethiopia.

I also have a clear memory of the creation of the Board of Correction's minimum standards, which sprang almost directly from what we all learned – or should have learned – from the Attica Prison rebellion, and its awful conclusion on September 13, 1971, that led to its being called the most deadly one-day encounter between Americans since the Civil War.

The creation of minimum standards represented – five years post-Attica – what has been called in other contexts and court cases "evolving standards of decency." At that time, with the world watching, we all got to see what happens when prisons are overcrowded, and when the people who inhabit them are subjected to degrading conditions, including non-contact visits, restricted access to books and information, being forbidden to write or receive letters in Spanish, extended time in isolation, and many other practices that few people remember. Since that time, court cases, accreditation by the American Correctional Association, and improved professionalism within the corrections field have eliminated many of the most egregious deprivations of dignity and respect. Standards of decency continue to evolve in modern times, and these evolving standards of decency recently led to ending the execution of juveniles, a practice that existed nowhere in the Global North other than the United States until quite recently. But as civilization evolves, so do our standards. And in fact, their evolution typically implies raising, not lowering them.

Imagine, then, my surprise at learning that the Board of Correction wanted to implement new standards that actually were lower than current standards, and are apparently based on those lower standards followed by upstate jails that permit fewer square feet per person, and fewer rights and privileges than those now accorded to men and women detained in and sentenced to New York City's jails.

It is certainly true that New York City's jails and New York State's prisons are subject to higher minimum standards than most facilities across the country, for which we should be rightly proud. And these standards have likely contributed to a low crime rate, falling prison populations, and safe and secure facilities. Why would the Board now tempt fate by moving backwards? Why would the Board choose to ignore the lesson of Attica – that crowding too many people into too little space, that keeping people locked in cells too many hours, in the absence of overwhelming necessity and due process of law – leads to ruin.

I am especially concerned that these standards are being "modernized" (lowered) based on assumptions about the operation of the jails today, and the current administration of DOC. I imagine that this Board has high regard for those now in charge of the Department of Correction, a respect that I share based on long relationships. However, standards remain on the books for a very long time, and will outlast me, the current Board, Commissioner Horn, and most people here today. They should be viewed from the perspective of restraining a future administration from a return to darker times, including the darker times currently in place at many upstate and out of state facilities.

With regard to specific Standards proposed by the Board of Correction, I would make the following recommendations:

- **With regard to visitation:** I am pleased that these standards were not lowered, but they are both insufficient to meet the needs of children and insufficiently enforced to ensure that the standards are met. We know that maintaining family ties is a key component of successful reentry, and that children have an absolute right to a relationship with their parents, whether incarcerated or not. The New York City Council currently funds Osborne to provide parenting education and a special children's visiting program at Rikers Island, which offers an excellent opportunity for improved parenting and family relationships to the relatively small

number of people who can participate. It is important that the visitation of ALL visitors be lengthened, enhanced, and offered in a secure and respectful environment.

- **With regard to space:** The Department of Correction has established a dormitory at EMTC where persons who participate in our programs are housed. This is both convenient and productive for us. Despite efforts on our part (including donations of bright colored paint and décor) and on DOC's part (including staffing with program-oriented correction officers), this is still a very difficult environment in which to live, with beds covering the floor with very little space in between. If I had to live there for more than 3 days I believe I would slit my wrists. I cannot imagine putting ten more people in there. We have already had problems with fights and personality clashes, which are inevitable in any barracks-like setting, but the degree to which people are exposed in this environment strongly mitigates against further crowding.
- **With regard to uniforms:** I have no opinion about what people wear inside the main jail, but it is important that they have the opportunity to greet visitors and attend court proceedings in normal looking attire. It is very difficult to greet family members when you look like you are in your pajamas, and it is disconcerting for children to see their parents in ill-fitting, odd looking jumpsuits. Even if they are jail issue, people should be permitted to go to visits with jeans that fit and perhaps a blue chambray shirt, which is the uniform in many facilities. Children are traumatized by seeing their parents in these odd costumes, and should be considered in the decisions regarding uniforms. We also know that judges and juries are affected by the personal appearance of a defendant, and it should not be obvious that the person is incarcerated, which suggests that they are dangerous and/or guilty. Once again, jail issue clothing would be fine if it looked normal and fit well.
- **With regard to monitoring of phone calls:** I have no objection to the general notion of monitoring phone calls, but it is not clear how the system will know

which calls are made to attorneys, clergy, the IG or the Board of Correction. Obviously, there is not sufficient staff to monitor several hundred thousand calls a week, so it is assumed that only certain people's calls will be monitored, and I am not sure why the current practice is insufficient to allow this. Nonetheless, my main concern is that those individuals who are monitoring calls are not also working in the housing areas or facilities where the callers are located, because the vast majority of the information that will be gleaned is simply personal family information, including arguments and problems that are not criminal in nature but are personal and should not be used to embarrass or humiliate the caller.

- **With regard to close custody:** The most frightening change in the standards is the one that would permit people to be placed in 23-hour lock-up as a classification decision and not based on actual current behavior problems. Whether we call it the Box, the Bing, the Hole, Isolation, Special Housing Units, Segregation, this is a practice that should not be permitted in the absence of a disciplinary hearing, with appropriate due process, based on actual behavior exhibited during the current incarceration. To make such a choice based on prior crimes, prior adjustment reports from another correctional agency, or even DOC records from prior incarcerations is not justifiable. Placement of an individual into this type of housing is an extremely serious matter. For a Department already struggling with a high percentage of men and women in custody who are suffering from mental illness, the trauma inflicted by this type of lock-up will only exacerbate mental illness of those who are already struggling with it, and may well foster mental illness, not to mention suicidal ideation, by those subjected to it. Evolving standards of decency would lead us away from this practice, not toward it. I recognize that the current system of administrative segregation, protective custody, and punitive segregation may require revisions, but loosening the standards as to who may be placed in 23-24 hour lock-up is not an appropriate solution.

Thank you,

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SYLVIA RIVERA LAW PROJECT

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Testimony of Gabriel Arkles, Sylvia Rivera Law Project
Before the Committee on Fire and Criminal Justice Service
Of the Council of the City of New York
June 6, 2007

Dear Members of the Council of the City of New York:

My name is Gabriel Arkles and I am a Staff Attorney at the Sylvia Rivera Law Project. The Sylvia Rivera Law Project provides free legal services to low-income people and people of color who are transgender, intersex, or gender nonconforming. I am grateful to have the opportunity to address the Council about the proposed amendments to minimum standards for New York City jails, an issue of vital importance to transgender communities. We are deeply troubled by the process that led to the proposal of these amendments, and by the amendments themselves, which would worsen, rather than improve, the already unacceptable conditions in City jails.

The substance of practically all of the proposed changes, including those regarding surveillance of phone calls and mail, lock-in, language access, and overcrowding, will hurt prisoners needlessly and have particularly serious consequences for transgender and gender nonconforming prisoners. Because of time constraints, however, I will focus on the standard regarding uniforms.

Imagine, for a moment, what it would be like for a young woman to be arrested and told she is going to be put in a men's jail. She is forced to strip in front of male correction officers, who force her to turn over her panties, bra, and any other article of clothing that the officers think is "too feminine." If she refuses, she is attacked and restrained while other officers tear all of her clothes from her body. She is then left in a men's jail, with no bra or female underwear, wearing only those clothes left to her. If she is given any replacement clothes at all, they are men's clothes, probably do not fit, and may be filthy. That is exactly what happens to transgender women in NYC jails on a regular basis, and it is as traumatic, humiliating, and unsafe for them as it would be for any other women—possibly even more so because of the other pervasive discrimination and invalidation of their gender identities that transgender women face.

As written, the proposed amendment to the standard for clothing not only would not address this problem, it would make it worse by increasing the amount of control over every aspect of the clothing of detainees through uniforms. There is nothing in the proposed amendment to prevent transgender detainees from losing the last shreds of their ability to express their gender through their clothing. As written

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the proposed standard would also allow uniforms to further strain already inadequate laundry facilities; may result in ill-fitting, undignified uniforms, not adequate for the weather; and would subject detainees to the bias associated with jail uniforms at all court dates other than trials.

The proposed uniform standard may have had as a part of its motivation a very legitimate consideration: there are prisoners on Riker's who do not have adequate clothing of their own.

An open dialogue among stakeholders, including current and former prisoners, could have resulted in a proposal that would have addressed these and other problems with clothing on Riker's, resulting in a proposed new clothing standard that would be a win-win situation for everyone. However, because of the complete lack of community input on the standard, the proposed change will harm prisoners rather than benefit them.

Additionally, I would like to note that it is outrageous that the Board, in its sweeping proposed revisions, has not proposed any changes to improve conditions or protections for prisoners, such as changing the non-discriminatory treatment policy to include gender identity, gender expression, or disability, all forms of discrimination the City Council has already made against the law.

I believe the City Council should be deeply disturbed by this fact, given the Council's deep commitment to ending discrimination in the City of New York, including discrimination against transgender and disabled people, and given the reality that transgender prisoners are targeted for extreme physical and sexual violence, abusive strip searches, denial of necessary healthcare, and other forms of discrimination.

The proposed amendments to the Minimum Standards must not be passed. Instead, they must be withdrawn or voted down and a genuinely inclusive process must be initiated to review what really needs to change about New York City jails. I encourage the City Council to do everything in its power to make that happen.

Thank you.

Very truly yours,

Gabriel Arkles
Staff Attorney

City of New York Board of Correction
Richard Wolf
51 Chambers St. Room 923
New York, NY 10007

Re: Comment on Proposed Amendments to the Minimum Standards for New York City Correctional Facilities

April 12, 2007

Dear City of New York Board of Correction:

I am submitting this comment on behalf of the Sylvia Rivera Law Project because we are concerned with the process that led to the proposal of the amendments to the Minimum Standards for New York City Correctional Facilities and because the minimum standards fail to address the needs of transgender and gender nonconforming prisoners held in City custody. Despite alluding to non-discrimination, the BOC Minimum Standards fail to comport with basic City law around the treatment of transgender prisoners and visitors with respect to such issues as housing, clothing, names and pronouns. The following recommendations will address these gaps and present ways to (1) bring the City jails into compliance with City law, and (2) establish a threshold for the treatment of transgender people in City custody.

The Sylvia Rivera Law Project (SRLP) is a collective organization providing legal services to transgender, intersex, and gender nonconforming low-income people and people of color in New York City and New York State. SRLP also engages in policy work, public education, community organizing support, and litigation on behalf of our communities. Since its founding, SRLP has served over 700 clients, at least 40% of whom have had contact with New York's criminal justice system. SRLP's experience serving transgender people in contact with the criminal justice system makes it one of the foremost experts on interactions between transgender people and communities and the criminal justice system in New York City. SRLP's expertise encompasses the treatment and abuse transgender people suffer while in Correction custody.

SRLP is deeply concerned that the BOC seems to be abandoning its role as an oversight agency that must hold the Department of Correction (DOC) accountable to minimal standards for the humane treatment of prisoners in DOC care, custody, and control. We are particularly upset that BOC proposed amendments that would severely restrict the rights of prisoners without first having meaningful public discussions and debates involving the communities that are most impacted by the proposed changes. We call on BOC to withdraw all of its proposed amendments and to initiate a fair, full, open public process that meaningfully includes all the stakeholders, including prisoners; former prisoners; families, friends, and communities of prisoners; community organizing groups, service providers, and advocacy groups that work with these communities; correction staff and unions; and DOC. It is particularly important that people of color, low-income people, disabled people, and transgender, gender nonconforming, intersex, lesbian, gay, and bisexual people are central to any process that results in proposed amendments to the minimum standards because of the highly disproportionate impact of New York City correctional facilities on these communities. We believe that the lack of such a process has

resulted in BOC's failure to consider and incorporate minimum standards ensuring that transgender and gender nonconforming people in City custody are treated with respect and dignity and that their human rights, Constitutional rights, and rights under City law are protected.

The recommendations below do not address all of the proposed amendments or the entire minimum standards, but rather focus on those aspects that are of particular concern to transgender and gender nonconforming people and that are less likely to be addressed by organizations without our particular expertise. However, the Sylvia Rivera Law Project opposes the many amendments that will further restrict and negatively impact the lives of prisoners and their communities, including the elimination of the standards for Spanish speaking staff; the permission for warrantless surveillance of telephone communications, packages, and mail; the lowering of the overcrowding standard, and the denial of contact visits during the first 24 hours of confinement. These amendments seem to have been adopted only for the convenience of DOC and have the potential to profoundly damage transgender and gender nonconforming prisoners in addition to all other prisoners and their communities.

After development in a fair and inclusive process, we believe BOC should adopt amendments that reflect the following recommendations and concerns in the minimum standards.

Discrimination policy and training: Gender identity, gender expression, and disability should be added to the non-discrimination statement in the minimum standards at § 101(a). Furthermore, the minimum standards should require training for all uniformed and civilian staff on how to work appropriately, respectfully, safely, and effectively with members of marginalized communities, including transgender and gender nonconforming prisoners and visitors.

In one instance, a transgender woman[1] reports that a C.O. viciously attacked her in the intake area of a DOC facility. The C.O. reportedly punched her and slammed her head into the wall while telling her "you fucking faggot, I'll show you who's boss." Later she was told "you fucking faggot, that's why there's no gay housing anymore, so you'll die here."

In another case, a C.O. ripped the hair out of a woman's head, telling her "you're not a woman" and grabbing her breasts so hard they popped.

Explicitly prohibiting discrimination against transgender and gender nonconforming people and requiring training of all staff, including line-staff, on how to interact respectfully with transgender people and comply with the minimum standards and city state and federal law will begin to secure the respectful treatment of transgender prisoners in DOC custody and transgender visitors to DOC facilities.

Clothing and grooming: The minimum standards should not be amended as proposed to permit

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[1] Transgender women are people who were assigned male at birth and who now identify as women. Transgender men are people who were assigned female at birth and who now identify as men. Transgender women are women and transgender men are men regardless of what medical or surgical treatments they have or have not received. Not all transgender people identify as women or men. All transgender people can be at increased serious risk of sexual and other physical assault when incarcerated with non-transgender men because they are likely to be perceived as female and/or feminine.

DOC to require facility clothing or uniforms. Rather, they should be amended to prevent DOC from confiscating or refusing to permit prisoners to wear clothing that is "women's clothing" or "men's clothing" or forcing prisoners to conform to gender stereotypes through grooming or dress.

Last summer, a transgender woman reported she had her bra ripped from her body by an extraction team when she was transferred to a male DOC facility. Despite written permission from the medical department to have a bra, correction officers threw her to the ground, immobilized her, and had an extraction team rip her bra from her body. The same woman had her bra repeatedly confiscated and was refused to be allowed to wear her bra even though she had permission to do so.

Another transgender woman recently reported experience of being forced to strip in front of male officers and turn over her jacket, her bra, and even her panties because they were "women's clothing." She was given a dirty, over-sized men's jacket to wear instead of her own. This experience was humiliating and traumatic for her.

Transgender women have reported having their bras and panties confiscated by C.O.s; being told they couldn't wear their own clothes and being forced to wear men's clothes; and being told they could not wear blouses or shirts off their shoulders.

A transgender woman reported being forced to cut another transgender woman's hair and have her hair cut by C.O.s. These women were forced to use their cut hair to mop up water that flooded their cell.

Uniforms would only worsen the current situation by sanctioning greater DOC control over prisoners' clothing, with major potential for damage to the dignity, safety, mental health, and well-being of transgender prisoners. Prohibiting DOC from confiscating or refusing to permit prisoners to wear clothing that is "women's clothing" or "men's clothing" or otherwise forcing prisoners to conform to C.O.s' gender stereotypes through grooming or dress will curb these assaults on transgender prisoners, help maintain consistency across facilities, and bring DOC better into compliance with law.

Lock-in and Optional Lock-out: The proposed amendment to § 1-05 or any similar amendments should not be adopted.

The proposed amendment would allow DOC to keep all people in close custody, even those there only for their own protection, in their cells without any opportunity for optional lock-out. It is well-documented that the intense isolation of 23-hour lock-in produces terrible mental and emotional strain and at times irreparable damage to the person confined. Many prisoners, including transgender and gender nonconforming people, are placed in close custody simply because they fear for their safety in general population and not because they have broken any rule or tried to hurt anyone. In effect, prisoners could be punished simply for being transgender or otherwise vulnerable. Such drastic isolation is not necessary, justified, or acceptable and will have a disproportionate impact on transgender and gender nonconforming prisoners.

Names and Pronouns: The minimum standards should require that transgender prisoners and visitors are treated with dignity and addressed appropriately and consistently with their gender identity.

Transgender women and men are routinely addressed using inappropriate names and pronouns while in DOC custody. A transgender woman reported that C.O.s insistently addressed her using male pronouns and refused to address her using the appropriate name. Legal advocates have reported the same. For example, during a legal visit, C.O.s angrily insisted they would continue to refer to the woman prisoner as "he." Transgender friends and family members are also deterred from visiting their friends or family members in NYC jails because they expect that they may be subjected to the same treatment.

Housing: The minimum standards should require that transgender people be housed appropriately, with gender identity and safety primary factors for placement, as required under law. Transgender women should generally be housed with other women, rather than with men, regardless of their anatomy.

Transgender women in men's NYC jails report that men repeatedly assault them, verbally and physically, with impunity. In one instance, men laid in wait until lights out to sexually assault a trans woman held on Riker's. Her screams for help went unanswered. One woman reported being leered at while taking a shower, despite waiting until men were clear of the area. Another reported repeated threats of rape while being housed in Protective Custody on Riker's.

Requiring that safety needs and gender identity are the primary factors for deciding the gender placement of transgender prisoners would eliminate much of the opportunity for such assaults and would bring DOC more into compliance with law.

Searches: The minimum standards should limit the use of searches, particularly strip searches, to the absolute minimum legitimately required for security purposes. Furthermore, the standards should limit the number of officers present during searches and should require that gender identity and safety are the primary considerations in determining the gender of the officer who may perform searches of transgender prisoners. Transgender women should generally only be searched by women.

Transgender women and men report being strip searched repeatedly and unnecessarily and displayed to other officers. Displaying transgender people for the curiosity, amusement, or gratification of male officers is a common problem in jails.

Transgender prisoners also report being forced to submit to "genital checks": ordered to drop their pants and submit to correction staff inspecting their genitals. These invasive searches are little more than sexual assaults and violate transgender people's rights under law.

A transgender woman held over the summer was repeatedly groped by male officers under the pretense of pat-frisks. The officers sexually abused this woman, throughout her detention, under the pretense of pat-frisks and in violation of NYC DOC Directive 4508 directing women to be

pat-frisked by women. When the woman refused to allow men to grope her, she was tortured by being denied food and water.

A transgender woman going to visit her boyfriend in a DOC facility was sexually assaulted by an officer during a search. The C.O. reached into this woman's panties, grabbed them and pulled them down exposing her crotch. Then, the C.O. called a male C.O. over who grabbed the woman's pants, pulled them down to her ankles and forced her to face the wall and spread her legs.

These sexual assaults of transgender people on the basis of gender are not only unconscionable but also illegal under state and City law. Making the changes described above will greatly lessen the chance of these egregious abuses of transgender prisoners and visitors.

In conclusion, we have advanced the above recommendations because we believe they are important to incorporate in amendments *following* an open process including all the relevant stakeholders. We urge BOC not to adopt the proposed amendments to the minimum standards at this time. We believe that the best policies can only result from a truly fair and inclusive process. Thank you for your attention.

Very truly yours,

Gabriel Arkles, Esq.
Staff Attorney
Sylvia Rivera Law Project

STATEMENT
By

Makeba Lavan

THE OSBORNE ASSOCIATION

to

City Council Hearing
on the proposed revisions to the
NEW YORK CITY
BOARD OF CORRECTION
Minimum Standards

June 6, 2007

Makeba Lavan

Youth Ambassador

NYC Initiative for Children of Incarcerated Parents

The Osborne Association

Good Morning. My name is Makeba Lavan. I am a Youth Ambassador at The Osborne Association. I co-facilitate a Saturday Arts Workshop for children of incarcerated parents, I provide mentorship to children impacted by their parent's incarceration, and I also spend my Sundays working in the Children's Center at Sing Sing Correctional Facility. Here, I interact with the families of incarcerated men, including many children. Seeing their anguish when they are separated gives me the passion to advocate for children's rights. I can relate to their feelings because my greatest experience with this issue is my own experience of my mother's incarceration. The foundation of my advocacy today and every day is the *Bill of Rights for Children of Incarcerated Parents* which I believe can be a tool towards developing not only minimum standards, but *best practice* standards.

When policies are developed or revised, their impact on children should be considered. However, unless the policy or standards are directly child-related, this rarely happens; although every policy in some ways affects children's lives. Additionally, standards are only as good as their implementation. In addition to the standards complying with the *Children's Bill of Rights*, monitoring that the Standards are upheld is critical. For example, the Standard may require that the visiting area be clean and supplied with adequate items, but children and their escorts may find that when they go to the visiting room bathroom, floor tiles are missing, broken toilet paper holders and toilet paper rolls strewn across the floor, the walls are dirty, the sinks don't work, and stall doors don't close. While this may seem trivial, it sends a powerful and damaging message to children—"This is what you deserve, and really, you don't matter." Children walk out of the visit feeling that they do not deserve to be in a clean and safe

environment. They have done nothing wrong, but their experience feels and looks like punishment.

As we address the Board of Corrections' proposed minimum standards today, we would like to recommend a new approach: that these standards be checked against the *Children of Incarcerated Parents Bill of Rights*. If the Standards do not violate these rights and do not send damaging messages to children about the kind of world they live in—then the standard can remain. If it violates these rights or conveys to children that their lives and feelings and well-being do not matter, the standard should be revised. These rights, as they were originally developed by the San Francisco Children of Incarcerated Parents Partnership, are:

1. **I have the right to be kept safe and informed at the time of my parent's arrest.**
2. **I have the right to be heard when decisions are made about me.**
3. **I have the right to be considered when decisions are made about my parent.**
4. **I have the right to be well cared for in my parent's absence.**
5. **I have the right to speak with, see and touch my parent.**
6. **I have the right to support as I face my parent's incarceration.**
7. **I have the right not to be judged, blamed or labeled because of my parent's incarceration.**
8. **I have the right to a lifelong relationship with my parent.**

These rights are basic human rights, but they are not currently being upheld. Of the almost 14,000 people who are incarcerated on Rikers Island, most are parents. Many of the close to 1,600 visitors a day are children. Acknowledging the well-being of children

through criminal justice policies does not mean being "soft on crime" or discipline. It means teaching and modeling that there are consequences for actions, but that these are appropriate, clear, and not randomly and unfairly inflicted on the children and family of those in custody. The difference between punishment and discipline is the root of the word DISCIPLINE—its Latin root *disciplina* means **teaching.** The Board of Corrections and DOC OC have an opportunity to be part of teaching accountability and responsibility; yet, currently what is more often taught is that punishment is cruel and unnecessary, disrespectful, mean and unfair. These are the more common messages that children walk away from a DOC facility having learned—that the *system, laws and policies* are mean and unfair, that people in uniforms are the "bad guys," and that their parents are the victims.

Among the youth that I work with, I have never heard a positive story about a visit to Rikers Island, or any jail or prison for that matter. Children already have a lot to face if their parent is incarcerated, negative visiting experiences should not be added to their pain. My personal memories of visiting my mother in prison are not any better. When my mom was first incarcerated, I wasn't even notified. I don't even know if anyone took the time to find out if my mother had children. Prior to my visit, I had not seen her in three years. I didn't even know if she were alive or dead. Because of this, I couldn't help wondering what she would look like when I finally saw her. After hours of travel (including a plane trip and an overnight stay upstate, free courtesy of The Osborne Association), I finally got the chance to find out. My mother has always been a very feminine woman. When I finally saw her, she was barely recognizable. My mother's hair was cornrowed straight back like a man's! It was very unflattering to her round, youthful

face. It was also very disturbing to me. She was also wearing construction boots and a dark green shirt/pants set. The way she looked did not correspond with the mental picture I had of my mother. As she sat down and began to talk, my eyes continually wandered back to the guards because their scornful gazes practically burned holes into my mother and me. They were clearly judging us. Their eyes asked mom how she could have gotten herself locked up. They asked me how I could visit my guilty mother in jail. What they never figured out was that I had done nothing wrong. Also, I love my mom and I have the right to maintain our mother/daughter bond, even through incarceration.

I feel that a lot of people just judge prisoners, saying "They should have thought about that while they were committing a crime." I cannot disagree, however, every situation is different. Why should the family, particularly children, be sentenced for a family member's crime? This does not have to be this way. If the BOC required minimum standards that upheld the *Children's Bill of Rights*, they could ensure that DOC's policies taught children lessons about responsibility and accountability, actions and consequences rather than punishing them for their parents behavior. They could be part of a positive message that safeguarded children's well-being and promoted children fulfilling their potential, rather than filling the next generation of jail cells.

It *is* possible to take security concerns seriously and to implement policies that reduce the likelihood of contraband and violence, while also being mindful of the children and families who care deeply about the people in DOC's custody. The current policies and practices of the criminal justice system, including NYC DOC, convey that sacrificing children's well-being is the acceptable collateral damage of incarceration; that this is the unavoidable cost of protecting society. In revising the minimum standards, the

Board of Correction's has an opportunity to take a stand that this will no longer be so—we will not sacrifice children's well-being and bright futures in exchange for holding their parents accountable; we will no longer accept that negative and damaging messages, inconsiderate treatment, and painful experiences for children whose parents are in DOC custody are an inevitable side effect of carrying out the mandate of Corrections.

Speaking as children of incarcerated parents and as Youth Ambassadors who have worked with many children whose parents are or were incarcerated, we recommend an audit of the proposed minimum standards that checks each item against the *Children's Bill of Rights*. We recognize the importance of maintaining security and agree that people should be held accountable for their actions. Yet, we also believe there is a way to develop correctional policies that consider a child's perspective and achieve penal goals while also safeguarding the next generation. We owe it to the 2.4 million children in this country who on any given day have a parent who is in jail or prison. The BOC must consider the well-being of children as within its purview – the numbers of children affected are too great and children are too important not to.

To demonstrate that this is possible, we have written what we consider to be a **model minimum standard for visiting**; this proposed standard follows the format of the current BOC minimum standard, but is revised so as to comply with the *Children's Bill of Rights.* We recommend that BOC put all of its proposed minimum standards to this same test and offer our assistance in this process.

Contact:

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Children of Incarcerated Parents:
*A Bill of Rights**

1. **I have the right to be kept safe and informed at the time of my parent's arrest.**

2. **I have the right to be heard when decisions are made about me.**

3. **I have the right to be considered when decisions are made about my parent.**

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8. **I have the right to a lifelong relationship with my parent.**

*These Rights were developed by the San Francisco Partnership for Children if Incarcerated Parents. More information is available at www.cwla.org .

For more information about the
Osborne Association's Initiative for Children of Incarcerated Parents and the **Saturday Youth Arts Program,**
please call (718) 657-6560.

Proposed Minimum Visiting Standard

THE OSBORNE ASSOCIATION

This Standard upholds the Children's Bill of Rights.

April 17, 2007

SUBJECT: PROPOSED REVISIONS TO MINIMUM STANDARDS FOR NEW YORK CITY JAILS

Proposed Minimum Visiting Standard
This is a revision of the current and proposed BOC minimum visiting standard. Where specific changes or new additions are made, justifications are also included within the document.

Most importantly,
this Standard does not violate the Children's Bill of Rights.

Revision of 1-09 Visiting

(a) Policy

Prisoners are entitled to receive personal visits of sufficient length and number.

When the prisoner is a parent (or caregiver/ guardian) and the visitor(s) are their children or minors with whom they have a parental or otherwise significant relationship (i.e. including stepparents, caregivers, guardians, grandparents, foster parents, etc.) sufficient length and number of personal visits shall be understood to mean no less than:

(1) Sufficient length: personal visits of at least 2 hours per visit (the time of the visit beginning when the child and parent are brought together on the visit floor).
(2) Sufficient number: personal visits at least twice a week.

For the purposes of this Policy, "child/ children" shall refer to children ages newborn through their 18th birthday.

(b) Visit Processing and Waiting Areas

The Department shall convey to all Correctional staff that visitors should experience the processing of visits as a respectful, expeditious, and courteous procedure prior to and after all visits.

(1) The Department shall make every effort to minimize the waiting time prior to a visit. The average waiting should not be more than 30-40 minutes and visitors will be given a ticket (following the Department of Motor Vehicles) when they first begin the visiting process which indicates the time they arrived.

[Justification:
This will provide the Department and visitors with an accountability mechanism and send the message to Correctional Staff at the visitor processing area that this process must be expeditious at all times.]

(2) Visitors shall not be required to wait outside a facility unless adequate shelter is provided and the requirements of [1-10] 1-09 (b) (2) are met. Adequate shelter shall be understood to mean that an enclosed, roofed area with seating able to comfortably accommodate a minimum of 20 people is available. A bathroom facility which includes a baby-changing table must also be available to all waiting visitors (including those waiting outside).

(3) All waiting and visiting areas shall provide for at least minimal comforts for visitors, including but not limited to:

i. Sufficient seats to accommodate the maximum number of visitors
ii. Children's play area and items for children including toys, games, books
iii. Access to bathroom facilities which include infant changing tables (in both the male and female facilities) and access to drinking water throughout the waiting and visiting periods
iv. Access to vending machines for beverages and foodstuffs during *both* the waiting and visiting periods
v. Access to Spanish-speaking employee or volunteer during the waiting period.

(4) The Department must provide adequate and secure locker-space for visitors carrying items that are contraband and/ or not allowed inside a facility. Locker space must be able to accommodate 75% of the maximum number of visitors for the particular facility's visiting room AND each facility must have an alternate secure arrangements for visitors' belongings should all the locker space be utilized.

[Justification: It is unreasonable to expect that every visitor will be familiar with DOC policy and/ or have a vehicle in which to store necessary items.]

(5) On particularly crowded visiting days, no visitors shall be turned away. Efforts to give priority to the elderly and caregivers of children, as well as those traveling over 100 miles, shall be given priority. If necessary, visits in process may be cut short beginning with those who are nearing the completion of their allotted visiting time; in other words, those first in will be the first to be asked to leave.

(6) All visiting rules, regulations and hours shall be clearly posted in English and Spanish in the waiting and visiting areas at each facility. Any posters with photos indicating the results of contraband or violence within the facility which are meant to alert visitors to the seriousness of this shall be

posted above children's viewing level and whenever possible, children's exposure to such disturbing photos should be prevented.

(7) The visiting processing policy detailing the above as well as other visitor information must be available to the public as required by [1-10] 1-09 (i). This includes being posted on posters in every facility -- as indicated in [1-10] 1-09 (b) (6)-- on the website, and available on the DOC inmate information line. It should be explained that this policy is implemented to ensure that no-one is turned away.

Visiting Schedule

(8) Visiting hours may be varied to fit the schedule of individual facilities but must meet the following minimum requirements for detainees:

i. Monday through Friday. Visiting shall be permitted on at least three days for at least eight consecutive hours. A minimum of two of these days must include outside of business hours (9am to 5pm). Outside of business hours shall be understood to mean at least 2 hours outside of business hours (for example, 11am to 7pm; 12pm to 8pm; 7am to 3pm). Visiting shall include a minimum of three evenings during the week for at least three consecutive hours between 6pm and 10pm.

ii. Saturday and Sunday. Visiting shall be permitted on both days for at least eight consecutive hours between 9am and 8pm.

(9) Visiting hours may be varied to fit the schedule of individual facilities but must meet the following minimum requirements for sentenced prisoners:

i. Monday through Friday. Visiting shall be permitted on at least two days for at least eight consecutive hours. Both of these days must include outside of business hours and at least one must include an evening visit for at least three consecutive hours between 6pm and 10pm. Outside of business hours shall be understood to mean at least 2 hours outside of business hours (for example, 11am to 7pm; 12pm to 8pm; 7am to 3pm).

ii. Saturday and Sunday. Visiting shall be permitted on both days for at least eight consecutive hours between 9am and 8pm.

(10) The visiting schedule of each facility shall be made available by a contact person at each facility as well as The Department, and in compliance with [1-10] 1-09 (i).

(11) Visits shall be at least 2 hours and may be longer. This time period shall not begin until the prisoner and visitor meet in the visiting room.

(12) Sentenced prisoners are entitled to at least 3 visits per week with at least one on a weekend or evening as the sentenced prisoner wishes. Detainees are entitles to at least 4 visits per week with at least one on an evening or the weekend, as the detainee wishes. For both detainees and sentenced prisoners, visits by properly identified persons providing services or assistance-- including lawyers, doctors, religious advisors, public officials, therapists, counselors, social workers, and media representatives-- shall not count against this number.

(13) There shall be no limit to the number of visits by a particular visitor or category of visitors.

(14) In addition to the number of visits required by paragraphs (c) (1), (2), and (5) of this subdivision, additional visitation shall be provided in cases involving special necessity, including but not limited to emergency situations, particular child-related circumstances, and situations involving lengthy travel.

(15) Prisoners shall be permitted to visit with at least three visitors at the same time, with the maximum number determined by the facility but no less than 5. Should a prisoner be the parent, legal guardian, or otherwise significant person in the life of a child or children, including more than 5 children, an exception to the limit on visitors shall be made. Arrangements must be made to allow prisoners to visit with all of their children at one time.

(16) Visitors shall be permitted to visit with at least two prisoners at the same time, with the maximum number to be determined by the facility.

(10) If necessitated by high visit volume, a facility may not reduce the number of visitors, but may shorten the visit length beginning with those who first arrived as outlined in [1-10] 1-09 (b) (5). This policy must be posted in each facility as well as in the venues detailed in [1-10] 1-09 (i).

(c) *Visiting Room*

(1) A visiting area of sufficient size to comfortably accommodate the average number of visitors (adults and children) and to meet the requirements of this Section shall be established within each facility. This is to include a Children's Center/ play area of sufficient size to allow for parents and their children to be in this designated area together, and allowing for the comfortable interaction of at least 10 families (minimum of 20 people) at a time.

(2) Visiting area and the Children's Center/ play areas shall be designed so as to allow physical contact between parents (inmates) and their visitors as required by [1-10]1-09

(3) Additionally, the general visit area must make available to visitors with children under age 18: age-appropriate toys and games, a diaper changing table in both the men's and women's bathrooms; a process for bringing in bottles or any diet/ health-specific item for a child.

(4) The Department shall make every effort to provide and utilize outdoor visiting areas during the warm weather months. Outdoor areas shall include at least picnic tables and chairs.

(d) Inmate Visit Clothing

(1) Inmates shall not be required to wear jumpsuits and flip flops during visits, but *where The Department has found that personal clothing poses a security breach or threat*, shall be issued City pants/ slacks, a collared shirt (with the option of long or short-sleeves), and City issued sneakers/ shoes. The Department's criteria for determining that personal clothing poses a security threat must be uniform across all DOC facilities and must be made available to the public via its website and other venues as outlined in [1-10] 1-09 (i).

(2) [1-10] 1-09 (d) (1) shall hold true for both detainees and sentenced inmates.

(e) Initial Visit

(1) Each detainee shall be entitled to receive a visit within 24 hours of his/ her admission to the facility. This visit shall be a monitored contact visit as are detainee visits after the first 24 hours. A decision by the Department to require a non-contact visit must be justified and documented, with a copy given to the detainee, the family and the visitor.

(2) If a visiting period scheduled pursuant to [1-10] 1-09 (c) (1) is not available within 24 hours after a detainee's admission, arrangements shall be made to ensure that the initial visit required by this subdivision is made available.

(f) Visitor Identification and registration

This section can remain the same (as is currently written in [1-10] 1-09

(e)) with the revision to (1) to read as follows:

(1) Consistent with the requirements of this subdivision, any properly identified person shall, with the prisoner's consent, be permitted to visit the prisoner. Proper identification shall include one or more of the following [list acceptable forms of ID here]. Information about identification required for adults and minor visitors, including children in foster care, must be made available to the public as outlined in [1-10] 1-09 (i). Alternate forms of ID for children must be listed, in particular for children and youth in foster care who may not have copies of their birth certificate.

(g) Limitation of Visiting Rights and Termination of Visits

Added to this section should be the following:

Visits with children must be understood to hold priority and be supported for children's sake whenever they take place. Consistent with this standard, visiting rights and visits should only be limited or restricted in the exceptional and documented cases where a child's well-being is threatened. Non-contact visits are harmful to children and should not be considered a viable option when the visitors include minor children.

(3) When the visits are with minor children who have a significant relationship with the detainee or prisoner (who is their parent, legal guardian or significant provider) very careful consideration should be given before visits are in anyway restricted. The harm done by preventing a child from seeing his / her parent/ guardian must be weighed against the specific security threat that a contact visit with the child and escort would actually pose for the facility. As with [1-10] 1-09 (h) (1) and (2), this decision must be documented and written notification given to the visiting parties and the prisoner. An appeal process must be in place and detailed in the venues outlined in [1-10] 1-09 (i).

(4) Visits in process shall only be terminated by The Department if the visitor's and/ or child's safety and well-being is threatened or the prisoner continues to disregard the visiting rules despite multiple warnings. When children are present, this must be handled very carefully protecting them from witnessing any adversarial interaction to the extent possible. Implementing this will be covered in the training outlined in [1-10] 1-09 (k) (2).

(i) Access to visiting information

Accurate, regularly updated, user-friendly visiting information must be made accessible and available to the public.

(1) Venues through which information about visiting is made available and accessible to the public must include:

i. The Department's Inmate Information Hotline (718-546-0700) with an option for speaking to a Department staff person between 9am and 5pm, 7 days a week who is knowledgeable and courteous, as well as an option in Spanish for how to access information in Spanish;
ii. The Department's website: www.nyc.gov/doc
iii. The City's 311 information line
iv. Posters and written information (in at least English and Spanish) at all The Department's facilities and Criminal Court houses

(2)Visiting information made available at the above venues shall include:

i. visiting days and hours, including any formulas for calculating an inmate's visiting schedule; visiting Holidays or special schedules; and accessing information about inmate's visits being restricted, suspended or prohibited;
ii. length and allowable frequency of visits;
iii. allowable visitor clothing/ dress and allowable items (including for visitors bringing infants and children);
iv. storage information for items that cannot be brought into the visiting room;
v. description of the visiting processing procedure and estimated time to allow for entire visiting process (from start to finish); this should include information about the policy on crowded visiting days and Holidays;
vi. description of visiting room, including availability of vending machines, child play areas, child changing tables, what inmates will be wearing, capacity of visiting area;
vii. location of facilities and transportation information
viii. information about locating an inmate who has been transferred to State custody (DOCS);
ix. referral to source of information regarding bringing packages and money for an inmate
x. information for registering feedback, both positive and negative, about Department procedures as outlined in [1-10] 1-09 (j); this should include information about what happens to the feedback and how to follow-up afterwards
xi. information about how to speak with someone directly.

(3) The information outlined in [1-10] 1-09 (i) (2) shall be monitored and updated by Department staff as needed, but a minimum of every 3 months.

[Justification:
There is currently only minimal information available for visitors on DOC's website and through the inmate information hotline. If a person calls 311 for this information, he/ she is connected to this information hotline which provides very little information and takes extremely savvy navigating abilities to reach a human being. When a person is reached,

questions are often responded to with annoyance, speed, and general information. For example, a call placed to find out about items that could be brought in for an infant (bottles, diapers, etc.) was responded to with quick, "Well how often does your baby need to eat anyway?...You can't bring in a diaper; people bring drugs in that way." This is not only not helpful, but also portrays an unprofessional, adversarial relationship between DOC and the public. It would serve DOC well to professionalize its interactions with the public and the minimum standards should address interaction with the public and make more information accessible to them.]

(j) *Quality Assurance and Accountability*
DOC must establish at every facility, through its Inmate Information Hotline and on its website **a public feedback mechanism** for visitors and others to register complaints/ grievances, as well as compliments and positive experiences. DOC must establish quality assurance mechanisms to ensure that the BOC minimum standards are being upheld.

[Justification:
This would serve to improve relationships with the community and family members of those in DOC custody. Currently, there is much discrepancy between the existing standards and Operations Orders (i.e., policy) and actual practice. A monitoring mechanism would help to control for consistency between policy and practice. Accountability must extend both ways—as we hold people accountable for breaking the law, DOC must be accountable to uphold and comply with the Minimum Standards governing its actions.]

(k) *Correctional Officer training*

(1) At least two hours of general Correctional Officer training, as well as training for DOC administrative and civilian staff, shall address an inmate's family-related issues, including the impact of incarceration on a family and on children.

[Justification: Given the fact that most people who are arrested and incarcerated are parents, and that many Officers and DOC staff will at some point come into contact with prisoiners' families and/ or work a visiting room shift, this should be a required and standard part of Officer and DOC staff training. There are also benefits for security purposes and the reduction of disciplinary infractions when incarcerated parents' concerns about their children are understood and addressed. For example, understanding that a parent can have his or her parental rights terminated (permanently severed) if he/ she does not have contact with the child or foster care agency for 6 months is important information for all COs to have.]

(2) Department staff, including Correctional Officers who are regularly assigned to the visiting room or visiting processing area (i.e. who have regular and routine contact with an prisoner's family members and children) should receive a minimum of an additional 3 hours of training on family dynamics and the impact of incarceration on children.

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[Justification:
This minimum standard will benefit not only children and visitors, but also the COs staffing the visit room. It is not uncommon to hear Officers state that they do not like working the visiting room because it is painful to watch or they do not understand why children are brought to see their parents. Sometimes with the best of intentions, Officers intervene in parent-child interactions in ways that actually worsen the situation. The therapeutic aspect of visits in some cases means that a child or parent may cry or have a verbal dispute, but that this is an important step on the way to healing. Officers would feel more confident and less anxious about recognizing positive interactions from those that might escalate and from learning ways to de-escalate a child's anxiety about leaving the parent at the end of visits. Such training could improve the visiting room experience for both visitors and DOC staff.]

Additionally:
BOC and The Department should consider creating a Citizen/ Family Review Board and minimally should increase the transparency of its procedures regarding interacting with the public, including the children and family members of those in its custody.

TESTIMONY

OF

DE AVERY IRONS

JUVENILE JUSTICE PROJECT ASSOCIATE

CORRECTIONAL ASSOCIATION OF NEW YORK

BEFORE THE FIRE AND CRIMINAL JUSTICE SERVICES

COMMITTEE OF THE NEW YORK CITY COUNCIL

JUNE 6, 2007

NEW YORK CITY COUNCIL
NEW YORK, NY

consistently reported that staff instigate, perpetuate, sanction, or ignore much of the violence in the dormitories. Because there is only one correctional officer patrolling eeach dormitory containing up to 50 prisoners, the staff members rely on the cooperation of the prisoners to maintain some semblance of order in the housing areas. In the adolescent units, this dynamic takes on a particularly insidious form. We have received dozens of independent accounts from youth that staff, in effect, appoint a few youth to serves as "teams" that maintain control of the dormitory. Youth reported to us that staff members allow gang-affiliated youth and/or youths with the toughest reputations for fighting to control other prisoners in the dormitories.

Young people describe how these "teams" control aspects of life in the dormitories including the distribution of food, interactions in the dayroom, and the exercise of telephone privileges. J.V., a 19-year-old from the Bronx, described to use his experience in a Rikers dormitory: "You had to join a gang so you could live. If not, in every house they want to take your food, your phone call . . . If you want to be by yourself you don't want to live in Rikers. If you're 16, 17, 18, it's like hell. Jeffrey, also age 19 from the Bronx characterized life in the dormitories in the following terms: "Somebody's always getting violated, punched, choked out – all through the house until you go to sleep . . . You have to fight to win or [you are] going to wind up hanging yourself from a towel." Given these descriptions of the conditions in the adolescent units, it is extremely troubling that the Board is considering an amendment that would exacerbate violence in the dormitories.

We have not only urged the Board to reject the proposed amendment to increase the number of prisoners in the dormitories, we have also urged the Board to explore promoting new standards to increase safety and security in the housing areas. Most importantly, we have urged the Board to consider the special needs of adolescents in DOC custody. It is important to note that New York is just one of two states that automatically treats 16-year-olds as adults in the criminal justice system. Although the New York State penal code considers 16- and 17-year-olds to be adults, most citizens would recognize that adolescents are indeed developmentally different than adults. Adolescence is a critical transition phase from childhood to adulthood. Currently, the conditions that adolescents experience in DOC facilities is completely antithetical to helping young people develop into healthy, successful adults. We ask that you would urge the Board of Correction to promote best practices such as staff training in adolescent development, structured youth programming (particularly in the after-school and evening house) and great availability of counseling and mental health services for adolescents.

Thank you again, for this opportunity to testify today.

Good morning. My name is DeAvery Irons and I am the Juvenile Justice Project Associate at the Correctional Association of New York. Founded in 1844, the Correctional Association of New York is a non-profit criminal justice advocacy organization. For over 160 years, the Correctional Association has visited New York State prisons and has made recommendations to policymakers and lawmakers on ways to improve conditions of confinement. The Juvenile Justice Project seeks to create more fair, humane, and effective policies for young people who enter our juvenile justice and criminal justice system. The Juvenile Justice Project coordinates the Juvenile Justice Coalition, a coalition of organizations that work with youth involved in the juvenile justice and criminal justice systems. In additions, we run a youth leadership program that works with formerly incarcerated youth.

On behalf of the correctional association of New York and the Juvenile Justice Project, I would like to thank the Fire and Criminal Justice Services Committee for the opportunity to present this testimony on the Board of Corrections proposed amendments to the Minimum Standards for New York City Correctional Facilities.

As an organization that advocates on behalf of incarcerated youth, we believe that some of the Board's proposed amendments will diminish the safety and basic rights of adolescents incarcerated on Rikers Island. Of particular concern to us are the Boards proposed amendments that would enable the Department of Correction to increase the number of detainees it confines in dormitories. The changes would reduce the required square footage per inmate and allow the DOC to confine as many as 60 detainees in dormitories. The Board asserts that these amendments would not adversely affect safety or security. We strongly disagree with this conclusion.

In proposing an amendment to increase the number of detainees in the dormitories, the Board has pointed to a marked drop in slashings and stabbings as evidence of the decreased violence in DOC facilities. While this decrease is to be commended, we believe that it is not the only measure of violence in the dormitories. In fact, we believe that violence continues to be endemic in the adolescent dormitories and that one of the root causes of this violence is the one-to-fifty staff to prisoner ratio in the dormitories. Increasing the allowable number of young people in a housing area to 60 will further undermine safety for prisoners and staff members.

Through our coalition and youth leadership work, we have spoken with dozens of young people who have been detained at Rikers Island. The youth have consistently described troubling levels of violence in the housing areas, particularly at the Robert N. Davoren Center (formerly the Adolescent Reception and Detention Center) a facility which confine the 16 to 18 year-old male detainees. Young people describe an atmosphere characterized by daily fights, power struggles, and intimidation. One young man summed up his experiences in the adolescent housing areas in the following terms: It's like battle camp for kids, the survival of the fittest."

The overarching concern reported to us is the failure of correctional officers to prevent or effectively respond to violence in the adolescent housing areas. Youth

TESTIMONY OF THE PUERTO RICAN LEGAL DEFENSE & EDUCATION FUND

IN OPPOSITION TO THE PROPOSED AMENDMENTS TO THE MINIMUM STANDARDS

June 6, 2007

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TESTIMONY OF THE PUERTO RICAN LEGAL DEFENSE & EDUCATION FUND

IN OPPOSITION TO THE PROPOSED AMENDMENTS TO THE MINIMUM STANDARDS

June 6, 2007

Good morning. My name is Ghita Schwarz and I am Associate Counsel at the Puerto Rican Legal Defense and Education Fund (PRLDEF). Since 1972, PRLDEF has been a leading force in the fight for the civil rights of Latinos. Using the power of the law as well as education and advocacy, PRLDEF protects opportunities for Latinos to succeed in work and school and to sustain their families and communities. We are grateful to the City Council for this opportunity to discuss these important issues and their impact on the community.

PRLDEF strongly opposes the Proposed Amendments to the Minimum Standards for New York City Correctional Facilities. While we object to any reduction in the Minimum Standards, I will confine my remarks today to the amendments that affect language access for prisoners who do not speak English.

Since 1978, Section 1-01 of the Minimum Standards, titled "Nondiscriminatory Treatment," has required that every facility have a "sufficient number" of employees and volunteers who are fluent in Spanish. Bilingual staff facilitate access to confidential health care, help inmates understand crucial rules and procedures, and provide numerous

forms of assistance to Spanish-speaking prisoners. For almost thirty years, New York City has recognized that without regular and stable access to Spanish-speaking staff, prisoners who are not fluent in English face enormous barriers to equal treatment.

The proposed amendments to Section 1-01 would eliminate the requirement for "a sufficient number" of Spanish-speaking staff. Instead, a new provision states that "procedures will be employed to ensure that non-English speaking prisoners understand all written and oral communications from facility staff members." While this provision articulates a laudable goal that PRLDEF supports, it is not a substitute for adequate bilingual staffing. Further, the proposed amendments do not specify what procedures will be implemented or how they will guarantee that prisoners' needs are met. We are very concerned that the proposed change will hurt the ability of limited English speakers to navigate the corrections system.

Adequate language access means that an ill prisoner can have privacy in communications with a medical care provider, or that a new inmate can properly understand the disciplinary rules of the facility. Reducing Spanish-speaking staff increases the chances health privacy laws will be violated when an inmate facing a medical emergency is forced to use another inmate as an interpreter. Reducing Spanish-speaking staff increases the risk of disruption when an inmate does not understand an order from monolingual English-speaking staff.

In proposing these amendments, The Board of Corrections has offered no evidence that Spanish-speaking staff are less necessary today than in 1978. Nor has the Board provided any other justification for the reduction of bilingual services to prisoners. In fact, relaxing the Spanish-speaking requirements makes no sense. A sufficient number of competent Spanish-speaking staff is crucial to prisoner well-being as well as to the orderly operation of a correctional facility. If implemented, these proposed amendments will harm both inmates and the corrections system as whole. We urge the City Council to recognize the devastating community impact of the proposed changes and to stop any reduction in the minimum standards.

Thank you.